



ABAC Adjudication Panel Determination No. 70-71/18

Product: Drinks promotion
Company: Merivale
Media: Digital/Print
Complainants: Ms Dunne & Confidential
Date of decision: 25 July 2018
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 drinks promotion by Merivale (“the Company”) and arises from two complaints received 8 June 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 marketing 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, Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by Ad Standards, 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 Ad Standards 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 Ad Standards Community Panel 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 8 June 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 was completed in 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 obtained for some but not all elements of these marketing communications.

The Marketing Communications

10. The first complaint relates to the following digital banner advertisements.

The image displays two side-by-side screenshots of mobile phones. The left phone, at 7:10 am with 99% battery, shows a notification for '49% off All Drinks, Bottoms Up!' from merivale.com. Below the notification is a banner for Merivale with the text 'Bottoms up, Sydney' and '49% OFF ALL DRINKS* ALL JUNE, EVERY DAY 5-7PM'. The main content of the page reads: 'Love a cheeky drink? We do too...but we love Sydney even more. In our ultimate cheers to you, we're bringing some vibrancy back into the city as a big "thank you" with 49% off all drinks in Merivale bars and pubs every single day in June, from 5pm - 7pm. Now, that's a reason to say "Bottoms up, Sydney!"'. The right phone, at 7:31 am with 94% battery, shows a notification for 'Bureau of Meteorology staff sneak hidden message' from amp.watoday.com.au. Below the notification is a WA Today banner with the text '49% OFF ALL DRINKS* ALL JUNE EVERY DAY 5-7PM' and a 'FIND OUT MORE' button. The main content of the page reads: 'The proposed agreement provides a substantially front-loaded pay increase, protects core conditions, is financially

11. The second complaint relates to a print advertisement on the front page of the Sunday Telegraph on 3 June 2018.



The Complaint

12. The first complainant is concerned that the ads use drinks positioned so as to simulate a woman's naked buttocks and breasts to attract patrons to drink at the Merivale Sydney establishments and in a way that objectifies women.
13. The second complainant is concerned that the ad suggests it is acceptable to "grab" bottoms when you are alcohol fuelled, promoting alcohol fuelled sexual behaviour and sexual assault.

The ABAC Code

14. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (a)(ii) show (visibly, audibly or by direct implication) or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage;

The Company's Response

15. The Company responded to the complaint by letter dated 21 June 2018. The principal points made by the Company are:
 - Merivale submits that the Bottoms up Campaign does not breach any relevant part of the ABAC Code but is willing to accept the Panel's decision regarding the complaints.
 - The advertisements form part of a co-ordinated advertising campaign to promote the 10th anniversary of Merivale's "March into Merivale" (MIM) festival which is an annual festival celebrating the range of restaurants and bars which form part of the Merivale Group (Bottoms up Campaign). As stated in the Bottoms up Campaign, Merivale is offering "49% off all* drinks (*to the value of \$200 per unit*) between 5-7pm in our bars and pubs (available at 37 venues)" (49% Beverage Promotion) as a "thank you" to Sydney and to revive nightlife across the city.

