



ABAC Adjudication Panel Determination Nos 241 & 242/21

Product: Alcohol
Company: Nightplan and Others
Media: Instagram
Date of decision: 22 November 2021
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 number of posts made to the Nightplan Instagram page, as well as one to the Red Eye Bar Instagram page, depicting various alcohol products and mentioning or tagging alcohol retailers (venues). It arises from two complaints received from a single complainant on 13 October 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 complaints raise concerns under the ABAC Code and accordingly are within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaints were received on 13 October 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 an 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 Instagram posts.

The Marketing

10. The complaints concern a total of 16 Instagram posts, which can be classified as follows:

On the Nightplan Instagram page:

- Three posts promoting the Nightplan Launch Party
- One post showing a person wearing a “Nightplan” t-shirt, providing instructions on how to make a giant mojito
- Six posts showing people wearing “Nightplan” t-shirts engaging in drinking games
- One post promoting a third-party event where alcohol would be served (Cocktails and Techno, organised by Dangerous Goods Events and held at daHa Bar)
- Two posts promoting third-party venues that serve alcohol
- One post promoting take-away cocktails from eight different third-party alcohol retailers
- One post promoting the product of a third-party producer.

Red Eye Bar Instagram page:

- One post promoting the Red Eye Bar, as follows:



The Complaint

11. The complainant objects to the Instagram posts as follows:

Nightplan is a platform for advertising direct to consumers. All of its Instagram Posts are calculated to promote a product, service, organisation or line of conduct according to the definition of Advertising in the AANA Code of Ethics.

Nightplan's Instagram advertisements fall into two categories of Advertising:

- *Nightplan posts and reels advertising alcohol and food venues, events offers and products on behalf of businesses; and*
- *Nightplan posts and reels that advertise the Nightplan brand and business, and aim to attract followers and encourage user engagement.*

The second category includes posts and reels promoting Nightplan drinking games and giveaways. It also includes reels entitled 'Confession Monday' and 'Stitch Up Wednesdays' with re-posts of anonymous stories from Nightplan users, often describing illicit drug use or involving highly offensive and sexually degrading content. Nightplan encourages users to participate in these promotions by offering \$50 for the best confession or story.

Much of Nightplan's Advertising includes content that is contrary to Prevailing Community Standards under the AANA Code of Ethics for the following broad reasons:

- *It directly encourages consumption of alcohol, and in so doing, encourages or condones unhealthy or unsafe behaviour. This includes content directly*

encouraging people to drink enough to become extremely intoxicated, including to the point of memory loss, being sick and/or needing to have days off work. This is clearly contrary to Prevailing Community Standards on health and safety (clause 2.6), including the Australian guidelines to reduce health risks from drinking alcohol (Australian Alcohol Guidelines), which recommend consuming no more than 4 standard alcoholic drinks on any one day, and no more than 10 standard drinks in a week.

- *It shows people who appear to be younger than 25 years of age consuming alcohol excessively or irresponsibly and in so doing, encourages or condones unhealthy or unsafe behaviour. This is contrary to Prevailing Community Standards on health and safety (clause 2.6), including the Australian Alcohol Guidelines, which recommend consuming no more than 4 standard alcoholic drinks on any one day.*
- *It describes illicit drug use, which encourages or condones unhealthy or unsafe behaviour. This is clearly contrary to Prevailing Community Standards on health and safety (clause 2.6).*
- *It employs sexual appeal in a manner that is degrading of women (clause 2.2), and/or treats sex and sexuality without sensitivity (clause 2.4), including content that is highly offensive and/or degrading of women.*
- *Encourages unhealthy or unsafe behaviour contrary to Prevailing Community Standards.*

Many of the reels and posts feature young people who appeared to be younger than 25 years of age participating in drinking games.

This encourages unhealthy or unsafe behaviour and may have the effect of encouraging excessive alcohol consumption by children younger than 18, who are not restricted from following or accessing Nightplan Instagram posts. For this reason, it is contrary to Prevailing Community Standards on health and safety, including the Australian Alcohol Guidelines and the standards set out in clause 3(b)(ii) of the ABAC Responsible Alcohol Marketing Code (ABAC Code). Nightplan's Instagram account is not an Age-Restricted Environment according to the ABAC Code.

