



ABAC Adjudication Panel Determination No. 96/15

Product: Substation No. 41
Company: Woolworths Liquor Group
Media: Digital
Complainant: Confidential
Date of decision: 30 September 2015
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Debra Richards
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns an advertisement on the Ninemsn website and arises from a complaint received 31 August 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 31 August 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 within this timeframe.

Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for this marketing communication.

The Marketing Communication

10. The advertisement was placed on the Ninemsn website in the food and recipe section under “Alcohol Recipes”.
11. The advertisement is a post by Stuart Griffith and Substation No 41, titled “Substation No 41 summer storm cocktail” and followed by a photograph of a cocktail next to a bottle of the product and the ingredients and recipe for making the cocktail.

The Complaint

12. The complainant is concerned that the advertisement:
 - (a) Doesn’t include drink alcohol responsibly messaging;
 - (b) Has strong or evident appeal to minors;
 - (c) Is not placed on a non-alcohol-specific age restricted digital platform that requires users to register using date of birth and hides the existence of alcohol advertising from those registered as minors.

The ABAC Code

13. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (b)(i) have Strong or Evident Appeal to Minors;
 - (ii) depict a person who is or appears to be a Minor unless they are shown in an incidental role in a natural situation (for example, a family socialising responsibly) and where there is no implication they will consume or serve alcohol; or
 - (iii) depict an Adult who is under 25 years of Age and appears to be an Adult unless:
 - A they are not visually prominent;
 - B they are not a paid model or actor and are shown in a Marketing Communication that has been placed within an Age Restricted Environment.

The Company's Response

14. The Company responded to the complaint by letter dated 15 September 2015. The Principal points made by the Company are:
- (a) WLG aim is to be Australia's most responsible retailer of alcoholic beverages. In 2013 we formalised our status as a signatory to the Alcohol Beverages Advertising Code (ABAC) Scheme. Prior to becoming a signatory, WLG demonstrated a long-standing commitment to supporting and adhering to ABAC and Advertising Standards Bureau principles. WLG maintains strict internal and external processes in addition to those required by the ABAC Scheme, which are highly relevant in this context. WLG has also instigated a range of industry-leading initiatives to ensure that children are not served alcohol, including:
 - ID25 (ask for ID from anyone who looks under 25)
 - Don't Buy It For Them (stopping secondary supply to minors)
 - Staff training that exceeds legal requirements, including "Don't Guess, Just Ask", team talkers, regular refresher and reminder courses, and implementation of the award winning training program "Safe".
 - (b) In marketing alcoholic products, WLG has been fully aware of the requirement not to appeal to people not of legal purchase age. Substation 41 is a product developed by Pinnacle Drinks (Pinnacle) in conjunction with the rum-bar team at ALH-owned venue, The Breakfast Creek Hotel. As a new rum entering the market, Pinnacle sought to engage a Public Relations firm to help promote the product. Activities of the PR firm included issuing a media release and hosting an event of influencers and media writers. While not required to be officially pre-vetted under the ABAC Scheme, the activities of the PR firm were subject to internal review by Woolworths Liquor Group and Pinnacle team members that have strong experience with the ABAC Scheme and Code provisions to ensure compliance.
 - (c) The website is not within the control of the Woolworths Limited group of companies. From a review of the recipe, it would appear that the journalist or editor associated with the website has used a recipe and picture provided by the PR firm Pinnacle engaged to launch the brand. It should be noted that the publication of a cocktail recipe is a matter of placement; and not one of content. ABAC is a content – rather than placement – code which focuses the question on whether the advertisement meets with the ABAC standards whether it is transmitted on television, radio, over the internet, in conjunction with a movie at a cinema or in a newspaper. The mere fact that a medium such as a website is used to

convey marketing materials or makes mention of an alcoholic beverage will not of itself be a breach of the ABAC.

