

# ABAC

## ABAC Complaints Panel Determination No: 162/08

### In the Complaint of Ms Emma Barnard Product: Moorilla Wines Advertiser: Moorilla Wines

Professor The Hon Michael Lavarch – Chief Adjudicator  
Jeanne Strachan – Member  
Professor Richard Mattick - Member

5 February 2009

#### Introduction

1. This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns print and website advertisements for Moorilla Wines by Moorilla Wines (“the Advertiser”) and arises from a letter of complaint by Ms Emma Barnard received 20 December 2008.

#### 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 ASB and the Panel both assess complaints separately under their own rules. However, for the ease of public access to the complaints system, the ASB receives all complaints about alcohol beverage advertisements and forwards a copy of all complaints to the Chief Adjudicator of the ABAC.
4. The Chief Adjudicator of the ABAC then determines if the complaint raises issues which are solely within the province of the AANA Code of Ethics. If not, then the complaint will be forwarded to the ABAC Adjudication Panel for consideration. If only AANA Code issues are raised, then the matter is determined by the ASB.
5. The complaint raises concerns under the ABAC and accordingly is within the Panel's jurisdiction.

### **The Complaint Timeline**

6. The complaint is in the form of a letter from Ms Emma Barnard received 20 December 2008.
7. 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 has been affected by the Christmas/New Year period which resulted in a delay in the advertiser's response and the availability of Panel members. As a result, the determination has occurred beyond the 30 day time frame.

### **Pre-vetting Clearance**

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

### **The Advertisement**

9. The complaint refers to firstly, a print advertisement that was published in the Daily Telegraph and was also available on the company's website and secondly, the photographs using images of naked men and women on the company's website.
10. The print advertisement features an artistic photograph of a naked woman from the waist up. The woman is holding her breasts with her hands with one nipple exposed, her back is arched, head thrown back, skin moist and mouth apart. A bottle of Moorilla Wine with the caption "Refined Wine" is to the right of the woman. To the left of the woman is the tagline "Come on line with Moorilla" and below the text is the Moorilla logo with smaller text "MOORILLA", "REFINED WINE" and "WWW.MOORILLA.COM.AU".
11. The website opens with one of a number of artistic photographs featuring in some cases single naked men and women and in other cases groups of naked

models. On entering the website the user can choose to access a number of different parts of the website entitled “accommodation”, “the art gallery” or “the brewery”.

12. On selecting the winery option, the user can choose to view a sub-item entitled “Refined Wine”. A pdf document opens with the text “Moorilla Refined wine” and a photograph of three naked bodies of a man and two women intertwined.
13. The next page contains the title “Muse series” and the text “WINE IS NOT JUST FOR DRINKING. THE EXPERIENCE OF WINE IS AN EXPERIENCE OF CONTROLLED LICENTIOUSNESS. EVERY BOTTLE OF MOORILLA RECAPITULATES THE HISTORY OF RITUALISTIC INDULGENCE. NOW BOTH WITHIN AND WITHOUT.”
14. The next page contains the following text: “Traditional and modern thinking combine in the creation of each of our wines. Small batch ferments allow us to elevate the quality threshold and control over each production stage. Finished wines are blended according to style in order to create our two streams of high range varietal products. Each series finely illustrates the principles of a cool climate wine: natural balance and refined varietal character. Our Muse series is blended according to an Old World philosophy, resulting in a more sophisticated and bottle maturable product. These artistic wines present a more thoughtful spectrum of flavour and aroma. They push the boundaries of winemaking and unite the Moorilla and Museum philosophies.—*Conor van der Reest, Winemaker*”.
15. The following 9 pages each contain a description of a Moorilla wine accompanied by a different artistic photograph. The final page contains the Moorilla Wines website address. One of the photographs is the same as that used in the print advertisement.
16. Another part of the winery part of the website that can be accessed by selecting a sub-menu entitled “Labels” contains the following text: “The labels deal with universal themes and represent not only the intoxicating power of wine but also its social and beneficial influences....The Greek antiquity was caught up by the seriousness of the truth that [in wine] pleasure and pain, enlightenment and destruction, the lovable and the horrible, lived in close intimacy...”.

