



ABAC Adjudication Panel Determination No. 85-87/16

Product: Wine
Company: Rydges Hotels & Resorts
Media: Digital
Complainant: Confidential
Date of decision: 11 August 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 digital advertising by Rydges Hotels & Resorts (“the Company”) and arises from a complaint received 28 June 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 complaints raise concerns under the ABAC Code and accordingly are within the Panel's jurisdiction.

The Complaint Timeline

7. The complaints were received on 28 June 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 not been determined within this timeframe due to the unavailability of the Chief Adjudicator.

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 Communications

10. The advertising complained of is a Facebook and Instagram post on the Rydges Hotels & Resorts Facebook and Instagram pages. Both posts feature an image of a man and a woman each holding a glass of wine and sitting on what appears to be a stationary Vespa scooter at an inside location next to a poster promoting a competition to win the scooter. A message on the Facebook post by “rydgeshotels” states: “Congratulations to @natoa, the lucky winner of our #VinoForAVespa Instagram competition! She is the proud owner of a brand new #Vespa!”. The message on the Instagram page states: “Congratulations to Natalie A., the lucky winner of our #VinoForAVespa Instagram competition! She is the proud owner of a brand new Vespa!”

The Complaint

11. The complainants are concerned that the advertising:
 - Endorses and promotes drinking alcohol and driving by showing the man and woman on the scooter holding glasses of wine;
 - Promotes reckless and dangerous driving by showing the man on the scooter driving with one hand and both the driver and passenger without helmets in breach of Australian law;

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (d) show (visibly, audibly or by direct implication) the consumption of an Alcohol Beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical co-ordination, such as the control of a motor vehicle, boat or machinery or swimming.

The Company’s Response

13. The Company responded by email dated 1 July 2016. The principal points made by the Company were:
 - The image with the man and the woman on the bike on Facebook and Instagram were not used as a marketing piece. The image that was used for officially marketing the ‘Win a Vespa’ promotion involved an image of a Vespa motorcycle, without any people on it, with the words ‘Win a

Vespa', '#VinoForAVespa', and instructions on 'How to Win'. These instructions directed that a person had to 'Snap a photo of your Italian wine at any participating Rydges property, post it to Instagram, Tag #VinoForAVespa, and follow @RydgesHotels'.

- The image which is the subject of this ABAC complaint was used in a minor and incidental way in the Rydges Facebook and Instagram pages, to simply announce the winner (Natalie) of the 'Win a Vespa' promotion. The photograph complained about clearly shows Natalie and a male companion simply posing for the photo on the Vespa motorcycle which is parked inside the hotel lobby of a Rydges hotel. The Vespa was stationed in the lobby next to signage for the promotion to show the prize available to be won. Contrary to the complainant's description, the Vespa is clearly not being actually driven. It is stationary. It is simply a prop for a humorous pose. The photograph does not promote drink-driving. The persons shown in the photo are not consuming alcohol before, during or after actually riding a Vespa.
- This is reinforced by the following wording that appears next to the photo on the Rydges Facebook page: '*Under no circumstances does Rydges Hotels & Resorts endorse drinking and driving. Please drink responsibly and drive safely. This picture was taken on a parked Vespa in our lobby.'
- The competition ended 14th of June and there are no current promotions on winning a Vespa.

The Panel's View

Introduction

14. In May and June 2016, the Rydges Hotel group ran a competition with a prize being a Vespa motor scooter. To enter, the competition required a person to 'snap a photograph of your Italian wine at any participating Rydges property and post the photograph to Instagram'. The competition was entitled '#VinoForAVespa'.
15. The competition ended on 16 June 2016 and the winner of the Vespa was a young woman called Natalie. The Company posted a photo of Natalie and a male companion on the Company's Facebook and Instagram pages and it is these posts which have attracted the complaints. The complainants argue that the posts are irresponsible because they show Natalie and her male friend with glasses of wine while posing on the Vespa as if riding the scooter.
16. While the complaints raise a straightforward point, the issues raised are unfortunately somewhat more complex. This is because it is not entirely clear whether the Facebook and Instagram posts are alcohol beverage marketing communications to which the ABAC scheme applies.
17. Generally, the ABAC scheme applies to the marketers of branded alcohol products or to the retailers of alcohol beverages e.g. bottle shops or liquor outlets. The Rydges Hotel and Resorts group does not produce or distribute

brand named alcohol products as such as primarily is in the business of operating short-term accommodation and associated facilities.

18. The Company does however operate restaurants and bars at its various sites and alcohol beverages are available for purchase and consumption at these locations. This means that the Company is an alcohol beverage retailer for ABAC purposes and on the face of it, its advertising which promotes or has a discernible link to alcohol as a product does fall within the potential scope of the ABAC scheme.
19. The key threshold issue in these circumstances is whether the Facebook and Instagram posts can be regarded as a marketing communication to which the Code standards apply. Not all advertising from a hotel group will need to comply with ABAC requirements if the advertising does not go to the promotion of alcohol e.g. the advertising went merely to promoting the convenience of the hotel's facilities and it's competitive room rates. In the current case however, the Panel does believe that the posts can be regarded as falling within the scope of the ABAC scheme because:
 - The competition #VinoForAVespa expressly references Italian wine, which presumably is available for purchase at the Company's restaurants and / or bars.
 - This means that the advertising is promoting the availability of an alcohol beverage and is capable of being regarded as retailer advertising within the meaning of section 2 of the ABAC.
 - The Facebook and Instagram posts flow directly from the competition and reference the competition winner together with featuring the name of the competition and depictions of alcohol beverages being held by the winner.

Are the posts inconsistent with section d of the ABAC?

20. Section d of the Code provides that a marketing communication must not show the consumption of an alcohol beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical coordination, such as the control of a motor vehicle. A prime aim of this section is to ensure that alcohol advertising does not promote drink driving.
21. 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 attitudes, opinions and values held in a majority of the community is to be the benchmark. A person who takes a different interpretation is not necessarily 'unreasonable', but their take on the marketing item may not be shared by a majority in the community.
22. The complainants take the post to be an encouragement of drink driving and dangerous behaviour by depicting the two people sitting on the scooter with glasses of wine and no helmets. For its part, the Company argues that the post

announces the winner of the competition, posing on a stationary scooter within a hotel lobby and would not be taken as promoting drink driving.

23. The Panel acknowledges the point made by the complainants. Drink driving is a major public health and safety issue and much effort has been committed by governments, police and health professionals to change community attitudes as to the acceptability of this behaviour. Despite these efforts, each year, many people are involved in motor vehicle accidents, in which alcohol use is a contributing factor. Equally, the Panel accepts that the Company had no express intention to promote drink driving as such and that it saw its posts as a light-hearted way to advise the winner of the competition.
24. On balance, the Panel does not believe a reasonable person would take the post as breaching the Code standard. Clearly, the scooter is not being operated and is in a fixed position within a hotel lobby. The competition winner and her companion are posing for the shot and playing up to the camera for this purpose. It cannot seriously be contended that the scooter is going to be driven by the two and the post would be seen for what it is – a representation of the winners of the competition and not a depiction of acceptable behaviour when riding a motor scooter.
25. Accordingly, the complaints are dismissed.