



ABAC Adjudication Panel Determination No 71/22

Product: NED Whisky
Company: Top Shelf International
Media: TV – Free to Air
Date of decision: 26 September 2022
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Louisa Jorm
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 5 September 2022 and concerns a television advertisement for NED Whisky (“the Product”) by Top Shelf International (“the Company”).
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 the 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 meet 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 5 September 2022.
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 obtained for the marketing (Approval Number 2719).

The Marketing Communication

10. The complaint relates to a television advertisement which can be viewed at the following link:

[Link to NED Whisky TVC on YouTube](#)

The advertisement is primarily shown in black and white, with the exception of the Product, which is in colour.

The advertisement commences with a shot of a bottle of NED Whisky and two glasses.



Two hands reach in to take the glasses, and the words “OLD FASHIONED” are superimposed as two people clink glasses, and a shot is shown of someone pouring Product into a glass.



There is a close-up of a guitar being played, and a woman dancing.



The words “AUSSIE OWNED” are superimposed on the screen as the marketing shows a person pouring a glass of the whisky and raising the glass towards their mouth.



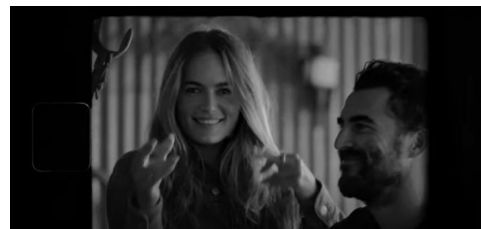
What looks like a bar scene is then shown. The people shown are sitting, standing and interacting.



The scene then changes to show people in an outdoor setting around a small campfire and the words “UNCHAINED” are superimposed. Some of the people are shown holding glasses of whisky.



The advertisement then reverts to the bar scene, where a woman is shown lifting her hands upwards.



The final scene shows the NED Whisky logo, along with a bottle and glass containing the Product.



The Complaint

11. The complainant objects to the marketing as follows:
 - *Right at the end of the advert, the blonde lady lifts her hands up and begins to gesture putting up her rude fingers. It may cut out in time, but you can still see her rude gesture.*

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 15 September 2022. The principal comments made by the Company were:
 - The TVC received Alcohol Advertising Pre-vetting Service Approval.
 - Top Shelf International Pty Ltd (TSI) does not believe a reasonable person viewing the TVC would be encouraged to act irresponsibly or offensively. Furthermore, the woman is not seen to be overtly gesturing 'rudely' within the TVC.

The Panel's View

14. Top Shelf International is a Melbourne based distiller and marketer of premium Australian spirits. Its principal brands are NED Australian Whisky and Grainshaker Hand Made Australian Vodka. It is a television advertisement for NED Whisky that has drawn this complaint.
15. The complainant is concerned that the marketing shows a woman lifting her hands up and beginning 'to gesture putting up her rude fingers'.
16. The ABAC standard requiring assessment by the complaint is whether the marketing is showing or encouraging irresponsible or offensive behaviour related to alcohol use - Part 3 (a)(ii).

17. In response, the Company has advised that:
- the woman is not seen to be overtly gesturing 'rudely'; and
 - a reasonable person viewing the marketing would not be encouraged to act irresponsibly or offensively.
18. In assessing the consistency of an ad with an ABAC standard, the Panel adopts a viewpoint of the probable understanding of the ad by a reasonable person. This means the life experiences, values and opinions found in most of the community is the benchmark. A person who interprets a marketing message in a different way is not 'unreasonable' but possibly their understanding would not be shared by a majority of the community.
19. The Panel does not believe that the ad shows or encourages irresponsible or offensive behaviour related to alcohol use. In reaching this conclusion the Panel had regard to:
- the scene identified by the complainant is shown for less than two seconds (within a 15 second commercial);
 - the woman is seen lifting her hands towards her face or hair. Even when pausing the advertisement and viewing frame by frame, it is by no means clear that the woman is gesturing rudely;
 - the woman is not seen at any time during the advertisement holding a glass of or consuming alcohol;
 - the remainder of the 15 second advertisement does not show or encourage irresponsible or offensive behaviour; and
 - a reasonable person, taking the content of the advertisement as a whole, would not believe that it shows or encourages irresponsible or offensive behaviour related to alcohol consumption.
20. The complaint is dismissed.