



ABAC Adjudication Panel Determination No. 89/17

Product: Cellarbrations
Company: Australian Liquor Marketers Pty Ltd
Media: Radio
Complainant: Confidential
Date of decision: 13 July 2017
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns a radio promotion for Cellarbrations by Australian Liquor Marketers Pty Ltd (“the Company”) and arises from a complaint received 19 June 2017.
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 19 June 2017.
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 was 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 complaint relates to a radio promotion for Cellarbrations on Kate, Tim and Marty's drive show on Nova radio station. The dialogue by the radio hosts in which the promotion was delivered for the program aired on Friday 16 June 2017 was as follows:
 - a) Voiceover: Shall we take a dip? [music]
 - b) Host 1: Are we ready?
 - c) Host 2: Hmmm, the water.
 - d) Host 3: So ready for this.
 - e) Host 2: Its so nice and hot today.
 - f) Jacuzzi Friday theme song – then bubbling water sounds in background throughout the segment
 - g) Host 1: I tested it a second ago and I've gone full European trunk
 - h) Host 2: I know
 - i) Host 1: I haven't brought this out since last summer
 - j) Host 2: You look like Steve Jacobs
 - k) Laughter
 - l) Host 3: Who's that?
 - m) Host 1: It's you know the shortest man in weather
 - n) Host 2: Oh no Tim Bailey probably shorter than Steve Jacobs
 - o) Host 2: Yeah Grant Denyer in his heyday was giving it a nudge
 - p) Host 2: Kate do you want to sit between my legs and I'll rub your shoulders?
 - q) Host 3: No I don't want you to touch me ever
 - r) Host 1: You can rub her shoulders with no hands

- s) Host 2: Jump in here
- t) Host 1: Today's drink of the week, how's this, Pure Blonde Cider, who knew that they did cider?
- u) Host 2: I did not know that until today and I am so glad I know it now
- v) Host 1: Brought to you by our friends at Cellarbrations for cider recipe ideas head to cellarbrations.com.au. Cellarbrations helping you celebrate. What we got, cause its very fancy
- w) Host 3: Its so fancy, we are drinking in the Jacuzzi a Pure Apple Marguerita guys
- x) Host 2: I've never heard of it
- y) Host 3: And I don't even like Margueritas usually but this one is amazing [Mexican hat dance music]
- z) Host 2: I love margueritas
- aa) Host 3: Remember that place we were just talking about that we were at. I mean not that we go out and have a drink or anything but
- bb) Host 1: Yeah
- cc) Host 3: I didn't have one that night, I don't like them I don't drink them
- dd) Host 2: Yeah because you were getting, they weren't the sort of crushed ice ones were they?
- ee) Host 1: No mate this was a place were proper margueritas
- ff) Host 3: This is like a grown up drinks
- gg) Host 2: I thought the proper margueritas were the crushed ice ones with the salted glass
- hh) Host 1: Oh maybe at hooters, no not the ones from the machine, no not those frozen ones
- ii) Host 3: [laughs] what like slurpies [laughs]
- jj) Host 2: What are you saying?
- kk) Host 2: Well that's how I always made margueritas at home, just put a bucketload of ice into a blender and then add alcohol, pour into glass
- ll) Host 1: Well what have we got in this one?
- mm) Host 3: We have 200ml of this pure blonde apple cider we didn't know existed but we now do, 30ml of grand marnier, 30ml of tequila,

- nn) Host 2: Jeez
- oo) Host 3: and then you kind of garnish it with, I am guessing you can do whatever you want but there are oranges and apples of course, cinnamon and sugar around the top of the glass
- pp) Host 1: So cinnamon sugar is the best
- qq) Host 2: Like drinking porridge, I love it, but with tequila poured all over your porridge. I love porridge.
- rr) Host 3: Oh its so good
- ss) Host 2: Its so good
- tt) Host 1: What tequila is it, is it George Clooney's tequila, cause that's the only tequila I'll drink
- uu) Host 3: Oh please
- vv) Host 1: Well if its not I'm not drinking it.
- ww) Host 3: Yes you will
- xx) Host 1: I'll have a pure blonde cider instead, on its own. That's delicious. Coming up next we are gonna ask is your bro worthy of the flog hall of fame

The Complaint

11. The complainant is concerned that:
 - a) This is a time when a lot of families are returning home from work/school/afterschool activities and is an inappropriate time slot.
 - b) It depicts drinking as a way to relax and feel good after a long week.
 - c) It encourages drinking in an unsafe environment (hot tub is a water based environment).
 - d) The hosts often venture into times they over indulged or their favourite types of alcohol.
 - e) It encourages drinking.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (a)(i) show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or

abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines;

