



## **ABAC Adjudication Panel Determination Nos: 191, 192 & 195/20**

**Product:** Bacardi Rum  
**Company:** Bacardi – Martini Australia Pty Limited  
**Media:** Outdoor Advertising  
**Date of decision:** 29 December 2020  
**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 outdoor advertising by Bacardi – Martini Australia Pty Limited (“the Company”) for Bacardi Rum (“the Product”). It arises from three complaints received from a single complainant on 10 December 2020 and 14 December 2020.
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 Code”) – 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 and Policies – which place 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 the 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 10 December 2020 and 14 December 2020.
8. The Panel endeavours 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 complaints were 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 content of the advertising (Approval Number 18779).

## The Marketing

10. The complaints relate to advertisements placed at the Henry Street and William Street railway bridges in Hawthorn, Victoria. The advertisements are shown below:



*First Advertisement*



*Second Advertisement*



*Third Advertisement*

## The Complaint

11. The complainant lodged three separate complaints about the advertising which collectively raised concerns with the advertising:
  - being directed towards teenagers (school leavers);
  - failing to notify about the impact of alcohol on driving a car and its impact on judgement in navigating social activities; and

- promoting excessive consumption and associating the product with achieving success in life.

## The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:

- (a)(i) show or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with Australian Alcohol Guidelines.
- (b)(i) have Strong or Evident Appeal to Minors.
- (b)(iv) be directed at Minors through a breach of any of the Placement Rules.
- (c)(ii) show the consumption or presence of an Alcohol Beverage as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success.

13. Part 4 of the ABAC Code provides that:

A breach of this Code that is reasonably unforeseeable by or outside the reasonable control of the Marketer or their agency will be classified as a no fault breach.

14. Part 6 of the ABAC Code provides that:

### **Strong or Evident Appeal to Minors** means:

- (i) Likely to appeal strongly to Minors;
- (ii) Specifically targeted at Minors;
- (iii) Having 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.

### **Placement Rules** means:

- (i) A Marketing Communication must comply with codes regulating the placement of alcohol marketing that have

been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy).

## **Company Response**

15. The Company responded to the complaint by letter emailed on 22 December 2020. The principal points made by the Company were:

### **Introduction**

- We note that the complaints relate to the display of three advertisements for BACARDÍ Spiced Rum (collectively, the Advertising) on posters beneath the railway bridge on Henry Street, Hawthorn, Victoria (the Henry Street Location) and William Street, Hawthorn, Victoria (the William Street Location).
- At the outset, we would like to note that we take our compliance obligations with the ABAC Responsible Alcohol Marketing Code (Code) and all other applicable regulatory requirements very seriously and intend to cooperate with ABAC to address the current complaints.

### **Alcohol Advertising Pre-vetting Service Approval**

- The Advertising received Alcohol Advertising Pre-vetting Service Approval for content (Final Approval #18779).
- The Advertising does not have Alcohol Advertising Pre-vetting Service Approval in respect of its placement at the Henry Street Location or the William Street Location.
- In this regard, we outsource the placement of our outdoor media to our advertising agency, Optimum Media Direction Pty Ltd (OMD), which is responsible for selecting locations and ensuring that the locations comply with the Code and all other regulatory requirements.

### **Excessive or Rapid Consumption**

- We do not consider the Advertising to breach Part 3(a)(i) of the Code. The Advertising does not show or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines.
- Contrary to the suggestion raised by ABAC, the Advertising does not show BACARDÍ Rum being consumed in a large, full glass and does not depict

any actual consumption of an Alcohol Beverage in any of the scenes depicted in the Advertising.

