



ABAC Adjudication Panel Determination No 9/21

Product: Venue
Company: The Star Pty Limited
Media: Out of Home - Billboard
Date of decision: 15 February 2021
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 billboard advertising by The Star Pty Limited (“the Company”). It arises from a complaint received on 18 January 2021.
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:
 - 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;

- 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 complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaint was received on 18 January 2021.
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 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 not obtained for the advertising.

The Marketing

10. The complaint refers to the following advertisement seen at a train station:



The Complaint

11. The complainant is concerned about the advertising as:

This angle of marketing is unbelievably ill suited to the times. Telling people that staying home to drink (Doesn't Work) places people in endangerment from Corona Virus and tries to break an important conceptual rule of only going out for essentials. The Star Casino is trying to de-escalate people's mindsets on the seriousness of COVID.

The ABAC Code

12. 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

13. The Company responded to the complaint by letter emailed on 11 February 2021. The principal points made by the Company were:

Alcohol Advertising Pre-vetting Service Approval

- The Star did not submit the Advertisement to ABAC for Alcohol Advertising Pre-vetting Service Approval.

Marketing placement

- The Advertisement appeared in the marketplace for a two (2) month period, commencing 16 November 2020 and ending 18 January 2021 (Relevant Period), at the following limited locations (Advertisement Locations):
 - Wynyard Station Platform 3 & 5;
 - Townhall Station Platform 4; and
 - Central Station Platform 24.

Responsible and moderate portrayal of Alcohol Beverages

- It is The Star's submission that the Advertisement did not breach part 3(a)(ii) of the ABAC Responsible Alcohol Marketing Code (Code), that is, the Advertisement did not show or encourage irresponsible or offensive behaviour related to the consumption or presence of an alcohol beverage.
- Whilst it is true that the Advertisement related to the consumption of alcohol, it does not automatically follow that The Star encouraged irresponsible or offensive behaviour. Indeed, the promotion of liquor itself within the Advertisement is done so responsibly and the Advertisement was reviewed and approved in accordance with The Star's internal legal and compliance protocols.

- The Star submits:
 - The Advertisement was designed to raise awareness amongst The Star's target audience to visit The Star Sydney by using a creative approach that was relevant to the mind and mood of the community at the time the Advertisement entered the marketplace. Indeed, from the commencement of the Relevant Period until approximately mid-way through this period, the NSW Government had been progressively easing restrictions in NSW regarding public gatherings and encouraging businesses to return to operations, whilst ensuring compliance with the relevant health order restrictions in place. To this end, The Star refers to:
 - *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 5) 2020 [NSW] Amendment Order (No 2) 2020 commencing 23 October 2020 and in force until 23 November 2020;*
 - *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 5) 2020 [NSW] Amendment Order (No 3) 2020 commencing 23 November 2020 and in force until 30 November 2020*
 - *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 6) 2020 [NSW] commencing 1 December 2020 and in force until 7 December 2020; and*
 - *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 7) 2020 commencing 7 December 2020 and in force until the beginning of 17 December 2020;*
 - For the duration of the Relevant Period, The Star was (and remains) a COVID-Safe venue. The Star complied with all relevant laws, regulations and public health orders. The Star notes that its approach to protecting its guests and staff was (and remains) rigorous. The Star:
 - adopted many proactive and precautionary measures from as early as March 2020; and
 - has passed regular checks conducted by regulatory bodies. The Star notes that Liquor & Gaming NSW and NSW Police regularly attended The Star to assess The Star's compliance with public health orders including

directives around the prevention of comingling, capacity limits and hygiene measures;

- For the duration of the Relevant Period, The Star and other entertainment and hospitality venues across Sydney (excluding the Northern Beaches area) were permitted to remain open subject to relevant public health orders;
 - The Star practices the responsible service of alcohol; and
 - The Advertisement does not undermine the severity of COVID-19, nor induce the public to breach public health orders.
- The Advertisement was not placed at a time when Sydney had any active COVID-19 clusters or was subject to “lock-down” orders. At the commencement of the Relevant Period, the risk of community transmission of COVID-19 was low. The Star notes that as at 16 November 2020, NSW had recorded no new locally acquired cases of COVID-19 for the ninth day in a row.
 - We note that from mid-way through the Relevant Period there were parts of Sydney (that is, the Northern Beaches area) that were subject to “lock-down” orders, however the Advertisement Locations were limited to the Sydney CBD where there were no “lock-down” orders.
 - Whilst the Advertisement encouraged consumers to visit The Star Sydney to celebrate the end of the year responsibly, The Star submits the following:
 - NSW recorded no new cases of locally acquired COVID-19 from 7 November 2020 until at least 16 December 2020. As such, there was no known community transmission of COVID-19 for the first half of the Relevant Period, being, critically, the time in which the Advertisement campaign was specifically targeted (that is, being a campaign for “end of year” drinks);
 - The NSW Government began to tighten restrictions around public gatherings and movements from 17 December 2020. For the Greater Sydney region, this included the reinstatement of the following measures:
 - hospitality venues in Greater Sydney were obliged to observe capacity limits of 300 people per separate area; and

