



## ABAC Adjudication Panel Determination No. 66/16

**Product:** Beer  
**Company:** Australian Brewery  
**Media:** Cinema  
**Complainant:** Ms Roberts  
**Date of decision:** 27 May 2016  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Debra Richards  
Professor Louisa Jorm

### Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns a cinema advertisement for Australian Brewery and arises from a complaint received 5 May 2016.
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.

### **The Complaint Timeline**

7. The complaint was received on 5 May 2016.
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 marketing communication is in the form of a cinema advertisement. The advertisement opens with the outside of the venue and then a voiceover commences accompanied by various scenes with the Australian Brewery logo superimposed:
  - 'V/O – At the Australian Brewery Rouse Hill we offer a selection of locally brewed fine ales and beers made from fresh pure Australian produce produced by local growers' - as we see a man behind the bar placing a tray of small glasses of beer onto the bar, a couple each taking a glass of beer, a woman behind the bar placing a glass of beer onto the bar next to five other glasses and a selection of cans of beer, with the camera then closing in on the beverages and then moving to a tray shaped like Australia holding 5 small glasses of beer being lifted from the bar.
  - 'V/O – Take a brewery tour and tasting' – as we see 3 men and a woman in an industrial room with a staff member sniffing a glass held out by the staff member.
  - 'V/O - ..and stay for a delicious meal made to order' – as we see a range of dishes on a bench ready to be served, a smiling chef, a table with food and soft drinks.
  - 'V/O – we also offer private functions for 10 to 300 people in a great family friendly atmosphere, and there's great kids playrooms and free face painting on Saturdays and Sundays, the Australian Brewery, Rouse Hill, great beer, great food, great times, open 7 days, right next door to Bunnings' – as we see a family with three small children sitting at a table eating a meal, a family waiting to order, a wider shot of the restaurant, small children on play equipment, a boy having his face painted, a family walking up to the door of the venue and then the Australian Brewery logo, address and website address.

## **The Complaint**

11. The complainant is concerned that by highlighting the facilities for children such as free face painting on weekends and a children's play area in an advertisement for a brewery shown prior to a children's film the ad targets and is likely to appeal strongly to children and encourages kids to pester their parents to go to the brewery.

## **The ABAC Code**

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
  - (b)(i) have Strong or Evident Appeal to Minors;

(b)(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;

13. Definition in Part 5 of the ABAC provide:

Strong or Evident Appeal to Minors means:

- (i) likely to appeal strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
- (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

A 'Minor' means a person who is under 18 years of age and therefore not legally permitted to purchase an alcohol beverage in Australia.

### **The Company's Response**

14. The Company responded to the complaint by email received 17 May 2016. The principal points made on behalf of the Company were:

- The ad is targeted specifically at adults promoting the venue as a place to bring the family and enjoy a meal. There are no children featured in the brewery tour section, the ad and limited shots (5 out of 22 in total) of alcohol being shown. In fact no one is seen consuming alcohol in the whole ad, I therefore don't believe it is promoting the consumption of alcohol at all.
- The advertisement is not a marketing communication for ABAC purposes.
- The fact that children are allowed to go to this venue for meals with their families, as they are to almost any restaurant or pub in Australia where alcohol is served, is what the ad is promoting. It is not promoting the place as a night club or place to go and consume excessive amounts of alcohol on any level and I don't believe it is targeting children in any way. The fact that there are activities for kids such as the play area and face painting are helping promote the venue as a family friendly 'bring the whole family' venue.

- I therefore believe it is not in breach of any of the Codes mentioned in your letter.

## **The Panel's View**

### **Introduction**

15. The Australian Brewery is a small craft brewery, sporting and games hub, restaurant, function centre and night club with all weather kids play areas.
16. The Company is not a signatory to the ABAC Scheme and as such is not contractually bound to the ABAC Standards of good marketing practice, nor is it obliged to accept a Panel adjudication. That said, the Company has fully cooperated in the Panel's processes, enabling the determination to be made.
17. The nature of the complaint, and the communication involved raise, firstly, a threshold question of whether the advertisement is a "marketing communication" for ABAC purposes. If so, the second question is whether the marketing communication is consistent with the ABAC Standard, which requires that alcohol marketing not have a strong or evident appeal to children.

### **Is the advertisement a marketing communication?**

18. The ABAC establishes a code of good practice in alcohol marketing. The Code, by Part 2 (a) provides a non-exhaustive description of the types of marketing communications which are subject to the ABAC Standards, whereas Part 2 (b) expressly lists some materials and marketing activities to which the Code does not apply. The Company states that it does not believe the advertisement is a marketing communication for ABAC purposes and argues that the ad:
  - is targeted specifically at adults promoting the venue as a 'family friendly' place to bring the family and enjoy a meal;
  - there are no children featured in the Brewery section;
  - there are limited shots showing alcohol; and
  - no one is shown consuming alcohol.
19. The ABAC schemes creates a code of good marketing practice for the use of alcoholic beverages. It does this through providing standards which apply to both brand owners of particular alcohol products as well as alcohol retailers. This means that marketing from licensed premises will potentially fall within the ambit of the ABAC scheme if the marketing either directly or by necessary implication relates to alcohol as a product.
20. As noted in Determination 101/2015, this relationship need not be the primary purpose for the advertisement i.e. the ad can be promoting the attraction of a restaurant or café, but if in doing so there is a discernible link to alcohol as a product, then the ad will fall within the ABAC code and scheme.