### **The Complaint**

17. The complainant argues that the advertisement breaches section (c) of the ABAC by:
  - (a) placing a woman who is naked from the waist up and appears to be in the throws of orgasm next to a bottle of Moorilla Wine with the tagline “Come on line with Moorilla” all of which can be interpreted as having sexual connotations in reference to the woman orgasming; and
  - (b) the company website containing sexually explicit photographs of naked men and women.

## The Code

18. The ABAC provides that advertisements for alcohol beverages must-
  - (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.

## Arguments in Favour of the Complaint

19. In favour of the complaint it can be argued that the advertisement breaches section (c)(i) of the ABAC Code by depicting the presence of alcohol beverages as a cause of or contributing to the achievement of sexual or other success, by a combination of:
  - a. The image of a woman naked from the waist up who looks to be in the throws of orgasm, next to a bottle of Moorilla wine.
  - b. The tag line beneath the image of the woman “Come on line with Moorilla” which has a double meaning.
  - c. The inclusion on the website [www.moorilla.com.au](http://www.moorilla.com.au) (which the reader of the ad is directed to) of:
    - i. artistic photographs of naked men and women in sexually suggestive positions;
    - ii. written statements on the website such as the following: “Wine is not just for drinking. The experience of wine is an experience of controlled licentiousness. Every bottle of Moorilla recapitulates the history of ritualistic indulgence now both within and without.” and “The labels deal with universal themes and represent not only the intoxicating power of wine but also its social and beneficial influences....The Greek antiquity was caught up by the seriousness of the truth that [in wine] pleasure and pain, enlightenment and destruction, the lovable and the horrible, lived in close intimacy...”

## The Advertiser's Comments

20. The Advertiser responded to the complaint and questions posed by the Panel in relation to the complaint by way of letter received 16 January 2009. The principal points made by the advertiser are as follows:
  - a. Moorilla is more than a producer of alcoholic beverages. Moorilla's interests extend beyond the normal activities of a "wine making" company and include, at our Tasmanian site, accommodation,

brewery and fine dining facilities and the much publicised site of the soon to open Museum of Old and New Art (MONA) - which will be the finest privately owned museum in the country.

- b. Moorilla is also a company guided by a philosophy to provide food, wine and art to the sophisticated, mature, and usually highly engaged sector of the market who commonly have broad and liberal tastes in not only the wine they drink but also in the art, theatre, literature and life experiences they expose themselves to. The inspiration for this philosophy was provided and influenced by ancient cultural traditions including the practices and interests of the epicureans. If you review the website you will also see that the nature, appearance and content of much of the site evokes, or is meant to, links with the wine god Dionysus and, in particular early Greek culture. Perhaps the link is too subtle but the ultimate aim is to reflect the attention to detail and care that is taken in producing our products which we think is associated more with ancient practices than modern. Generally our products and the Moorilla philosophy, so to speak, is not for everyone and is not meant to be.
- c. Daily Telegraph Advertisement - Moorilla is the naming rights sponsor of the Moorilla Hobart International tennis tournament which is one of the tournaments leading up to the Australian Open. The advertisement appeared in the mainstream media only because it was part of the "deal" with Tennis Australia related to the sponsorship. The advertisement appeared at the bottom of the page (taking up about 20% of the page) underneath a large advertisement promoting the Australian Open. Please note: it is not the policy of Moorilla to utilise "mainstream" media in this way and the advertisement only appeared because the space was available as part of the sponsorship, package. This advertisement WILL NOT BE PUBLISHED AGAIN IN MAINSTREAM MEDIA.
- d. We consider that the print advertisement should be considered on its own without being represented as necessarily tied in with the website. Whilst the print advertisement may be glanced at by a consumer involuntarily coming across it in the newspaper access to the website is a separate, voluntary and conscious act taking some time. As such a consumer who finds the advertisement distasteful is not compelled to take the next step of logging on to the website and need not expose themselves to the website.
- e. There was no intention that the advertisement specifically evoke the message that consumption of wine is mood changing and /or leads to sexual success. The advertisement is ambiguous and deliberately so - the appearance - in quite separate parts of the advertisement - of the female, the tagline and the bottle of wine cannot be said to directly convey any particular message. The purpose of the advertisement was to promote interest and, possibly, further investigation by the consumer.