- hospitality venues in Greater Sydney were obliged to observe the 4 square metre rule;
- At no time during the Relevant Period was the Greater Sydney area subject to lock-down orders. Only the Northern Beaches area was subject to lock down orders. Importantly, The Star notes that the Advertisement was limited to the Advertisement Locations and did not target the Northern Beaches area.
- The Star’s corporate office entered its annual Christmas shut down period from close of business 18 December 2020 until 4 January 2021 (Shutdown Period), with a large proportion of its corporate staff, and particularly within the marketing department, returning to the office on or around mid-January 2021.
- The Star accepts that the NSW Government expressed sentiments for residents to limit non-essential travel over the Shutdown Period. However, The Star also notes that during this time, NSW Government took a pragmatic approach to restricting movements and gatherings, namely, to enable families and businesses to engage with some non-essential travel where feasible and based on the best health advice.
- The Star was (and remains) a COVID-Safe venue with a well-developed COVID-Safe Plan. Throughout the Relevant Period there were no locally acquired cases of COVID-19 linked to The Star Sydney.
- The Star submits that it was never its intention to “break an important conceptual rule” with respect to non-essential travel, nor was it attempting to “de-escalate the situation” around COVID-19. The Star takes its legal obligations and the safety of its guests and staff very seriously, as demonstrated by its COVID-Safe plan.

Concluding remarks

- The Star submits that ABAC should have regard to the factors raised above, and in particular those raised in the fifth bullet point above, when coming to its determination in the present matter. The Star notes that the Relevant Period has lapsed and confirms that the Advertisement is no longer featured at the Advertisement Locations or otherwise in the marketplace. As such, The Star submits that no remedial action is necessary should ABAC determine there was a breach of the Code.

The Panel's View

14. The Star Sydney is Australia's second largest casino which, beyond its gambling facilities, features bars, restaurants, hotel accommodation and a lyric theatre. Commencing on 16 November 2020 and ending on 18 January 2021 the Company had placed at Sydney's Central railway station a billboard which contained the message - Because EOY DRINKS Don't work from Home - combined with branding for the Star. It is the juxtaposition of the billboard message with the NSW government's response to COVID-19 which has drawn the complaint.
15. The Complainant argues the message is highly irresponsible as it is encouraging people to attend the Star for end of year drinks at a time that Sydney was confronting a cluster of COVID cases and the government was seeking to limit non-essential travel. It is contended the message was de-escalating the seriousness of the COVID virus. The ABAC in Part 3 (a)(ii) provides that an alcohol marketing communication (which includes billboards) must not encourage irresponsible or offensive behaviour that is related to the consumption or presence of an alcohol beverage.
16. The Company provides a detailed explanation of the timing of the placement of the billboard with the COVID outbreak which impacted Sydney in December 2020. It is pointed out that the government measures announced to deal with the outbreak did not close the Star or any other venue serving alcohol beyond a defined area in Sydney's northern beaches region and that the Star met all its requirements to operate in a COVID safe way consistent with the rules and restrictions imposed by the State government.
17. There is no question that hospitality/entertainment businesses have had important obligations to operate during the pandemic in a manner which protects community safety and contains the spread of the virus. While the ABAC standard is mostly directed at marketing not encouraging anti-social behaviours related to alcohol use e.g., drunken loutish behaviour, alcohol marketing which was in contravention of government restrictions to control the pandemic would also breach the standard. The Panel, however, believes the billboard message is not in breach of the standard. In reaching this conclusion the Panel noted:
 - the billboard was installed prior to the commencement of the December 2020 Sydney northern beaches COVID cluster;
 - the message does encourage attendance at the Star to have end of year drinks;
 - at no point of the December cluster government measures was attendance at licensed premises, located outside the northern beaches, such as the Star, prohibited;

- the December government measures sought to permit economic activity including entertainment venues, restaurants etc to continue consistent with containing the cluster;
- while not within the remit of the ABAC Scheme to assess, the Company advises it operated consistently with all government requirements e.g., social distancing and recording all patrons for contact tracing purposes; and
- the billboard message merely promotes the Star as a venue and does not suggest irresponsible alcohol consumption patterns.

18. The complaint is dismissed.