



ABAC Adjudication Panel Determination No 87/22

Product: Alcohol
Company: Heartbreaker Bar
Media: Instagram
Date of decision: 25 November 2022
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”) arises from a complaint received on 24 October 2022 about marketing communications for the Heartbreaker Bar (“the Company”), specifically two Instagram posts promoting happy hour.
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 the 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 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 24 October 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 not sought for the marketing.

The Marketing Communication

10. The complaint relates to two Instagram posts at the following links, with screenshots also being provided below:

<https://www.instagram.com/p/Cj15WNurpf/?igshid=YmMyMTA2M2Y=>

<https://www.instagram.com/p/Cj7BVgWtLXm/?igshid=YmMyMTA2M2Y=>





The Complaint

11. The complainant objects to the marketing as follows:

- *Promoting happy hours with specific pricing that encourages binge drinking.*

The ABAC Code

12. 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;

The Company's Response

13. The Company responded to the complaint by email on 6 November 2022. The principal comments made by the Company were:
 - The health, safety and wellbeing of our guests and staff is of the utmost importance to us and it is front of mind whenever we are creating campaigns for our venues. We have reviewed the ABAC code to ensure our marketing material aligns with the ABAC guidelines and our company values.
 - We don't encourage copious amounts of alcohol consumption in our venue or in any marketing materials. In a climate where the cost of living is increasing and with the changing nature of the hospitality scene in the CBD areas especially, we wanted to provide guests with a more friendly price point of some of our premium beverage products during a short period each day.
 - The two drinks in question, both have a price point of \$9 during this two hour period only. We do not view this as an excessively cheap price that would encourage inappropriate alcohol consumption. We also ensure responsible service of alcohol within our venue is adhered to at all times.
 - We appreciate you bringing this to our attention and we hope we have addressed your concerns above.

The Panel's View

Introduction

14. Heartbreaker Bar is a licensed venue located on the corner of Russell and Lonsdale Streets in the Melbourne CBD. It has an American rock and roll theme, a pool table and a retro jukebox. It is two Instagram posts promoting happy hour at the bar that has drawn this complaint.
15. The first post promotes 'Power Hour', with \$9 Pints and Palomitas and free pool every day between 5pm and 7pm. The background to the post is dark with red lightning bolts shown. The accompanying text reads:

⚡ DANGER ⚡ High Voltage.

—
\$9 Pints, \$9 Palomitas, Free Pool.

—
Everyday From 5-7pm

16. The second post shows a picture of American 1970's rock band, Boston, and promotes \$9 Palomitas, again between 5pm and 7pm. The accompanying text reads:

This weather is definitely more than a feeling!

—
Perfect day for tequila, and we've got the Palomita pouring on tap
for \$9 between the hours of 5 and 7pm. ❤️🍹

17. The complainant is concerned that the promotion of happy hours with specific pricing of drinks encourages binge drinking. This concern raises an issue under both the Victorian responsible service of alcohol (RSA) regime as well as the ABAC Scheme. Before turning to the consistency of the marketing with ABAC requirements, it is useful to briefly explain the interplay between ABAC and the Victorian RSA system.

RSA and ABAC

18. As mentioned in paragraph 2, alcohol as a product and the marketing of alcohol falls within a shared regulatory space between direct government regulation and agencies and industry-based initiatives such as the ABAC Scheme. In Victoria, the direct regulation of licensed premises such as the Heartbreaker Bar is pursuant to the Liquor Control Reform Act 1998. The responsible government authorities are Liquor Control Victoria ('LCV') and the Victorian Liquor Commission ('the Commission').
19. It is LCV and the Commission which are responsible for the RSA regime in Victoria and this includes the regulation of 'happy hours' and similar activities run by a licensed premise. This means the actual conduct of the 'Power Hour' activity by the Company is regulated by LCV and the Commission. The ABAC Scheme has no role in how bars or hotels physically serve alcohol and ensure all patrons consume alcohol in a moderate and responsible fashion.
20. 'Responsible Liquor Advertising and Promotion Guidelines' have been issued pursuant to the Liquor Control Reform Act 1998. The aim of the guidelines is alcohol advertising by liquor license holders that complements responsible service of alcohol. The guidelines go directly to 'happy hour' style promotions and provide that advertising must not encourage excessive consumption, encourage stockpiling of drinks or involve free or unlimited alcohol being provided without reasonable controls in place. Examples of unacceptable practices include:
- promoting 'all you can drink' within a limited timeframe;
 - a competition where unlimited alcohol is a prize;

- promotions linked to unpredictable events eg free drinks after every goal scored;
 - extreme discounts eg \$1 shots; and
 - multiple promotions in a single trading period eg an open bar for the first 10 minutes of each hour.
21. It should be noted that while the ‘Responsible Liquor Advertising and Promotion Guidelines’ identify ‘happy hour’ style activities and promotions as a potential risk, ‘happy hours’ and the like are not prohibited by Victorian law. This means offering discounted drinks is permitted provided the practice is conducted in a manner that excessive consumption is not permitted.
22. For its part, the ABAC Scheme does not regulate the physical serving of alcohol nor does it generally cover ‘point of sale’ marketing within a licensed premise such as the Heartbreaker Bar. Rather the ABAC Scheme is directed towards alcohol marketing to the wider community as opposed to promotional activities within a licensed premise.
23. Drawing this together:
- it is not prohibited under Victorian law and RSA requirements to conduct ‘happy hours’;
 - it is recognised that a ‘happy hour’ and alcohol discounting within a license premise can however lead to rapid and excessive consumption and care needs to be taken in how the activities are conducted and promoted;
 - in Victoria, LCV and the Commission are the primary regulators of happy hours and advertising guidelines give examples of unacceptable promotional activities of happy hours; and
 - ABAC requirements can intersect with happy hours, but only in relation to marketing directed to the wider community and not the actual conduct of a happy hour at a licensed premise.

Are the Instagram posts consistent with ABAC Standards?

24. The complainant’s concern about the two Instagram posts raises Part 3 (a)(i) of the Code. This standard provides that a marketing communication must not 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.

25. In response, the Company has explained that it:
 - does not encourage copious amounts of alcohol consumption in its venue or in any marketing materials;
 - wanted to provide guests with a lower price point on premium beverage products during a short period each day;
 - does not view the \$9 price point as excessively cheap, such that it would encourage inappropriate alcohol consumption; and
 - ensures responsible service of alcohol within the venue is adhered to at all times.
26. The two posts promote the happy hour conducted by the Company. The posts do not depict any alcohol consumption, recommend any number of drinks to be consumed and do not portray immoderate alcohol consumption or the effects of consuming alcohol. It is not likely that a reasonable person would view the posts as encouraging excessive or rapid consumption.
27. The complaint is dismissed.