21. In this case, the primary purpose of the advertisement is to promote the attractions of the Australian Brewery as an entertainment venue. In doing this however, the advertisement makes direct references to the availability of alcohol products both in the narration and in the accompanying images used in the advertisement. In the Panel's view, the ad clearly falls within the intended ambit of the ABAC scheme and hence the advertisement is subject to the standards of good marketing practice contained in the Code.

**Is the marketing communication inconsistent with the ABAC Standard?**

22. Part 3 (b)(i) of the ABAC provides that a marketing communication must not have strong or evident appeal to minors. The Definition section of the Code provides further information as to what might be considered as having strong or evident appeal to minors and specifically references material likely to strongly appeal to minors and material that targets minors.
23. In assessing if a marketing communication is inconsistent with a Code Standard, the Panel is to have regard to the probable understanding of the communication by a reasonable person, taking its content as a whole. The reference to a reasonable person is drawn from the Australian common law system and means that the views, opinions and values of a majority of the community is to be the benchmark.
24. The complainant viewed the ad prior to the screening of the movie Kung Fu Panda 3 in a local cinema. This movie is classified as 'PG' by the Classification Board, which is the statutory body responsible for assessing and allocating ratings to films, computer games and certain publications. A PG classification is described as having mild impact, which could contain content that children find confusing or upsetting and hence may require the guidance of parents or guardians.
25. Unlike the time of broadcast restrictions applying to free to air television, there is no formal restrictions on the screening of alcohol advertising in conjunction with movies of a particular classification or shown at a particular time of day. It appears, as a matter of general practice, that alcohol ads are not shown with movies of a G or PG classification. As the Company did not consider their ad to be 'alcohol advertising', it is possible that it and its placement agency did not seek to target its advertising spread so as to exclude P and PG rated movies.
26. In any event, as mentioned in paragraph 3, the ABAC is a content and not a placement code of practice. What this means is that an alcohol marketing communication will not be in breach of the Code for the reason alone that it is accessible to under 18 year olds. On the flipside, an advertisement which by its content can be said to be strongly or evidently appealing to under 18 year olds will still be in breach of the ABAC even if it's audience could be established as being overwhelmingly comprised of over 18 year olds.
27. The question of consistency with the ABAC standard therefore is centered upon how a reasonable person would understand the content of the ad. In this case, the ad is promoting the attractions of the brewery as an entertainment venue. One of these attractions is the availability of a variety of locally brewed beers. The other attractions include the brewery tour, a restaurant and areas

and activities, which are specifically catering for younger children i.e. the playground and face painting.

28. The complainant argues the promotion of the children's playground and face painting will be strongly appealing to children and may result in children 'pestering' their parents to visit the venue. The Company contends the ad is directed at adults and is promoting the venue and not alcohol consumption. It is pointed out that children regularly accompany their parents to licensed premises for meals and the ad in effect positions the brewery as a family friendly venue.
29. The underlying intent of section (b) is that alcohol use by under 18 year olds not be encouraged. This is done by restricting the depictions of under 18 year olds in marketing and by prohibiting and laying down tests of what could amount to 'strong or evident appeal' of a marketing communication to a minor.
30. Prior to the extension of the ABAC to cover 'retailer advertising' in 2014, the potential for the Code standard to be applied to what are predominantly 'venue promotions' as opposed to 'brand beverage promotions' was more limited. It did however occur in Determination 66-7/2011 involving a print advertisement for Old Coast Road Brewery. In that particular case, the Panel dismissed the complaints and in doing so, noted:
  - The 'strong or evident' appeal to minors prohibition contained in the standard is directed at alcohol use by under 18 year olds.
  - The ad in this instance related to the venue.
  - The ad did not feature depictions of children, nor did it have features in its content which could be said to be encouraging under 18 year olds to drink alcohol.
31. Since the 2014 extension, the Panel has made several decisions on marketing which focused upon the attractions of a licensed premise and in doing so created a direct link to the consumption or availability of alcohol beverages. In Determination 36-7/2016, the marketing for Bright Brewery involving children's colouring in sheets inspired by the beer making process was held in breach of section (b) of the Code.
32. The Panel believes the current advertisement is also in breach of the section (b) standard. In reaching this conclusion, the Panel has noted:
  - The advertisement clearly identifies and promotes alcohol availability and consumption as one of the core attractions of visiting the venue.
  - While the ad cannot be fairly said to be encouraging 'children' to consume alcohol, it does contain elements e.g. playground and face painting, which will be evidently appealing to children.
  - In doing so, the advertisement combines clear alcohol consumption promotion with a message about attracting attendance at the venue by families with children.

- The segment of the advertisement which contains the child appealing activities places the children in the front and centre of the advertisement and not as an incidental or background element.
- Taken as a whole, the advertisement establishes a clear nexus between alcohol use and overall promotional elements, which are evidently appealing to under 18 year olds.

33. In upholding the complaint, the Company is strongly encouraged to take advantage of the ABAC pre-vetting service. This service will enable to Company to independently assess its marketing and give confidence that applicable standards are being satisfied.