- f. To suggest that the advertisement DOES convey ANY particular message and specifically that it promotes wine as leading to sexual success is difficult to understand. Undoubtedly the female is in a state of enjoyment but there are a number of thought processes that need to be gone through to put the disparate ideas and images together to conclude that the message means "you will achieve sexual success because of the consumption of alcohol". Furthermore, the interpretation of the tagline is equally ambiguous. Surely anyone offended by the advertisement would simply ignore it and move on rather than analysing possible double entendres and linking wine bottles and so on to each other.
- g. In our view there is NO SINGLE MESSAGE sent by the advertisement - it certainly does not explicitly or intentionally set out to, or achieve, the aim of linking sexual success and alcohol nor does it explicitly or impliedly breach any other part of the code. Our view is however academic given that the advertisement will not appear again.
- h. As stated above access to the website is voluntary and a conscious and considered act by a consumer. In our view, it seems inescapable logic that anyone offended by the print advertisement would not then access the website. The fact is that the photographic content of the print advertisement was chosen from a range of artistic works which have been on the website for two years. The photograph was NOT TAKEN for the purpose of appearing in a print advertisement and the image complained of is not - as such - an advertisement. The photo is part of a commissioned series of art included in the MONA collection.
- i. We dispute the assertion that the print advertisement and the website should be considered together. To put together the elements of the print advertisement and selective extracts from the website is not a true reflection of how a consumer would be exposed to either. In other words by including point 1 (c) as though it flows from points 1 (a) and (b) in your letter distorts the circumstances and implies that there is a direct and unavoidable link between points a, b and c - which is simply not true. As stated, access to the website, whilst referred to in the print advertisement, is NOT COMPULSORY.
- j. The website must be looked at in its entirety and, when it is, the MOORILLA philosophies and in particular the links between the history of wine and the Moorilla approach to making and marketing wine come together. When the site is viewed as a whole it is apparent that there is no "grubby" or exploitative use of sexual imagery. Moreover, when the philosophy is understood then the historical references and context of some written statements referred to in your letter make very real sense. The content, mood and philosophy of Moorilla and its website may not appeal to everyone but as stated at the outset it is not meant to.

- k. The products and advertisements are not presented in a way where they are aimed at children. There is no suggestion that misuse of alcohol is condoned and statements of historical fact and opinion are for consideration by the discerning, mature and interested wine lover. Moorilla has defined its market and its website is designed to appeal to and be attractive to that market. To repeat, the website is compliant with the terms of the code and any assertion that it is not is based on taking phrases or sentences out of context.
- l. Moorilla respects the aims of the code and always has and always will abide by it. As stated Moorilla will not be repeating the print advertising. In addition Moorilla would be more than happy to discuss any issues or suggestions the Board or the secretariat may have on the issues raised by you or raised by our response. You have our absolute assurance that we are open minded about this issue and are willing to have an open dialogue with you on this matter and related matters.

### **The Panel's View**

- 21. The complaint raises concerns about a print advertisement and a website and the Panel will deal with each of these mediums separately. In both instances, the complainant argues that section (c) of the ABAC has been breached.

### **The Print Advertisement**

- 22. The advertiser explains that the print advertisement is a one-off example of an ad created as part of a sponsorship relationship the advertiser had with Tennis Australia. It was apparently developed using one of the photographs featured on the advertiser's website and the ad will not be republished. The Panel notes the advertiser's advice that it does not generally use mainstream broadcast media, such as newspapers, to promote its wine and other activities and unfortunately the ad was not subject to pre-vetting approval to test its consistency against the ABAC standards prior to its publication.
- 23. The ABAC scheme does not distinguish between continuing advertising campaigns or a single advertisement in terms of considering public complaints. While the ad may not be repeated, the Panel is obliged under its rules of operation to make a decision on the complaint. It is also noted that the ad appeared in a major newspaper and potentially would have had a substantial audience.
- 24. The issues raised by the complaint concerns section (c) of the ABAC. This section provides that alcohol product advertisements are not to suggest that the presence or consumption of alcohol may lead to a significant change in mood and accordingly must not suggest that alcohol is or might be a cause or contributor to the achievement of sexual success. In this case the complainant points to the erotic photograph of a topless woman combined

with the tagline “Come on line with Moorilla” as breaching the section (c) standard.