Many of Nightplan's Instagram posts and reels encourage unhealthy or unsafe consumption of alcohol, which is contrary to Prevailing Community Standards, including the Australian Alcohol Guidelines. This includes the following posts:

Three posts promoting the Nightplan Launch Party

In several posts, Nightplan has promoted 'bottomless drinks' and excessive consumption of alcohol at mystery or unidentified events and venues.

For example, an Instagram post on 10 May promoting a mystery rave directly encouraged consuming alcohol to the extent of needing to 'take a few days off work'. The post stated:

"This rave is one that has never been done before. Imagine you and your mates not even needing to have pres because there's 3 hours of crazy bottomless drinks. You'll need to take a few days off work after this one. Don't tell us we didn't warn you."

In another example, Nightplan promoted a launch party event in Melbourne with a hidden address that it texted to consumers on the day of the event. The Instagram post promoting the event had the caption:

'We all love bottomless drinks. But you've never had anything like this. Picture this. You receive a text at 9 am on the day of what is said to be the craziest event of 2021. The text displays nothing but an address. Yep, it's time to call in the annual leave for a week and start pre-drinking. You show up to the craziest hidden warehouse party, fully decked out to feed you bottomless drinks, all damn afternoon baby....'

One post showing a person wearing a "Nightplan" t-shirt, providing instructions on how to make a giant mojito

On 13 August 2021, Nightplan posted a video featuring a woman wearing a Nightplan branded t-shirt demonstrating how to make a 'giant mojito', with the caption, "This giant mojito will get you through lockdown". The video showed the woman pouring two bottles of Bacardi into a large bucket, along with soda water, ice and mint.

Six posts showing people wearing "Nightplan" t-shirts engaging in drinking games

On 11 August 2021, Nightplan posted a video featuring people wearing Nightplan branded t-shirts playing a 'beer pong' drinking game and skulling glasses and shots of alcohol. The post included the caption, "Lockdown extended? @nightplan has you covered [beer emoji, cocktail emoji], #drinking games #canadian club #pureblonde #cocktails #lockdown #lockdown activities This promotion encouraged drinking games and excessive consumption of alcohol as a way to cope with the extended lockdown.

A number of Nightplan reels and posts promoting drinking games feature Nightplan staff playing drinking games and consuming alcohol rapidly and excessively, contrary to Prevailing Community Standards. This includes video content of pouring one or more bottles of alcohol into the mouth of a person lying on the floor. Some of the posts also promote drinking games as a lockdown activity, a lunchtime activity, or to make someone 'forget their week'.

One post promoting a third-party event where alcohol would be served (Cocktails and Techno, organised by Dangerous Goods Events and held at daHa Bar)

A Nightplan Instagram post on 5 April 2021 promoted Cocktails and Techno bar in Melbourne. The post advertised 2.5 hours of unlimited cocktails, and stated, "You guys are ready for a massive one with the bottomless cocktails overlooking the city...you're ready for barely making it home."

Two posts promoting third-party venues that serve alcohol

A Nightplan post promoting Top Golf Gold Coast on 30 August 2021 encouraged people "to drink as many cocktails as you want" to see "who the best is at swinging those poles and also who can't handle their alcohol", and states "you already know you're going to have to call in sick Monday morning."

On 13 March 2021, Nightplan posted an Instagram promotion for Red Eye Bar in St Kilda, Victoria. The post featured photographs of intoxicated patrons at the bar, including photographs of a man tattooing another man's leg, a naked man, and a stripper straddling a woman. The caption for the post read:

*"Have you ever wanted to get loose? Like real F****g loose? Well, let me tell you about this bar. Imagine partying at a bar that has unrestricted rules, crazy as hell games as you can see by the pictures, absolute dirt cheap deals such as \$5 drinks, \$3 wines, free steak with a beer and being below the wildest hostel in the whole city? You can fill in the blanks with your imagination, or just go, We did, and holy hell it was lit. @redeyebars."*

One post promoting take-away cocktails from eight different third-party alcohol retailers

On 3 June 2021, Nightplan posted an Instagram promotion for takeaway cocktails from several Victorian alcohol venues: Romeo Lane, The Everleigh, Bowerbird Bar, Two Wrongs, Leonardo's Pizza Palace, Capitano, Above Board and the Black Pearl (see images of promotion attached). All of these venues were tagged in the promotion. The text for the promotion stated that during lockdown there is 'no reason why you have to be stuck at home sober', that you can enjoy drinks from your favourite bars and the 'best part is you can order as many drinks as you want'. This is followed by the statement 'let's just hope your partner isn't a fan of RSA'.