- The First Advertisement depicts a male making a mixed drink with BACARDÍ Rum in a highball glass containing a large quantity of ice, and using a spirit measuring cup / jigger (shown in the foreground of the image, to the left of the bottle). The use of a jigger emphasises the moderate and controlled use of BACARDÍ Rum.
- A reasonable person viewing the First Advertisement would understand the beverage in the glass to be a mixed drink, particularly as the mixer (a bottle of cola) is clearly visible in the image. This is consistent with the famous recipe comprising BACARDÍ Rum and cola, which is made in a highball glass filled to the top with ice cubes with 50 ml of BACARDÍ Rum and a minimum of 100 ml of cola.
- The Second Advertisement depicts a female holding a highball glass, which is also filled with ice. She is not shown to be actually consuming the glass held in her hand.
- A reasonable person viewing the Second Advertisement would understand the drink shown in the image to contain not only BACARDÍ Rum but rather be a mixed drink. The colour of the liquid in the glass and the layer of bubbles on top of the liquid in the glass would suggest to a reasonable person a mixed drink with a cola mixer, over a large quantity of ice.
- The Third Advertisement (which always appears adjacent to the First and Second Advertisements as part of the Advertising) depicts a full, closed and sealed bottle of BACARDÍ Spiced Rum. There can be no suggestion that this image shows or encourages the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol, or consumption inconsistent with the Australian Alcohol Guidelines.
- Further, in addition to the responsible depictions of the product in the Advertising, we note that the First and Second Advertise Enjoy BACARDÍ Rum responsibly.
- The above views are further supported by the fact that the Advertising received Alcohol Advertising Pre-vetting Service Approval for content.

### **Strong or Evident Appeal to Minors**

- We do not consider the Advertising to breach Part 3 (b)(i) of the Code. The Advertising does not have a “Strong or Evident Appeal to Minors”.

- The Advertising is not likely to appeal strongly to minors (including adolescent minors). The colours, actors and environments depicted are relevant for an adult audience and do not have any aspects that are likely to appeal to adolescent minors.
- With regard to the First and Second Advertisements, there is nothing specific about the colours used, and the environment depicted that would appeal to minors. The dark and muted colours of the First Advertisement are consistent with being indoors in a house at night, and the environment depicted is a gathering of friends.
- The colours used in the Second Advertisement are consistent with an outdoor setting. Although the environment depicted is vague, it is suggestive of a tropical location, which is consistent with the Caribbean roots of BACARDÍ Rum.
- The colours and environments shown in the First and Second Advertisements are not unique to BACARDÍ Rum and are commonly used in many other advertisements for alcoholic beverages. The use of these colours and environments do not pose any stronger or more evident appeal to minors than any other commonly used indoor or outdoor settings.
- The green leafy background interspersed with small tropical flowers shown in the Third Advertisement is suggestive of the tropics, again consistent with the Caribbean roots of BACARDÍ Rum. Tropical colours and backgrounds are also commonly used in many alcohol advertisements. Again, there is nothing at all inherent in the Third Advertisement that is likely to appeal to minors.
- In support of our position, we refer to ABAC Adjudication Panel Determination No. 52/18 in which the Panel accepted the company's position that the use of Hawaiian style fruit and images (i.e., a tropical theme) was colourful but in the overall context was not considered as having strong appeal to minors. The background of the Third Advertisement is far less colourful than the background of the advertisement that was the subject of the above determination.
- Further, the actors in the Advertising are clearly adults. Based on their general appearance (including the facial hair on the male actor and visible signs of aging (laugh lines and crow's feet) on the female actor's face, a reasonable person would assume they are likely to be aged in their late twenties or thirties. The clothing that each actor wears is both plain and rather conservative. Given this, there are no "youthful, stylish models" in the Advertising that would strongly appeal to minors (including adolescent minors).

- The above views are further supported by the fact that the Advertising received Alcohol Advertising Pre-vetting Service Approval for content.
- The Advertising does not breach Part 3(b)(iii) of the Code. Each of the individuals depicted in the Advertising were 25 years of age or more when the images were taken. In the First Advertisement the male actor was 26 years old and the female actor was 32 years old at the time the photograph was taken. Similarly, the female actor in the Second Advertisement was 31 years old at the time the photograph was taken.

### **Placement Rules**

- In the present case, our advertising agency, OMD, engaged a third party vendor, Revolution360 to undertake the physical placement of the Advertising in the locations selected by OMD and approved and paid for by us. The placement of the Advertising at the Henry Street Location was approved and paid for by us.
- **The placement of the Advertising at the William Street Location was not selected, approved or paid for by us.**

### ***Henry Street Location***

- The Advertising at the Henry Street Location does not breach Part 3(b)(iv) of the Code.
- In relation to the Advertising beneath the railway bridge on Henry Street, Hawthorn, the satellite image below shows the relationship between the Henry Street Location and the nearest school (Swinburne Secondary College), the boundary of which is outlined in red.