- Every year Merivale is renowned for doing something of this grand scale for MIM which will always reflect Merivale’s brand personality traits of imaginative, sophisticated, playful and genuine. In line with this Merivale wanted the Bottoms up Campaign to bring MIM to life in a playful and light-hearted manner that was genuine in offer and sophisticated in its execution.
- In developing the Bottoms up Campaign, Merivale chose to include the image of two drinking vessels positioned together to create the shape of bottom cheeks (Bottom Motif). The Bottom Motif was created as a means of playing on the use of the Australian vernacular “*Bottoms up*” in the campaign (being a reference to expressing good wishes/thanks and taking a sip from a beverage – the equivalent to “Cheers”). This theme was further developed through additional, similarly humorous and light hearted messaging, such as “*we don’t do things half-arsed*”.
- The execution of the Bottoms up Campaign was carried out in a cheeky yet sophisticated manner, consistent with Merivale’s brand personality traits, but the creative was also carefully and responsibly selected for display across appropriate media. Merivale has received an enormous amount of extremely positive feedback about its Bottoms up Campaign.
- Merivale engaged with both the ABAC Pre-vetting Service and Liquor and Gaming NSW in relation to aspects of the campaign prior to launch.
- Merivale submits the Bottoms up Campaign does not breach Part 3 (a)(i) of the ABAC code in any of the following respects:
 - Promoting 49% off drinks at Merivale bars from 5-7pm every day – Merivale takes its responsibilities in relation to the promotion of liquor very seriously and ensures that appropriate controls are put in place, both in campaigns and in terms of conduct during the implementation of its offers to ensure the safety of its patrons.
 - Merivale engaged with Liquor & Gaming NSW prior to launch to ensure the promotion complies with regulatory limits on such promotions. The discounted prices are not extreme and the limited (2 hour) and early evening hours of the offer were chosen so as not to allow excessive drinking, including continuing to drink toward the end of an evening. Further, elements such as the availability of food, free water, and normal RSA practice controls all continue to apply during the conduct of the offer. In addition, the inclusion of premium range alcohol in this offer was a deliberate choice to draw a sophisticated consumer who is interested in a quality experience, as opposed to a consumption model.

- The “bottoms up” reference was approved by ABAC and is intended to reflect the common turn of phrase for saying “cheers!” or expressing good wishes or thanks. In discussions with ABAC it was decided that “bottoms” and “up” should be displayed in italics to distinguish the intended meaning (cheers!) from the alternate meaning associated with the expression, being to scull a glass of alcohol (which may have been suggested by only italicising “up”).
- The depiction of two upside down bottles of wine and/or two glasses of beer or other alcoholic drinks – The portrayal of two glasses in each Bottom Motif is simply a play on the words and images used in the central message of the campaign and is not intended to promote excessive or rapid consumption of alcohol.
- The half arsed message was approved by AAPS. It is included as a reference both to the “almost” 50% discount offered through the campaign as well as the grand scale with which Merivale celebrates MIM each year by delivering quality and excellence. It is not intended to inform drinking styles or habits and certainly does not suggest excess consumption.
- Merivale submits the Bottoms up Campaign does not breach Part 3 (a)(ii) of the ABAC code in any of the following respects:
 - Suggesting people grab their mates after work and enjoy 49% off drinks at Merivale bars 5-7pm – The message “grab your mates” is used in its common sense meaning, as a turn of phrase for collectively coming together as mates to meet up. It is not suggestive of sexual assault or any other form of irresponsible or offensive behaviour when displayed in connection with the Bottom Motif.
 - The portrayal of two glasses in each Bottom Motif is not encouraging irresponsible or offensive drinking habits. It is simply a play on the words used in the central message of the campaign, being “*Bottoms up*” and the ordinary viewer would interpret the Bottom Motif as such.
 - The message “Bottoms up, Sydney!” or the Bottom Motif, do not separately or together encourage irresponsible or offensive behaviour of a sexual nature. Neither are intended to be sexually suggestive. “Bottoms up” is a reference to the common turn of phrase for saying “cheers!” and the Bottom Motif employs a visual impression rather than actual images of human bottoms, is not gender specific and certainly does not evoke images of a woman’s breasts.