The inference from these statements is that people should order these cocktails to consume excessively in order to become intoxicated, and in a manner that is inconsistent with responsible service of alcohol principles.

One post promoting the product of a third-party producer

The Nightplan advertisement for Wet Pussy is a clear breach of the following clauses of the ABAC Code for the reasons set out below:

Clause 3(a)(i)

The advertisement caption encourages consumers to preload on Wet Pussy by rapidly drinking Wet Pussy shots to ensure they are intoxicated when they arrive at their destination. In addition, responses to comments on the advertisement encourage people to stockpile Wet Pussy, and state that people won't remember their night after a bottle of Wet Pussy. These statements clearly encourage excessive and rapid consumption of alcohol, misuse and abuse of alcohol, and consumption of alcohol inconsistent with the Australian Alcohol Guidelines, in breach of clause 3(a)(i) of the Code.

Clause 3(a)(ii)

The photograph of a man drinking straight from a bottle of Wet Pussy, a pre-mixed spirit, shows irresponsible consumption of alcohol in breach of clause 3(a)(ii). In addition, the comment response, "you won't remember your night after a bottle" encourages irresponsible alcohol consumption in breach of clause 3(a)(ii).

Clause 3(b)(iii)

The two women shown in the advertisement images appear to be younger than 25 years of age in breach of clause 3(b)(iii).

The Nightplan Instagram account is not an Age-Restricted Environment according to the ABAC Code definition. There is no restriction on Minors following or accessing Nightplan's Instagram account and viewing the advertisement.

Clause 3(b)(iv)

By engaging Nightplan to advertise its alcoholic product Wet Pussy on Instagram, the Marketer (80Proof) has failed to utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communication in breach of Placement Rule (ii). Nightplan is a third party platform that is primarily related to alcohol for the purposes of the Available Age Restriction Controls definition. There is no restriction on Minors viewing and following Nightplan Instagram posts.

Clause 3(c)(i)

The statement, "Think of the craziest night you've ever had. Now think of it in a bottle." suggests that the consumption or presence of Wet Pussy contributes to a significant change in mood or environment in breach of clause 3(c)(i) of the Code.

The ABAC Code

12. Part 2 of the ABAC Code 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:
- brand advertising (including trade advertising)
 - competitions
 - digital communications (including in mobile and social media and user-generated content)
 - Alcohol Beverage product names and packaging
 - Advertorials
 - alcohol brand extensions to non-alcohol beverage products
 - point of sale materials
 - retailer advertising
 - Marketing Collateral
13. 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
 - (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.
 - (b)(iii) depict an adult who is under 25 years of age and appears to be an Adult unless:
 - they are not visually prominent; or
 - they are not a paid model or actor and are shown in a Marketing Communication that has been placed within an Age Restricted Environment
 - (b)(iv) be directed at Minors through a breach of any of the placement rules.

- (c)(i) suggest that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment.

14. Part 6 of the ABAC Code provides that:

Available Age Restriction Controls means age restriction, targeting or affirmation technologies available to restrict a Marketing Communication to Adults, but this does not require a third-party platform, website or account that is not primarily related to alcohol to be age-restricted in its entirety before it can be used to place a Marketing Communication.

Marketer means a producer, distributor or retailer of Alcohol Beverages.

Placement Rules means

...

- (ii) A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.

The Companies' Responses

Nightplan

15. Nightplan responded to the complaints by email on 5 November 2021. Its principal comments were:
- Nightplan is not a producer, distributor or retailer of Alcohol Beverages.
 - Nightplan does not hold and has never held a liquor license.
 - We did not have any arrangements with the alcohol producers, distributors or retailers mentioned or tagged in the Instagram posts.
 - The Nightplan Launch Party is an event organised and promoted by Nightplan. There will be alcohol served at the venue. The event will be at "The Third Day" in North Melbourne. Our relationship is that they have allowed us to host our launch party at their venue.