- (d) Reviewing the marketing material that the journalist or editor has used, it is clear that it is limited to a recipe for a “summer storm cocktail”, accompanied by a bottle shot and the finished cocktail. It contains a list of ingredients and how to prepare the cocktail. There are a number of other links to recipes for alcoholic beverage based cocktails and other food based stories and recipes to the left and right hand side of the webpage, clearly indicating its adult nature.
- (e) Dealing with the relevant ABAC clause, it would be apparent to the ‘reasonable person’ that the recipe and website in general is clearly intended for adults and has no elements that would have strong or evident appeal to minors. The recipe and associated photograph do not contain minors either directly or incidentally.
- (f) With respect to the complainants concerns about the recipe appearing on a non-age-gated website, this is only applicable under the Code subclause if the marketing materials depict a person under 25 years of age.
- (g) Quite clearly, there are no people featured in the recipe and associated photo which would then trigger issues on whether it is an age-restricted environment or not. Focussing then on the content, there are no words in the promotion, visuals, iconography, designs, motifs, or symbols or imagery used that could possible lead the reader into thinking the recipe or photo depicts a person under 25 years of age, or has strong and evident appeal to a Minor. Taking the advertisement as a whole, a ‘reasonable person’ would view the page as a simple cocktail recipe. There is nothing in the materials that a reasonable person would view as having strong or evident appeal to children.
- (h) Alcoholic beverages are regularly consumed with food in most Australian households and drinking occasions. It is not uncommon to see food and beverage (alcoholic and non-alcoholic) reviews and recipes together. There is evidence of this across a wide range of communication materials including books, newspapers, blog posts and websites. Accordingly the complaint should be dismissed, and the Panel should determine that there has been no breach of the Code.

The Panel’s View

15. The complaint concerns an entry on the Ninemsn website. This site is based on the Channel 9 Television network and features multiple linked pages of which one is entitled ‘Lifestyle’. From the Lifestyle link, a viewer is taken to a page titled ‘Food’ and a further link goes to a ‘recipe’ menu. A search from this

link can be made of 'alcoholic recipes' and it is from there that the actual page promoting the product can be located.

16. The complainant raises concerns about a recipe for a cocktail featuring the product namely:
 - That the cocktail recipe was not accompanied by a 'drink responsibly' message and;
 - Access to the site and the page required no age verification process and as a result under 18 years could readily view the page.
17. In its response the Company explains the origin of the launch of the product and the associated public relations activities. The Company argues that the promotion of the product via the Ninemsn page is not breach of the ABAC on both jurisdictional and substantive grounds namely:
 - The Company did not control the placement of the cocktail recipe featuring the product on the Ninemsn site and;
 - In any event, the promotion does not appeal to under age persons.
18. The basic concerns raised by the complainant are not covered by the ABAC. The Code does not require that alcohol marketing be accompanied with a 'drink responsibly' message. While such messages often feature in alcohol marketing and their use might be regarded as good practice, there is no ABAC requirement imposed on marketers of alcohol to use such a message.
19. The second concern raised is that the Ninemsn site contains alcoholic product promotions, but unlike common industry practice for the internet sites of alcohol brand owners, no age restriction protocols have been implemented to try and stop under 18 year olds accessing the alcohol specific materials. While this is a perfectly valid point there is no ABAC standard which requires 'age gating' on sites that might reference alcohol products.
20. The ABAC is at its heart a self-regulatory initiative from the producers and retailers of alcohol products. The Code Standards go to the content of alcohol marketing rather than where marketing might be placed. Equally, only direct participants in the alcohol industry have bound themselves to the Code Standards and this does not include Ninemsn.
21. Pulling all this together means that the complaint cannot be made out as:
 - This website itself may well be beyond the reasonable control of the Company and more importantly;
 - There is no ABAC standard which is breached by a failure to include a 'drink responsibly' message or place an age restriction on accessing the Ninemsn site.
22. Further, the Panel does not believe the content of marketing can be said to have a strong or evident appeal to minors. Merely giving details of a cocktail

ingredients and how it is made is not a promotion likely to appeal strongly to under 18 year olds.

23. The complaint is dismissed.