



ABAC Adjudication Panel Determination No 55/23

Product: Venue
Company: Gilligan’s Hotel & Resort
Media: Instagram
Date of decision: 2 May 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 27 March 2023 and concerns social media marketing for Gilligan’s Hotel & Resort (“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 27 March 2023.
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 marketing.

The Marketing Communication

10. The complaint relates to four Instagram posts:

Post 1	Post 2
 <p data-bbox="446 743 846 779">GILLIGANSCAIRNS Posts Follow</p> <p data-bbox="446 800 846 827">gilliganscairns</p> <p data-bbox="446 1304 846 1430">87 likes gilliganscairns Drinks in the pool to cool down this summer? Count us in! 🍹☀️ #gilliganscairns #eatplaystay #poolparty #summer #letsplay #timetoparty #thingstodoincairns 8 January</p> <p data-bbox="446 1451 846 1484">gilliganscairns Gilligan's Hotel and Resort</p>	 <p data-bbox="966 743 1365 779">GILLIGANSCAIRNS Posts Follow</p> <p data-bbox="966 789 1365 825">gilliganscairns Cairns, Queensland, Australia</p> <p data-bbox="966 1377 1365 1491">176 likes gilliganscairns Drinks by the pool? YES PLEASE! 🍹☀️ Gilligan's pool is open 7 days a week to EVERYONE, 8am to sundown! Time to let the fun begin 🍹 #gilliganscairns #gilligans #eatplaystay #clubbing #letsplay #timetoparty #thingstodoincairns</p>

Post 3



Post 4



The Complaint

11. The complainant objects to the marketing as follows:

- *Alcohol marketing communication must not show (including by direct implication) the consumption of alcohol before or during any activity that for safety reasons requires a high degree of alertness or physical coordination. Under this premise, it must also raise the question why a pool is allowed in a licensed premises that serves alcohol.*
- *Alcohol consumption can significantly increase the risks associated with swimming. Some of the dangers of alcohol while swimming include:*
 - *Impaired judgment: Alcohol can impair a swimmer's judgment and decision-making ability, making them more likely to take unnecessary risks or ignore safety guidelines.*
 - *Loss of coordination: Alcohol can impair a swimmer's coordination, making it difficult to move and swim properly. This can increase the risk of accidents or drowning.*
 - *Dehydration: Alcohol is a diuretic, which means it can dehydrate the body. Swimming while dehydrated can cause cramps, muscle fatigue, and other problems.*

- *According to National Alcohol Strategy (www.aihw.gov.au) 2001 to 2003-04 Occasional Paper January 2003 "A priori and anecdotal evidence suggests alcohol is an important risk factor for death and serious injury arising from recreational aquatic activity."*

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (d) show (visibly, audibly or by direct implication) the consumption of an Alcohol Beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical co-ordination, such as the control of a motor vehicle, boat or machinery or swimming.

The Company's Response

13. The Company responded to the complaint by email on 29 March 2023. The principal points made by the Company were:
 - Gilligan's is licensed under the QLD liquor act of 1992 and Liquor Regulations of 2002 and hold a QLD Liquor License number 87750 for the whole of the premises located at 57 – 89 Grafton Street Cairns QLD 4870 issued by the Office of Liquor and Gaming Regulation QLD. In doing so Gilligan's follows the conditions set out on the license and follows all sections of the liquor act of 1992 and liquor regulations of 2002 including but not limited to section 142ZZ Unacceptable Practices and Promotions.
 - The Venue is also a member of the Cairns City Safe Night Precinct Board, which I, myself are on the Management Committee.
 - The venues control a safe environment in and around the licensed venue by following the Venues Risk Assessed Management Plan that has also been approved by OLGR and are very aware of the risk of swimming and drinking and the requirement of all patron at the venue to maintain hydration given the tropical environment of Far North Queensland and free water and hydration stations are provided above and beyond the requirements of the QLD Liquor Act and the venues Risk Assessed Management plan.
 - We take offence that you have assumed that all drinks in these ads are to be Alcoholic Beverages as the venue also offers a large range of non-alcoholic drinks and Mocktails.
 - Far North Queensland has many Resort Licenses that offer pool bars with service in the pool itself and these are also licensed by OLGR QLD so we are at a loss as to why you have singled out these ads and would ask that you supply the current legislation in QLD that you claim these are in breach of?

- Lastly Gilligan's is a resort with 120 rooms and accommodates 700 guests per night, it is highly common for people staying in resorts to relax by the pool with a cocktail, further to this after your email I have investigated poolside resort and hotels, almost every resort in Australia that I have looked into has poolside guests consuming a drink on their social media platforms.

The Panel's View

Introduction

14. Gilligan's Hotel & Resort is located in Cairns in North Queensland. According to its website, the venue features dorm and hotel accommodation, three bars, an indoor beerhall, nightclub, restaurant, gaming lounge, private function spaces and a resort swimming pool. The venue uses social media to promote its facilities including its swimming pool, which is described as a place to have drinks and cool down.
15. The determination arises from a complaint about four posts on the Company's Instagram account. The posts show patrons of the venue in or about the swimming pool. The concern expressed is that the patrons are depicted consuming alcohol in conjunction with the use of the pool. It is argued that this amounts to irresponsible marketing and is a breach of ABAC standards of responsible alcohol marketing.
16. It would be fair to say that the Company was surprised to receive the complaint and the request to respond to questions posed by the ABAC Scheme. In its response the Company contends that:
 - the venue is licensed and complies with its licence requirements and the provisions of the Queensland Liquor Act;
 - the swimming pool is integrated within alcohol licensed premises and the Company adheres to an approved risk management plan to mitigate risk to patron safety;
 - it should not be assumed the drinks shown in the posts are alcoholic as the hotel offers many non-alcoholic beverages including mocktails; and
 - it is common for poolside resorts and hotels to use images of people with drinks in social media posts.
17. Further the Company explains that pool bars are permitted in Queensland and questions why its social media posts have been singled out and asks that the provisions of Queensland legislation claimed to be breached be identified.