- Clearly, there is no possible line of sight from any boundary of the school to the area below the bridge on Henry Street where the Advertising is present (as there are numerous obstacles in the way, including a number of houses and a multi-story building).
- This is further supported by the below Google Street View image taken at the corner of the school boundary on George Street (which is the closest boundary of the school to the Henry Street Location). Clearly, the Henry Street railway bridge cannot be seen from this position, let alone any advertising posters on the walls below the bridge.



### **William Street Location**

- We did not select, authorise or pay for placement of the Advertising at the William Street Location. Further, OMD has confirmed that it did not book this location with Revolution360 for the placement of the Advertising.
- The investigation of the complaints in your letter with OMD (our advertising agency) and Revolution360 (the service provider engaged by OMD to place the Advertising) identified that the Advertising was placed at the William Street Location as a result of human error by a Revolution360 installation team, without the knowledge of Revolution360 management.
- Revolution360 has informed us that the William Street Location was not included on its internal allocated sites for our advertising campaign and that the William Street Location did not appear Revolution360's list of approved ABAC sites.
- As a result of this unfortunate and unforeseeable human error, the placement of the Advertising at the William Street Location breached Part 3(b)(iv) of the Code, as it appears to have been placed within a 150 metre sightline from the boundary of a school.
- The Advertising at the William Street Location was removed on 17 December 2020. Revolution360 has informed us that it intends to provide further education to its installation teams regarding compliance with the Code.
- In the circumstances, as each of Bacardi Australia and OMD did not select, approve or pay for the placement of the Advertising at the William Street Location and were unaware of it until the receipt of your letter, neither we nor OMD could have foreseen the human error on the part of Revolution360, we respectfully submit that this breach should be classified as a "no fault breach" on the part of Bacardi Australia pursuant to section 4 of the Code.

### **Social and Other Success**

- We do not consider the Advertising to breach Part 3(c)(ii) of the Code. Nothing in the Advertising shows (visibly or by direct implication) that the consumption or presence of an Alcohol Beverage as a cause of or contributing to the achievement of success.
- It is noted that the First Advertisement depicts a male actor in an indoor, night-time gathering making a mixed drink. A female actor is present next to the male actor with her arm on his shoulder. The scene is typical of a normal gathering of adults and the interaction between the actors is typical of an interaction between friends. Neither the making of the mixed drink nor

the background suggests the achievement of any success rather the image depicts what commonly occurs at gatherings involving adults.

- The Second Advertisement depicts a female actor holding a drink and smiling. A reasonable person viewing the Second Advertisement would not consider this a depiction of social (or other) success. There is no basis for any assertion that a person holding a drink and smiling has achieved social success simply by reason of her smile, and that this success is caused or contributed to by the consumption or presence of an alcoholic beverage. Advertising for most consumer goods generally depicts happy, smiling people, rather than sad people.
- The Third Advertisement shows a full, closed and sealed bottle of BACARDÍ Spiced Rum. There can be no suggestion that this image indicates any achievement of success (social or otherwise).
- BACARDÍ Rum is not a product traditionally consumed by people after achieving success in their fifties. This assertion made in the complaint is not true or substantiated. In fact, our market research indicates that the average BACARDÍ Rum consumer is 29.5 years old.
- BACARDÍ Rum may be consumed by adults of all ages who are legally permitted to drink alcoholic beverages. Given this, there can be no implication that consumption of BACARDÍ Rum would cause or contribute to the early achievement of personal and business success. Further, none of the images in the Advertising allude to the achievement of any personal and/or business success.
- The above views are further supported by the fact that the Advertising received Alcohol Advertising Pre-vetting Service Approval for content.