25. In applying the ABAC standards, the Code’s preamble provides that conformity is to be assessed in terms of the probable impact of the ad upon a reasonable person taking the ad’s content as a whole. The Panel has previously considered the application of section (c) in determinations such as:

- 14.1.05 – St Agnes Brandy
- 26.2.07 – James Boag
- 23.5.08 – Cockatoo Ridge

From these determinations it can be noted that the ABAC does not prohibit ads from being sexy or portraying individuals as sexually confident. The key matter which section (c) prohibits is the implication that alcohol contributes to the achievement of success such as sexual success. In other words, is an ad implying that there is a causal relationship between the use of alcohol and the achievement of success.

26. Invariably a decision as to whether an ad breaches the section will come down to a matter of judgment and it is possible that different people viewing the ad might reasonably come to different conclusions as to whether the standard has been complied with. In this case the Panel concludes that section (c) has been breached by the print advertisement. In reaching this conclusion, the panel notes:

- The sexually provocative portrayal of the female model, and
- The double entendre tagline of “Come on line”.

These elements would, in the Panel’s opinion, be taken by a reasonable person as suggesting that the product can contribute to the achievement of sexual success.

### **The Website**

27. The second element of the complaint concerns the advertiser’s website. Again, it is argued that section (c) has been breached. The ABAC has applied to alcohol beverage advertisers’ websites since a major review of the ABAC scheme in 2004.

28. Often it is very difficult to apply the ABAC standards to websites. In part, this arises because of the dynamic nature of the medium. For instance, websites generally contain a multiple number of individual pages, each of which can be accessed by navigating through a range of different pathways. Accordingly, it is very difficult to know in which order a complainant viewed material on a website and for the Panel to gain a complete sense of how the totality of the material viewed formed an

impression in a complainant's mind. Equally, material on a website can be very readily altered which means that, by the time a complaint reaches the Panel and is viewed by Panel members, the material on a website may have been changed. This can occur even if the time period between when a complaint is made and when the Panel examines the site is no more than a few days.

29. In this case, the advertiser points out that its site is promoting and providing information about a range of what might be described as Moorilla brand products. This includes the advertiser's alcohol products, but also includes its accommodation facilities, its brewery and its art gallery. The advertiser's argument is that the website, unlike the print advertisement, is only viewed by a user making an active and conscious choice to visit the site. It is further argued that such viewers will therefore comprise of a self-selecting audience and will, by implication, be discerning as to the messages being communicated by the material on the site. This can be contrasted with the broad audience of an ad placed in a tabloid newspaper.
30. The ABAC is essentially a code which is concerned about the content of alcohol product advertising, rather than the placement of that content. The Panel is to have regard to the likely audience of an ad as a result of the preamble's reference to the standards of the code being applied, having regard to a "person to whom the advertisement is communicated or is likely to be communicated". While a website is not a broadcast medium such as television, it is nonetheless widely accessible to anyone with an internet connection and accordingly the site has potentially a wide and diverse audience.
31. The Panel has found forming a view on the website a daunting task. The complainant states the concern to be that the site contains "sexually explicit photographs of naked men and woman". This concern however is not raised in the terms of taste or decency, but in reference to section (c) of the ABAC. The site does contain various photographs of naked men and women, but it is highly debatable (and no doubt a matter of personal opinion) whether the photographs can be said to be sexually explicit. The photographs are not pornography, and can fairly be said to be artistic and beautifully shot. The photos will, however, not be to every person's taste.
32. The panel has concluded that elements of the website are inconsistent with section (c) (i) of the ABAC. In particular, under the menu 'muse series' there is located a series of 9 pages, each of which features a photograph of one or more naked men and women juxtaposed with a particular style of Moorilla wine and a description of the wine. Some of these pages, such as 'Cabernet Merlot', 'Chardonnay' and 'Gewürztraminer' breach section (c) in the Panel's view. It is also noted that the text which introduces this series of pages contributes to the highly sensual and somewhat erotic nature of the images through reference to the 'experience of wine is an experience of controlled licentiousness'.
33. In finding some elements of the website in breach of the ABAC, the Panel notes the advertiser's stated willingness to have its website material

reviewed. The Panel acknowledges that in some respects the ABAC provisions sit uncomfortably with the advertiser's complex and layered approach to alcohol advertising within a wider promotion of an art gallery and holiday accommodation. A review of the website by the ABAC scheme pre-vetting system will assist in meeting the legitimate aim of the advertiser to differentiate its product while satisfying the public policy intent of responsible alcohol beverage advertising.

34. Accordingly the complaint is upheld.