- (c)(i) suggest that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment;
- (c)(iv) suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation;
- (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 to the complaint by letter dated 6 July 2017. The principal points made by the Company were:
- a) The promotion was not submitted for approval as this is a media sponsorship where Cellarbrations assists with providing cocktail recipe suggestions which is then integrated with the live broadcast of the Jacuzzi Friday segment. If there is a requirement for Cellarbrations to gain approval for future segments, we will work with ABACS and follow due process.
 - b) Cellarbrations provides Nova with a cocktail suggestion that is accompanied with a recipe which includes the ingredients and method. Cellarbrations also provides a call to action for listeners to visit their local Cellarbrations store where the ingredients related to liquor can be purchased as well as directed to www.cellarbrations.com.au for cocktail recipe ideas.
 - c) In response to whether the advertisement breaches Part 3 (a) (i) of the Code encouraging excess consumption:
 - Analysing the content of the Pure Apple Margarita, we have determined the recipe is 2.5 standard drinks. This will be rectified to ensure that all future cocktails remain within the 2 standard drinks.
 - Acknowledging that at no point has Cellarbrations instructed nor do we condone the hosts discuss occasions where they have excessively consumed alcohol.
 - d) Cellarbrations believes we have not breached the code by suggesting the consumption of alcohol or the cocktail suggestions significantly changes a person's mood, offers a therapeutic benefit or is a necessary aid to relaxation by suggestion that alcohol consumption in Jacuzzi is a way to feel good or relax after a long week.

- e) Jacuzzi Friday is the intellectual property of Nova and has been a long-standing segment of Kate, Tim & Marty's drive time slot since 2014. Whilst we do not have the ability to control the live broadcast content, we will work with Nova's production and creative teams to ensure that they are across these guidelines for the development of future segments.

The Panel's View

Background

14. Nova is a FM radio network. The drive show airs weekdays from 4.00 pm to 6.00 pm and is hosted by three presenters, namely Kate Ritchie, Tim Blackwell and Marty Sheargood. According to the Nova website, the program is the top ranking radio drive program with a 12.4% audience share of listeners at its time slot and a weekly cumulative total of 1.46 million listeners.
15. It would seem that the complainant has listened to the program on a number of occasions and identifies a concern about a regular program segment on Fridays known as 'Jacuzzi Friday'. This segment is 'sponsored' by the Company which results in the presenters describing the ingredients and then supposedly consuming a cocktail sourced from alcohol products available from Company outlets. The presenters make out that this is occurring in a Jacuzzi.
16. For the complainant, the segment is troubling for a number of reasons, namely:
- The broadcast time means a lot of families with children will be listening;
 - It depicts alcohol use as a way to relax and feel good;
 - It places alcohol consumption with an unsafe environment i.e. a hot tub; and
 - On occasions the presenters relate stories of when they have over indulged in alcohol.
17. The ABAC is a content rather than placement based code. What this means is that a marketing item will not be in breach of the Code by reason only that it might be viewed or heard by children and adolescents. Rather it is the content of the marketing communication which must meet the ABAC standards. For this reason, the broadcast of the 'Jacuzzi Friday' segment at some point between 4.00 and 6.00 pm is not of itself a breach of the Code.
18. The other issues raised by the complainant do raise ABAC standards. These are:
- Alcohol marketing must not encourage excessive consumption or consumption inconsistent with the Australian Alcohol Guidelines (section 3(a)(i));

- Alcohol marketing must not suggest alcohol use may create or contribute to a significant change in mood or offer any therapeutic benefit or is a necessary aid to relaxation (section 3(b)(i) and (iv); and
 - Alcohol marketing must not show (including audibly or by direct implication) the consumption of alcohol before or during any activity that for safety reasons requires a high degree or alertness of physical co-ordination such as swimming (section 3(d)).
19. It should be noted that the complaint goes to the 'Jacuzzi Friday' segment generally rather than to a particular show on a single Friday. That said, the Panel has only been able to access the show, which aired on the Friday immediately before the date of the complaint i.e. Friday 16 June 2017. The distinction between the show 'in concept' and the particular execution reviewed is drawn out in the paragraphs that follow.
20. In assessing if an ABAC standard has been breached, the Panel has regard to the probable understanding of the marketing communication by a reasonable person, taking its content as a whole. The reference to a 'reasonable person' means that the benchmark is to be the opinions, values and attitudes common in a majority of the community.

Does the segment encourage excessive consumption or consumption inconsistent with Australian Alcohol Guidelines

21. The section 3(a)(i) standard contains several elements which a marketing communication must not offend, namely the encouragement of:
- Excessive consumption;
 - Rapid consumption;
 - Misuse or abuse of alcohol; and
 - Consumption inconsistent with Australian Alcohol Guidelines.
22. In the Panel's view, the segment on 16 June does not contain dialogue or create a scenario which gives rise to the encouragement of excessive or rapid consumption. The presenters discuss their like or dislike of marguerita style cocktails. There is however, no reasonable implication that excessive consumption has or will occur or that such behaviour is acceptable.
23. The Australian Alcohol Guidelines are issued from time to time by The National Health and Medical Research Council and aim to give consumer information to help reduce the risk of harm from alcohol use. The Guidelines recommend, for healthy men and women:
- Drinking no more than two standard drinks on any one day reduces the lifetime risk of harm from alcohol related disease; and
 - Drinking no more than four standard drinks on a single occasion reduces the risk of alcohol related injury from that occasion.