### **The Panel's View**

16. This determination concerns posters advertising Bacardi rum located at two locations in the Melbourne suburb of Hawthorn. The complainant submitted three separate complaints about the posters which collectively raise issues under the ABAC content standards as well as the ABAC Placement Rules. Taken as whole, the complainant believes the advertising is being pitched at teenagers, specifically school leavers, and contains irresponsible messaging about alcohol use namely:
  - that excessive alcohol use is being encouraged;
  - that the advertising implies the product will assist a school leaver achieve success; and

- that the advertising fails to warn school leavers of the negative impacts of alcohol use e.g., on driving a car and navigating social activities
17. The ABAC consists of standards about the messaging in alcohol marketing only depicting/promoting moderate and responsible alcohol use as well as rules which aim to have alcohol marketing directed at adults and away from minors. The nature of the complainant's concerns brings into play the following content standards, namely that alcohol marketing must not:
- encourage excessive or rapid consumption of alcohol beverages - Part 3(a)(i);
  - have strong or evident appeal to under 18-year olds - Part 3(b)(i); and
  - suggest that alcohol use is a cause of or contributor to the achievement of success - Part 3(c)(ii)
18. In assessing if an alcohol marketing communication is consistent with a Code standard the Panel is to adopt the probable understanding of the marketing material by a reasonable person taking its content as a whole. This means that the life experience, values, and opinions common in a majority of the community is to be the benchmark. If the message to be derived from the marketing item can be understood in several ways, then it is the most probable interpretation which is to be preferred over a possible but less likely interpretation.
19. The Company contends that the messaging of the advertising is consistent with the relevant Code standards. It is argued:
- the posters don't depict actual alcohol consumption, and show the spirit being served in a high glass with a mixer and with ice;
  - the poster with the prominent male character shows a jigger which measures the amount of spirit for the drink;
  - a photo of an unopened bottle of the product cannot be reasonably interpreted as promoting excessive consumption;
  - the posters depict adult scenes and have no features which make them strongly appealing to minors; and
  - the advertising does not suggest that the product leads to social or other success.
20. The Panel does not believe the three posters breach the ABAC content standards. The images are not exceptional, and depict adult activity being performed by adults. While the people depicted are attractive, there is no

reasonable implication that the use or presence of the product is the reason why the people are considered attractive. The scenes don't create a scenario where the product is causing social success and it is consistent with the Code to associate alcohol with a pleasant enjoyable situation provided that it is not implied that alcohol is the reason for the success. Alcohol consumption depicted on the posters is moderate and no one appears affected by alcohol.

21. Further, the scenes depicted are not considered strongly appealing to minors. The scenes show adults, and the settings would not be strongly relatable to minors. The colours are muted and not overly eye-catching. It could be contended that the group scene on one of the posters might be aspirational for minors wishing to feel older, but this is mitigated by the age of the group who appear to be in their late twenties or early thirties.
22. The complainant was also concerned that the advertising did not allude to the negative consequences of drinking alcohol. While moderate and responsible portrayal of alcohol use is required in alcohol marketing, this does not extend to requiring messaging as to the risks of misusing alcohol. It is noted two of the three posters did contain a 'drink responsibly' message, but such messages are not a Code requirement.
23. The second element of the complaint goes to the location of the posters and their proximity to the Swinburne Secondary College. The ABAC Placement Rules provide, in effect, that an outdoor billboard or poster must not be located within 150 metres line of sight from a school. The posters are at two locations, namely on the walls of railway underpasses at Henry and William Street. The Company has supplied information which demonstrates the Henry Street location is not within line of sight of the school. It is accepted the William Street location does breach the Placement Rule requirement.
24. In relation to William Street, the Company contends a 'no fault' finding should be made as:
  - it did not book nor pay for the William Street site which was not on the list of allocated sites for the advertising; and
  - it was erected by mistake by the contractors and removed upon the complaint being investigated and the error detected.
25. A no fault finding is open to the Panel if the breach of the Code requirement was unforeseeable by or outside the reasonable control of the marketer. A no fault finding does not diminish that the breach occurred and that the complainant's concerns have been confirmed as valid. A no fault finding is justified in these circumstances as the Company did not select the William Street site and the installation occurred by mistake.

26. The complaint is upheld in relation to the breach of Placement Rule 1 and the William Street site and otherwise dismissed.