- The half arsed message approved by AAPS is not intended to encourage irresponsible or offensive drinking habits but rather is intended as a reference to the “almost” 50% discount offered and to the extravagant manner in which Merivale celebrates MIM each year. Further, the Bottom Motif is simply a visual representation of bottoms, not breasts, that is not gender-specific or capable of being confused as an image of actual human bottoms or breasts. Overall, neither the “*half arsed*” message or the Bottom Motif could be said to encourage any form of irresponsible or offensive behaviour.
- Merivale submits the Bottoms up Campaign does not breach Part 3 (c)(ii) of the ABAC code in any of the following respects:
 - Suggesting people grab their mates after work and enjoy 49% off drinks at Merivale bars 5-7pm – The message “grab your mates” is used in its common sense meaning, as a turn of phrase for collectively coming together as mates to meet up, and was in no way intended to be suggestive of any kind of achievement of personal, business, social or sexual success, alone or in connection with the Bottom Motif.
 - The portrayal of two glasses in each Bottom Motif is not capable of suggesting the consumption of alcohol contributes to the achievement of personal, business, social, sporting, sexual or other success, nor does the visual impression of human bottoms in this context create this association. It is simply a play on the words used in the central message of the campaign, being “*Bottoms up*”.
 - The message “Bottoms up, Sydney!” or the Bottom Motif, do not separately or together suggest to the ordinary viewer that the consumption of alcohol contributes to the achievement of personal, business, social, sporting, sexual or other success. Neither element is intended to be sexual in nature. “Bottoms up” is a reference to the common turn of phrase for saying “cheers!” and the Bottom Motif employs a visual impression rather than actual images of human bottoms, is not gender specific and certainly does not evoke images of a woman’s breasts. In light of this it cannot be said that the advertisements draw an association between these elements and success of any kind, particularly sexual.
 - The half arsed message and the Bottom Motif is a play on the theme of the Bottoms up Campaign and these elements are not presented in such a way that is sexually suggestive or creates an

association between the consumption of alcohol and “personal, business, social, sporting, sexual or other success”.

The Panel’s View

16. It should first be noted that Merivale is not a signatory to the ABAC Scheme. This means that it is not contractually bound to follow a Panel’s decision, in contrast to signatories to the Scheme or members of the peak alcohol industry bodies who are the sponsors of the Scheme. The Panel does, however, consider all relevant complaints regardless of whether the advertiser or supplier is a signatory to the Scheme and, in this case, Merivale has fully cooperated with the Panel in its decision making process and agrees to accept the Panel’s decision.
17. The complaints raise issues under both the AANA Code of Ethics and the ABAC. The issue under the Code of Ethics concerns whether the advertisements are objectifying women through the use of images that bring to mind a woman’s bottom or breasts. While this is a valid point to raise, the issue falls within the remit of Ad Standards and not the ABAC Scheme and hence the Panel does not have authority to make a determination on that particular concern.
18. The issue raised under the ABAC is whether the advertising is encouraging inappropriate behaviour related to alcohol use such as “alcohol fuelled sexual behaviour and sexual assault”. A marketing item which did this is in breach of Part 3(a)(ii) of the ABAC.
19. The Company argues that there was no intention to imply irresponsible or offensive sexual behaviour and that the play on words and visual imagery used in the advertisements would not be interpreted in this way.
20. In assessing if a marketing communication is consistent with a Code standard the Panel needs to have regard to the probable understanding of the marketing communication by a reasonable person taking the contents as a whole. The concept of a “reasonable person” is drawn from the Common Law system and means that the attitudes, opinions and life experiences held within a majority of the community is to be the benchmark. A person who holds another interpretation is not “unreasonable” but possibly their take on the marketing item would not be shared by a majority of the community.
21. On balance the Panel does not believe the advertising is in breach of Part 3(a)(ii). In reaching this view the Panel has noted:
 - The marketing is using imagery of wine bottles and wine glasses to bring to mind a woman’s bottom and breasts.

- References to “bottoms up” and “grab your mates” would, in the context of the advertising, be reasonably taken as meaning having a drink with friends at the Company’s premises. The expressions would not be taken as implying that it is acceptable to grab a woman’s bottom or breasts.
- The advertising is playful and irreverent and would be interpreted in that light.
- Taken as a whole a reasonable person would not believe the advertising is encouraging sexual assault or other illegal or offensive behaviour.

22. Accordingly the complaints are dismissed.