Red Eye Bar

16. Red Eye Bar responded to the complaint by email on 27 October 2021. Its principal comments were:

- Red Eye Bar (within Base Backpackers) has been a dynamic and thriving venue in St Kilda for the last 15 years and since my tenure (Feb 2017 - now) we have done our utmost to promote fun times whilst upholding VCGLR, local government and general community expectations. I am on the Executive Committee of the Port Phillip Liquor Accord (PPLA), we have made food a key component of our business since 2018 and we consider ourselves to be a highly regarded community member.
- As a preventative measure, we have hidden some images that you have mentioned from public view and will delete those pending the outcome of this conversation.

Post made to Red Eye Bar Instagram Page

- RSA laws (and our own house policy) direct us to serve all wine bottles with glasses of a recognisable nature and volume. The female in the photograph is not drinking the bottle of wine, she is holding it to her face and looking up. The text accompanying the photo is advertising food as a key component of our Saturday nights and "getting a little weird". What we're trying to convey is come to our venue, be yourself and we won't judge you for that.
- As an accommodation venue, all of our patrons must be over 18 years old to stay at Base. All guests must show a passport or driver's licence to stay and then asked again as a secondary measure when/if they enter the bar. Our key target audience is international and interstate youth (18-35) and by looking across all of our social channels you will see that patrons in their mid-20s form the bulk of our own and user-generated content. Where guests have entered our bar without staying in our accommodation (approx 10% of our clientele) we also have strict RSA and ID policies in place to determine that all guests are over 18.
- When placing paid advertising slots on social media our age range only and always starts at 18 years old and we would never intentionally allow anyone under 18 to follow/like our pages.

Post made to Nightplan Instagram Page

- Base, Red Eye Bar or parent company Tourism Adventure Group
 - has no formal or informal relationship with Nightplan

- did not provide the pictures to Nightplan
- did not contribute to the text shown in the post
- did not approve the post before it was made to the Nightplan Instagram page
- were not part of the creation or distribution of this post.

Dangerous Good Events (Cocktails & Techno)

17. Dangerous Goods Events, the organisers of Cocktails & Techno, responded to the complaints by emails on 19 and 25 October and 1 November 2021. Its principal comments were:

- Dangerous Goods Events or Cocktails & Techno are not producers, distributors or retailers of Alcohol Beverages, and do not hold a liquor licence.
- Cocktails and Techno is an event organised and promoted by Dangerous Goods Events. It is a weekly event held during the daytime on Saturdays at the daHa Bar.
- Dangerous Goods Events and daHa Bar collaborate to work out the marketing and promote the events to our audiences.
- DaHa is fully responsible for supplying and serving alcohol to patrons.
- Majority of the social media promotion is run through the Cocktails and Techno page, daHa promotes the events via their website. In regards to the Nightplan post - they helped us by sharing one of our posts to get more people to attend the event.
- DaHa Bar was not aware that Nightplan would be making the post to their Instagram page and did not approve it.
- We were aware of the Instagram post. Night Plan reached out to us via Instagram asking if they could complete a post about our event.
- Dangerous Goods Events did not have any involvement in the creation or approval of the post. Nightplan controlled the post.
- We have the ability to request that the post be deleted or modified – and are happy to arrange this right now. We were unaware of it potentially breaching a code.

- At the events, daHa is fully responsible for service of alcohol and we had zero issues with customers, there have been no medical incidents or police incidents at any of our events for the past 12 months since opening there.
- We are a licensed venue and advertise to 18+ audiences so we aren't targeting minors, our demographic is usually a bit older as well 22+ so we haven't had any issues with minors at any of our events.
- We will delete the post and ensure this doesn't happen in the future.

Others

18. The remaining alcohol marketers whose products or venues were identifiable in the posts to the Nighplan Instagram page responded to the complaint, advising that they did not have an arrangement with Nightplan to market their products and/or venues.

