



ABAC Adjudication Panel Determination No. 4/18

Product: Mornington Food + Wine Festival
Company: Nepean Events Pty Ltd
Media: Digital/Outdoor
Complainant: Confidential
Date of decision: 1 February 2018
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 digital and outdoor advertisements for the Mornington Peninsula Food + Wine Festival by Nepean Events Pty Ltd (“the Company”) and arises from a complaint received 8 January 2018.
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. The codes go either to the issue of the placement of alcohol marketing, the content of alcohol or deal with both matters. The ABAC deals with both the placement of marketing i.e. where the marketing was located or the medium by which it was accessed and the content of the marketing irrespective of where the marketing was placed. The ABAC scheme requires alcohol beverage marketers to comply with placement requirements in other codes as well as meeting the standards contained in the ABAC.
 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 8 January 2018.
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 the marketing communication.

The Marketing Communication

10. The advertisements are a photographic image of either a hand emerging from calm ocean waters holding a full beer with a jetty in the background on a sunny day, a hand emerging from rougher waters holding a glass of red wine on an overcast day or a hand emerging from the ocean holding a glass of white wine with sails in the distant background on a sunny day. All have the text superimposed “Mornington Peninsula Food + Wine Festival” and “24.FEB.2018 POINT NEPEAN NATIONAL PARK” “NEPEAN EVENTS” “ALWAYS STUDIO” “morningtonpeninsulafoodwinefestival.com”.



The Complaint

11. The complainant is concerned that the advertisements are promoting the combination of alcohol and swimming and have been placed at a coastal location where there have been multiple drownings or near drownings this year.

The ABAC Code

12. Part 2(a) of the ABAC provides that The Code APPLIES to all Marketing Communications in Australia generated by or within the reasonable control of a Marketer, except as set out in Section 2(b). This includes, but is not limited to, retailer advertising.
13. Part 3 of the ABAC 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.
14. Part 6 of the ABAC provides that the definition of:
 - **Marketer** means a producer, distributor or retailer of Alcohol Beverages; and

- **Marketing communications** means marketing communications in Australia generated by or within the reasonable control of a Marketer (apart from the exceptions listed in Section 2(b)), including but not limited to brand advertising (including trade advertising), competitions, digital communications (including in mobile and social media), product names and packaging, advertorials, alcohol brand extensions to non-alcohol beverage products, point of sale materials, retailer advertising and Marketing Collateral.

The Company's Response

15. The Company responded to the complaint by letter dated 19 January 2018. The principal points made by the Company were:
 - Nepean Events is not a distributor nor producer of alcohol beverages, we provide the area for producers to sell to the public at retail prices.
 - Nepean Events has applied for a temporary liquor license for the Mornington Peninsula Food+Wine Festival.
 - The relationship between Nepean Events and companies selling the alcohol is an agreement where Nepean Events rents the space for the vendors to sell from.
 - The Mornington Peninsula is a destination of bountiful premium produce which includes wine, beer, meat, seafood, fruit, cheese, vegetables and more. It's a place where the lush green vines of some of Australia's best Pinot Noir and Sauvignon Blanc are backdropped by the Great Southern Ocean, Port Phillip Bay and Western Port Bay. A place where livestock graze on pastures of a rich green hue, and where crops are enriched by rainclouds that have travelled thousands of kilometres across some of the wildest of oceans and frontiers. It's where the sea meets the land, and the land meets the sea; creating a crescendo of gastronomic experiences.
 - It is this fortuitous geographic landscape, and the produce of it's yield, that form inspiration for the Mornington Peninsula Food & Wine Festival 2018 artwork. As a creative juxtaposition of the land meeting the sea, and the sea meeting the land; a series of images have been created to form a visual discussion of the area. The intended message to the viewer is to appreciate our local produce, region, and to savour the experience.
 - In the series of images, you will see a hand emerging from the water. The hand is proudly holding one of several different local produce specialties which include; beef, cheese, beer, vegetables and wine. In a further addition to the ocean based images, some land based imagery is also introduced. With the hand now proudly emerging from a grape vine, you are introduced to yet another juxtaposition of a local Snapper fish rising above the lush green foliage. It is this visual juxtaposition which forms the discussion of the Mornington Peninsula's world class producers and growers who thrive on the geographic fortune; of the land meeting the sea.

- The artwork has not been created in a literal sense, and it is not the intention of the creator to be encouraging swimming, or climbing into grapevines for that matter. As a region that is largely surrounded by sea, the Mornington Peninsula is identifiable by its relationship with the ocean, and any visual discussion of the area that doesn't involve the sea would be ill-considered. In an attempt to mitigate any possible confusion that the figurative arm and hand belong to a person who is swimming, the artwork was carefully created so that the body cannot be seen, and the visual action of the arm and hand do not appear to be performing or actioning anything resembling a swimming stroke or technique.

The Panel's View

16. The Mornington Peninsula Food + Wine Festival will be held in February 2018 in Portsea in Victoria. The festival is described as a showcase of local food and wine produce, demonstrations, tastings and sales held at the historic quarantine station overlooking Port Philip Bay.
17. The festival is organised by an events management company, Nepean Events. To promote the festival, Nepean Events is conducting a marketing campaign which, in part, has featured a series of highly stylised advertisements showing a hand emerging from the sea holding either a glass of wine or beer or an item of foodstuffs such as beef or cheese. The alcohol products and the food are said to represent the high-quality local produce that will be available at the festival.
18. The complainant has taken issue with the advertisements showing the hand holding a glass of wine or beer. This is because of the concern that the advertisement might encourage the combination of alcohol consumption and swimming. It is noted by the complainant that this is a dangerous combination and that the region has seen some drownings.
19. For its part, the ABAC contains a series of standards which the marketing of alcohol beverages must satisfy. One of the standards goes to not showing the consumption of alcohol beverages before or during an activity that requires a high degree of alertness or physical coordination such as swimming.
20. The ABAC scheme however does not purport to regulate every depiction of an alcohol beverage in the media. Rather, the scheme applies to marketing by a producer, distributor or retailer of alcohol beverages. In its day to day business activities, Nepean Events is not a producer, distributor or retailer of alcohol beverages. A 'retailer' captured by the ABAC scheme is an entity such as a bottle shop, a hotel or licensed premises such as a restaurant or nightclub.
21. The Company has advised that it has secured a temporary liquor licence for the purposes of the festival. This means that alcohol can be sold and consumed at the quarantine station at which the festival will be held. (without this state government granted licence, it would not be permitted to sell or consume alcohol at the festival). The Company explains that it will not itself be the retailer of alcohol beverages at the festival, but rather its role is to make space available (for a fee) to other entities who will sell alcohol products.

22. The threshold issue therefore is to determine whether the securing of a temporary liquor license by Nepean Events makes it a retailer for the purposes of the ABAC scheme and the marketing campaign for the festival. If it is a 'retailer', then its advertising featuring alcohol products will need to comply with the ABAC standards. If it cannot fairly be considered a retailer for ABAC purposes, then the ABAC scheme and hence the Panel has no jurisdiction over its advertising and cannot make a substantive determination as to whether its advertising is consistent with the ABAC requirements.
23. The Panel believes Nepean Events cannot be considered to be a retailer within the intended scope of the ABAC scheme. It is conceivable that the gaining of a temporary liquor licence might bring an entity within the ABAC scheme, but there would need to be a relationship between the sale of alcohol and the entity holding the licence. Here, the entities selling the alcohol are different from Nepean Events.
24. Accordingly, the Panel does not have jurisdiction to make a decision over the individual advertisements and the complaint is dismissed.