ABAC and the shared regulation of alcohol marketing

18. The answer to the Company's question about the remit of the ABAC Scheme and its application to its social media marketing is that alcohol as a product and alcohol marketing operates in a shared regulatory space. This means that alcohol and the producers, distributors and retailers of alcohol are obliged to operate consistently with requirements sourced from each level of government and various codes of practice. The Queensland Liquor Act is the most important source of obligations imposed on the Company (and all other Queensland licensed premises), but it is by no means the only source of obligations.
19. For instance:
 - requirements on the information that must be placed on the labelling of alcohol products flows from Food Standards regulations at the Federal level;
 - the marketing of alcohol via broadcast medium must meet requirements set by Federal regulators such as the Australian Communications and Media Authority;
 - local councils have by-laws and other requirements going to where and the circumstances alcohol might be consumed in public places; and
 - industry lead initiatives such as the ABAC Scheme reflect the social licence that the alcohol industry recognise comes with the acceptance that alcohol is not just another product, and its misuse is the cause of considerable individual and community harm.
20. The ABAC Scheme operates cooperatively with the State Liquor Authorities. The regulatory focus of the State bodies tends to be on the responsible service of alcohol by licensed premises and the promotional activities undertaken by licensees regarding alcohol consumption within licensed premises. In contrast, the ABAC Scheme is not concerned with the responsible service of alcohol as such and the remit of the Scheme is on how the marketing of alcohol companies to the wider community models alcohol use.
21. Applying this to the current case, the ABAC has no application to how the Company actually operates the swimming pool and the service of alcohol to patrons within the venue who might use the pool. As the Company alludes, this is a regulatory issue for the Queensland Commissioner for Liquor and Gambling. The Company states it has a risk management plan and it complies with its licence requirements.
22. What is within the remit of the ABAC is the Company's marketing communications to the wider community. Instagram posts are a marketing communication to which the ABAC standards apply.

The posts and the ABAC standard

23. The posts each show patrons using the venue's swimming pool with posts 1 and 2 depicting women holding drinks in glasses while partially submerged in the water. Posts 3 and 4 show patrons holding drinks in the pool, but at its edge. Part 3 (d) of the Code states that marketing communications must not show the consumption of alcohol before or during any activity, that for safety reasons, requires a high degree of alertness or physical co-ordination, such as swimming.
24. The assessment of whether a marketing communication is consistent with a Code standard is from the probable understanding of the marketing by a reasonable person taking the content of the marketing as a whole. This means the benchmark is the values, opinions and life experiences shared by most members of the community. If a marketing communication can be interpreted in several ways, the most probable understanding is to be preferred over a possible but less likely interpretation.
25. Beyond its contentions regarding the applicability of the ABAC Scheme, the Company makes two responses to the complaint namely:
 - it cannot be assumed the drinks shown are alcoholic as the venue offers extensive non-alcoholic drinks; and
 - it is common for licenced venues to use images of patrons with drinks in pools in marketing.
26. It is true that the posts do not unambiguously establish that the drinks being held in the swimming pool are alcohol beverages. If the ABAC Scheme was imposing criminal or civil penalties for a Code breach, then it could be expected that the breach would require establishment beyond reasonable doubt.
27. The Code however is not operating in the domain of imposing criminal or civil penalties. The assessment of a Code breach is from the probable understanding of a reasonable person which means a breach is established on the balance of probabilities. The Panel believes a reasonable person, viewing an Instagram post from a licenced premise showing drinks - particularly with the appearance of a typical cocktail - will reasonably assume the drinks are alcohol beverages.
28. There are a very large number of alcohol marketing communications made over social media each day, and it is almost inevitable that some of them will depict alcohol use in a manner that does not meet ABAC standards. This does not excuse the Company from meeting its obligations, any more than a motorist could defend a speeding ticket by saying that there are other cars speeding on the roads.

29. The Panel does believe that the posts are inconsistent with the Part 3 (d) standard. The posts show alcohol use while actually swimming or raise the reasonable implication that swimming will occur after alcohol consumption. Swimming is an activity that, for safety reasons, should not be done in conjunction with alcohol consumption.

Conclusion

30. The Panel has found that the four posts on the Company's Instagram account are inconsistent with the ABAC standard in Part 3 (d). In making this finding the Panel is not suggesting that the Company is breaching the terms of its Queensland Liquor license or is not following the protocols in its risk management plan regarding having a swimming pool with a licensed premises. These are not matters for the Panel or the ABAC Scheme.
31. The ABAC standards seek to have the marketing of alcohol beverages, including by alcohol retailers occur in a manner that is consistent with the moderate and responsible use of alcohol by adults. Alcohol marketing by its nature is viewed by a potentially wide audience beyond the actual patrons of a particular retailer or the purchaser of a specific alcohol brand. It is the messaging about alcohol use to the wider community that is the focus of the ABAC Scheme.
32. In relation to alcohol use with an activity such as swimming, it is well understood that for obvious safety reasons a person should not drink and then swim. This does not mean it is impermissible for an alcohol marketer to associate an alcohol product with a beach or poolside setting. But alcohol consumption cannot be shown during swimming or where it would be reasonably assumed that swimming will follow alcohol use.
33. The complaint is upheld.