The Panel's View

Overview

19. On 13 October 2021 the ABAC Scheme received from Ad Standards two complaints from a single complainant. Combined the complaints went to the marketing via the social media platform Instagram of an entity called Nightplan. There were two Nightplan Instagram accounts identified, namely the Nightplan App Instagram account and also a second account called Nightplan Confessions. The complainant raised concerns about the marketing under both the AANA Code of Ethics administered by Ad Standards and the ABAC.
20. This determination relates to 15 different Instagram posts to the Nightplan App Instagram account, and one to the Red Eye Bar Instagram account. The posts on the Nightplan Instagram account related to several different venues or events and further, a number of alcohol beverage branded products are shown in the posts. The issues raised under the Code of Ethics and the 'Confessions' account do not fall under the ABAC Scheme and will be considered by Ad Standards.
21. As far as the ABAC is concerned, the complaint essentially argues that the posts depict alcohol use in a highly irresponsible manner. It is contended that
 - excessive alcohol use is encouraged;
 - irresponsible and offensive behaviour related to the consumption of alcohol is shown or encouraged;
 - the posts show persons under the age of 25 consuming or in the presence of alcohol beverages;

- alcohol is suggested as a cause or contributor to a significant change in mood; and
 - the Instagram accounts have not been age restricted to exclude minors from viewing the accounts as required by the ABAC Placement Rules.
22. While each of these concerns are of a nature that fall within the standards contained in the ABAC, the threshold question flowing from the complaint is assessing which, if any, of the posts are 'alcohol beverage marketing communications' to which the ABAC Scheme has jurisdiction. If a post is a marketing communication for ABAC purposes, then the Panel can make a substantive decision on the consistency of the content of the post with the applicable ABAC standard. If the post does not fall within the ambit of the ABAC Scheme, then the Panel has no authority to decide if the post meets the ABAC standard or not.
23. The ABAC applies to 'marketing communications in Australia generated by or within the reasonable control of a marketer' i.e., an Australian producer, distributor, or retailer of alcohol beverages. This means to fall within the ambit of the Scheme an Instagram post referencing alcohol must have a discernible and direct link to and be within the reasonable control of a producer, distributor or retailer of alcohol beverages.
24. The bulk of the posts identified by the complainant appeared on the Nightplan Instagram account. These posts will fall within the remit of the ABAC Scheme if either:
- Nightplan is itself a producer, distributor or retailer of alcohol beverages; or
 - any particular post on the Nightplan Instagram account has been generated by or is within the reasonable control of a producer, distributor or retailer of alcohol.
25. To answer this question, the ABAC Complaints Administrator has contacted each of the venues and the brand owners of the alcohol products identified in the posts contained in the complaint. Information was sought about the relationship between the venue or brand owner and Nightplan and the role the venue or brand owner had in the post. Based on this information together with the advice provided by Nightplan a conclusion has been reached as to whether the individual post is a 'marketing communication' for ABAC purposes.

Background information about Nightplan

26. The Nightplan website describes Nightplan as 'the biggest nightlife and day out app in Australia'. The site goes on to explain that Nightplan is a search platform that allows a user to search for 'the places you enjoy the most, whether it be a rooftop bar, your favourite breakfast spot, nightclub, festival or live music venue'.
27. The website provides advice for businesses wishing to sign up to the search platform. It seems that a business can register with Nightplan for their product offerings to appear on the app, which is used by consumers to plan their social outing. The main features of the app include:
 - a search feature for events, food deals, drink deals and venues within a specified area;
 - the ability to document and electronically share a planned night, so others know where the user will be throughout the night;
 - a rewards system for users;
 - links to ride-shares, using the address of the venue in the planned night out.
28. The financial model appears to be based upon businesses paying a monthly fee for their venue or event to be searchable on the app. The subscribing business can elect to create and maintain their profile on the app or have a Nightplan account manager maintain the profile. The Nightplan Instagram account complements the app and contains posts relating to various venues and events as well as content created by Nightplan unrelated to a specific venue but on occasions showing a branded alcohol product.
29. Nightplan has advised that it:
 - is not a producer, distributor or retailer of alcohol beverages; and
 - does not hold and has never held a liquor license.
30. As Nightplan has originated from Victoria, the ABAC Scheme has been in contact with the Victorian Commission for Liquor and Gaming Regulation (VCLGR) which has confirmed the entity does not hold a liquor license. On the basis that Nightplan is not itself a producer, distributor or retailer of alcohol beverages, posts made to the Nightplan Instagram page are not subject to the ABAC standards, unless the post has a discernible and direct link to and is within the reasonable control of an alcohol industry participant to which the ABAC obligations do apply.