24. The Company has acknowledged that upon review the cocktail recipe featured during the 16 June segment produced a drink that was 2.5 standard drinks. It states future recipes will be for drinks no more in strength than two standard drinks.
25. While the cocktail featured on the 16 June segment equalled 2.5 standard drinks, there was no dialogue which suggested that a person should consume multiple cocktails on this occasion. Nor can the segment be taken as suggesting a cocktail should be consumed each day. Accordingly, the segment is not encouraging consumption inconsistent with the no more than four standard drinks on one occasion guideline, nor that average consumption should exceed two standard drinks per day.
26. The complainant makes a broader point and that is that the segment on occasion has featured dialogue that related to excessive drinking by or witnessed by the presenters. The Company says it does not instruct such stories be told nor does it condone such stories.
27. For ABAC purposes, the intention of the Company is not the critical test in assessing an alcohol marketing item. Rather, the benchmark is how a reasonable person would understand the marketing communication. The Company is responsible for the reference to alcohol products in this part of the radio show and it has to take responsibility for the way in which alcohol use is portrayed in the segment. The fact that a presenter might 'go off script' and talk about alcohol use in a way that the Company did not intend will not relieve the Company of its responsibility for the marketing.
28. That said, each marketing communication has to be assessed on its own terms. The segment on 16 June did not contain stories or scenarios that encourage excessive consumption.
29. Drawing this together, the Panel concludes in relation to section 3(a):
 - The segment of 16 June did not encourage excessive consumption;
 - The cocktail featured was beyond 2 standard drinks however, the segment taken as a whole did not promote consumption beyond levels recommended in the Australian Alcohol Guidelines; and
 - If previous 'Jacuzzi Friday' segments have featured dialogue which could be said to encourage excessive consumption, then this will breach the ABAC standard and the Company is not excused of this breach even if the presenters did this of their own accord and contrary to Company instructions. This was not the case with the 16 June segment.

Did the segment suggest the consumption of alcohol causes a significant change in mood or is a necessary aid to relaxation

30. The segment places alcohol use while operating a Jacuzzi. From this, the complainant takes that alcohol use is suggested as being needed to have fun and relax.

31. The Panel does not believe the segment of 16 June breaches the section 3(c) standard. The segment establishes that it is fun and relaxing to use a Jacuzzi. The introduction of alcohol does not alter this mood nor does the dialogue suggest that a person needs alcohol to relax.

Does the segment show alcohol consumption during an activity that for safety reasons requires alertness or physical co-ordination

32. Section (d) of the ABAC requires that alcohol marketing not show the consumption of alcohol before or during any activity that for safety reasons requires a high degree of alertness or physical co-ordination. 'Showing' alcohol consumption is expressly stated to include visibly or audibly, or by direct implication.
33. Obviously a radio program is not visibly showing things, but the imagery of the Jacuzzi segment is to place the three presenters onto the hot tub. Listeners know this is a fantasy – there is no Jacuzzi in the radio studio – but equally the segment uses dialogue and sound effects which imply that a hot tub is in use.
34. Further the dialogue establishes that the presenters are supposedly consuming the cocktail while in the Jacuzzi. Ms Ritchie says “we are drinking in the Jacuzzi a Pure Apple Marguerita guys”.
35. The issue is whether the activity of using a Jacuzzi safely requires a high degree of alertness or physical co-ordination. In this respect it is noted:
- Government regulation does not appear to go to the use of alcohol in a Jacuzzi with applicable safety laws going to issues such as fencing to restrict the access to Jacuzzis by children; and
 - The producers and distributors of Jacuzzis (at least from a limited internet search) provide advice that it is unwise to consume alcohol while using a Jacuzzi. Identified risks include, dehydration, heat exhaustion, passing out, drowning due to alcohol influenced wild behaviours, and injuries from broken glass.
36. It is likely that many people have had a drink of alcohol while using a hot tub without incident and the risks listed by the distributors of Jacuzzis would be more likely if a person was drinking excessively rather than moderately. That said, like swimming pools, there are undoubted safety risks in using a Jacuzzi and alcohol marketing should not depict consumption occurring before or during the activity.
37. The Panel believes that the depiction of alcohol consumption while using a Jacuzzi as occurred in the 16 June segment is inconsistent with the section (d) standard. This does not mean the entire marketing concept of 'Jacuzzi Friday' is inconsistent with the section (d) standard. The Code does not prohibit the association of alcohol and a Jacuzzi any more than it does with showing a swimming pool or a beach in an alcohol advertisement. It would be possible, for instance, to envisage the segment whereby the presenters are supposedly in the Jacuzzi talking about the ingredients of a cocktail but the dialogue makes

clear the drink was to be prepared and consumed after the use of the Jacuzzi – not before or during its use.

38. Accordingly, the complaint is upheld in relation to section 3(d) and dismissed in relation to sections 3a(i) and 3(c).