Do the posts fall within the scope of the ABAC Code

31. The posts identified by the complainant fall into one of the following categories:

- Nightplan Launch Party;
- posts showing people engaging in drinking games or making a giant mojito with some of these posts identifying branded alcohol products;
- posts promoting a third party event (Dangerous Goods Events at the daHa Bar);
- a post promoting a third-party venue serving alcohol (Top Golf Gold Coast);
- posts promoting take-away cocktails available from various alcohol retailers; and
- posts referencing the alcohol product 'Wet Pussy Shot'.

32. As explained, Nightplan is media/digital platform and is not of itself an entity that is regulated by the ABAC Scheme. As a result, posts on its social media accounts will be subject to the ABAC standards if the posts are within the reasonable control of an alcohol producer, distributor or retailer. 'Reasonable control' is to be assessed on the facts of each case, but might arise by way of the following examples:

- the alcohol entity had entered into a commercial relationship with Nightplan for the promotion of the alcohol entity, such as becoming registered with Nightplan, as envisaged by the monthly fee arrangement outlined on the Nightplan website;
- the alcohol entity had taken active steps to have its products or venue placed on the Nightplan social media accounts, such as gifting product to Nightplan;
- Nightplan had approached the alcohol entity and sought prior permission to promote or otherwise reference the alcohol entity or its products; or
- the alcohol entity had a relationship with a third party, such as a social media influencer, to reference the alcohol products/venue and the influencer then posted on the Nightplan social media accounts.

33. In contrast, if Nightplan of its own volition without engagement or even the knowledge of an alcohol marketer posts about the alcohol marketer or its products/venue/events, then this post will not be in the 'reasonable control' of the alcohol marketer such as to bring the post within the scope of the ABAC Scheme. In this way, the post would be akin to the many thousands of references to alcohol

made on social media each day by private account holders which are not regulated by ABAC or other bodies.

34. The ABAC Scheme has been in contact with each of the alcohol producers, alcohol retailers and venues referenced in the posts. Each has been asked as to their relationship with Nightplan and their knowledge of the posts referencing or showing their venue or product. Information was sought as to whether product was gifted to Nightplan or any other actions had been taken which could be the basis to conclude that the alcohol entity had a reasonable measure of control over the posts so as to make the post a marketing communication for ABAC purposes.
35. Further, the social media accounts of the alcohol entities have been reviewed to ascertain if any reference has been made of Nightplan, so as to give a prima facie indication that a relationship of some nature exists between the alcohol entity and Nightplan. Based on the information gathered the position in the most straightforward cases appears as follows:
 - Nightplan Launch Party posts - these posts are not captured by the ABAC Scheme as Nightplan is not itself a producer, distributor or retailer of alcohol beverages and the venue at which the event was held was not involved or referenced in the posts;
 - giant mojito and posts showing drinking games - none of the brand owners of the alcohol products seen in these posts were aware of the posts or indeed Nightplan. There was no evidence to suggest the alcohol entities had any control over the posts or how their branded products were portrayed in the posts; and
 - posts promoting take-away cocktails - none of the venues mentioned in these posts were aware of the posts and both Nightplan and the individual venues asserted no relationship existed upon which the alcohol entities could be concluded to have reasonable control over the posts.

Post promoting a third-party event where alcohol would be served (Cocktails and Techno, organised by Dangerous Goods Events and held at daHa Bar)

36. One of the posts promoted an event called Cocktails & Techno, which is organised by Dangerous Goods Events and held at daHa Bar.
37. Dangerous Goods Events has advised that:
 - Dangerous Goods Events or Cocktails & Techno are not producers, distributors or retailers of Alcohol Beverages, and do not hold a liquor licence;

- it was aware of the Instagram post. Nightplan reached out to them via Instagram asking if they could post about the event;
 - Dangerous Goods Events did not have any involvement in the creation or approval of the post. Nightplan controlled the post; and
 - it has the ability to request that the post be deleted or modified.
38. daHa Bar has advised that they have not previously heard of Nightplan or seen the post and did not approve it. Dangerous Goods Events confirmed that daHa Bar was not aware of and did not approve the post.
39. This means that although Dangerous Goods Events did have reasonable control over the post on the Nightplan Instagram account, Dangerous Goods Events are not an alcohol marketer within the scope of the ABAC i.e. they are not a producer, distributor or retailer of alcohol beverages. The daHa Bar is a retailer of alcohol beverages, however the Bar did not have knowledge of the post nor took steps which can be considered as giving it reasonable control of the post promoting Cocktails & Techno.
40. Pulling this together, the post is not an ABAC marketing communication and accordingly the Panel has no jurisdiction to make a substantive decision as to the consistency of the messaging of the post with the ABAC standards.

Post promoting Top Golf Gold Coast

41. Nightplan has made posts referencing Top Golf, a golf driving range on Queensland's Gold Coast. The venue serves alcohol, is licensed under Queensland's liquor licensing regime and hence is an alcohol retailer for ABAC purposes. To the extent that Top Golf markets itself by reference to alcohol beverages (as opposed to mentioning golf but not alcohol products), then its marketing potentially falls within the ambit of the ABAC Scheme.
42. The Nightplan post certainly would give a reasonable person the impression that Nightplan had a relationship of some kind with Top Golf. However, both Nightplan and Top Golf state there is no relationship and that the posts were made by Nightplan without the knowledge of Top Golf. Indeed, when contacted, Top Golf were more than surprised to learn of the posts and advised:
- there is no association with Nightplan;
 - images used by Nightplan of Top Golf facilities was done without Top Golf's knowledge or approval;
 - there was no knowledge of the content of the posts until Top Golf was contacted by the ABAC Complaints Administrator;

- Nightplan's conduct infers a relationship between the parties when none exists; and
 - Top Golf is contacting Nightplan to demand that it cease and desist from marketing itself by referencing Top Golf.
43. Accordingly, it is clear the posts are not marketing communications from Top Golf and the Panel has no authority to make a substantive decision on the consistency of the posts with the ABAC standards.

Posts promoting the product 'Wet Pussy Shot'

44. In a similar vein to the Top Golf posts, the Nightplan Instagram account includes posts that promote the alcohol product branded as Wet Pussy Shot. Again, on its face the posts give an impression of a relationship between the product brand owner and Nightplan. This however is not the case, with the owner of Wet Pussy advising:
- the posts were not produced, created, published or endorsed by Wet Pussy Shot;
 - Wet Pussy Shot has no association with Nightplan, no commercial relationship and did not request the posts referencing the product be published;
 - it had no reasonable control over the posts; and
 - upon being made aware of the posts, it requested they be removed by Nightplan and this has occurred.
45. The Panel accepts that the product brand owner did not have the requisite measure of 'reasonable control' over the Instagram post to bring it within the scope of the ABAC Scheme. Accordingly, the Panel has no authority to make a substantive decision on the consistency of this marketing with the ABAC standards.

Red Eye Bar Instagram Posts

46. The Red Eye Bar is located at Base Melbourne, a hostel in St Kilda. The complaint went to a number of posts on the Nightplan Instagram account and a post on the Red Eye Instagram account also was included.
47. In relation to the Nightplan posts, as is the case with other posts on the account, it is clear that the posts were made without the knowledge or approval of the Red Eye Bar. In these circumstances, the posts cannot be regarded as marketing communications of the Bar and accordingly the Panel has no jurisdiction to make a determination on the consistency of the posts with the ABAC standards.

48. The post on the account of the Red Eye Bar itself is in a different category. The Bar is a licenced venue and a retailer of alcohol beverages and hence is a marketer within the scope of the ABAC. The post is therefore within the Panel's jurisdiction.
49. The post shows a person holding an open bottle of wine to their mouth. Their eyes are rolled upwards, and they are poking out their tongue. The text accompanying the post reads:
- When you've got \$4 beers, wines and tacos all night, it's easy to get a little weird!!*
50. The concern is that the post is encouraging the excessive or rapid consumption of an alcohol beverage in breach of the standard contained in Part 3 (a)(i) of the Code. In response to the complaint, Red Eye Bar explains that:
- RSA laws (and its own house policy) requires it to serve all wine bottles with glasses of a recognisable nature and volume;
 - the female in the photograph is not drinking the bottle of wine, she is holding it to her face and looking up;
 - the text accompanying the photo is advertising food as a key component of its Saturday nights and 'getting a little weird'. It intends to convey that patrons can be themselves when visiting the venue, without being judged;
 - its key target audience is people aged 18-35 years, with patrons in their mid-20s forming the bulk of its social media content; and
 - it has strict RSA and ID policies to ensure that all guests are over 18 years old.
51. The assessment of whether a Code standard has been breached is to be undertaken from the probable understanding of the marketing communication by a reasonable person. This means that the life experiences, values and opinions held by most people in the community is the benchmark.
52. The Code does not define 'excessive consumption'. The Australian Alcohol Guidelines recommend that no more than four standard drinks should be consumed on any one day in order to minimise the risk of harm from alcohol use. If a marketing communication would be probably understood as encouraging consumption beyond four standard drinks on a single occasion, then it would likely be encouraging excessive consumption.
53. Moreover, a marketing item might suggest excessive consumption if it showed or implied:

- a single individual apparently consuming multiple drinks on a single occasion;
- a person or persons apparently affected by alcohol through their speech, demeanour and behaviours; or
- placing a large quantity of alcohol with one or two people where the background scene suggests that they alone and immediately will consume the alcohol.

54. The Panel believes the post does breach the Part 3 (a)(i) standard. The Panel noted:

- due to the way in which the woman is holding the open bottle of wine, the post is directly implying or encouraging consumption straight from the bottle;
- drinking directly from a 750ml bottle of wine (as opposed to a half, demi or piccolo sized bottle, ready to drink spirit product or a stubbie of beer) can raise an inference of excessive consumption;
- it could be inferred that the woman pictured is demonstrating 'weird', as referred to in the accompanying text. People are more likely to have reduced inhibitions and to act 'weird' after drinking excessively;
- the text accompanying the post advises that 'it's easy to get a little weird' as the alcohol and tacos are affordable. The wording positions getting 'weird' after the consumption of alcohol and tacos, and a reasonable person could interpret this as encouraging a patron to drink alcohol until they are intoxicated.

Conclusion

55. This has been an involved and somewhat unusual determination. It has featured the marketing of a media platform via the platform's Instagram account and a second Instagram account of an individual alcohol retailer. The major assessment called upon to be made has been whether the posts on the Nightplan account were 'marketing communications' to which the ABAC standards applied. As explained above, while the posts have reference to alcohol retailers or alcohol beverage brands, the posts have not fallen within the ambit of the ABAC Scheme.

56. Nightplan itself is not a producer, distributor or retailer of alcohol products. It's business model however assumes that alcohol entities, particularly retailers such as nightclubs, bars and other licensed venues will market themselves via the Nightplan App. In this way Nightplan is not dissimilar to the large global media platforms such as Facebook and Instagram, which are also not alcohol marketers

themselves, but their business provides a vehicle for alcohol marketers (amongst other businesses) to reach an audience.

57. What has been surprising in this case is that Nightplan has made numerous posts on its Instagram account which at first blush suggest a commercial relationship with an alcohol marketer to carry an item of marketing, when it has turned out this has not been the case. It has become apparent that Nightplan has made a number of posts promoting alcohol retailers and products without the knowledge or approval of the alcohol company mentioned in the post.
58. Why Nightplan has acted in this way was not explained. It might be surmised that as a start-up business it needed to show a 'proof of concept' in order to build a mass of users of its sites and its app so in turn it had a product to be able to sell to paying alcohol marketers.
59. It is not the role of the ABAC Scheme to approve or disapprove of the Nightplan business model. It has been evident however, that while the circumstances of the case means the Panel has not had the jurisdiction to determine the consistency of the posts with the ABAC standards, many of the posts depict alcohol use in an irresponsible manner. It is entirely open to Nightplan to model alcohol use in a moderate and responsible manner. Many of the posts identified by the complainant show Nightplan has chosen not to do this.
60. The complaint is dismissed in relation to the Nightplan Instagram posts on the basis that the posts are not marketing communications to which the ABAC Scheme applies. The complaint is upheld in relation to the post of the Red Eye Bar dated 22 February 2020 in relation to Part 3 (a)(i).