



ABAC Adjudication Panel Determination No 124/23

Product: Venue
Company: The Empire Hotel
Media: Digital – TikTok
Date of decision: 4 September 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 28 July 2023 in relation to social media marketing for The Empire Hotel (“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 28 July 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 content of the marketing.

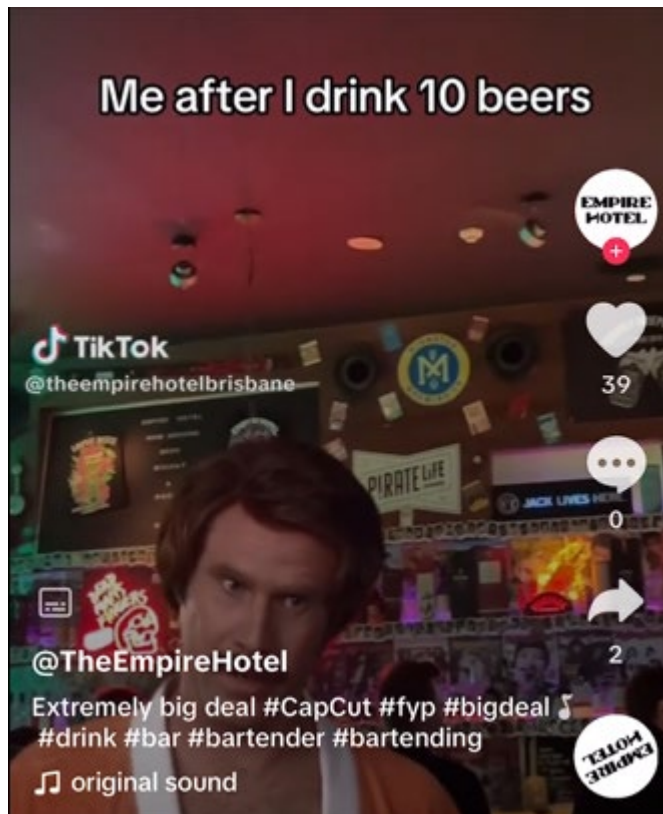
The Marketing

10. The complaint relates to three videos posted on TikTok, as described below:

Video 1

Video 1 shows the Anchorman movie character, Ron Burgundy (played by Will Ferrell), superimposed in front of footage of a bar, saying, *“I don’t know how to put this, but I’m kind of a big deal. People know me.”* The video is headed up by the words “Me after I drink 10 beers”.

The following screenshot is taken from the video:



Video 2

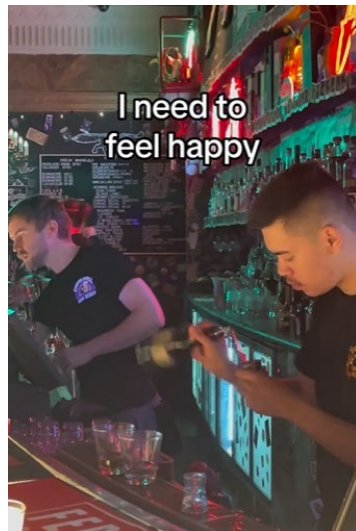
[Link to Video 2](#)

Video 2 video shows people working behind a bar. The scene is superimposed firstly with the words “I need to feel happy” followed by “Drinks at the Empire [winking emoji]” The accompanying audio is of the following conversation:

Person 1: *“I need to feel happy, Aaron – can you tell me something that will make me happy?”*

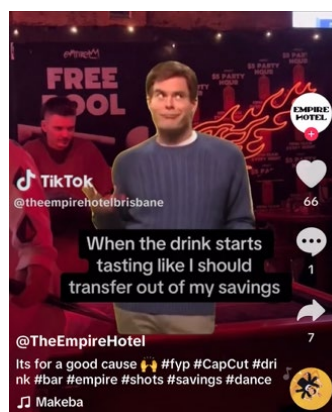
Person 2: *“You’re cute and have a nice butt”*

Person 3: *“Yup that’ll do it”*



Video 3

Video 3 shows a person dancing to Makeba by Jain. The caption for the video reads “When the drink starts tasting like I should transfer out of my savings”.



Complaint

11. The complainant objects to the marketing as follows:

Video 1

- *For Video 1 (Ron Burgundy) we hold concerns that this reel is in breach of ABAC Code 3 (c)(i) whereby “A marketing communication must NOT suggest that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment”:*
- *The clip focuses on Ron Burgundy who is a confident and successful character. The clip implies that the consumption of large quantities of alcohol will lead to a person becoming more confident and successful.*
- *We understand that this is a humorous clip and using humour in alcohol advertising is commonplace. There is concern, however, that using humour when referring to the consumption of large volumes of alcohol “10 beers”, is irresponsible.*

Video 2

- *For Video 2 (I need to feel happy) we have concerns that this reel is in breach of ABAC Code 3 (c)(i) whereby “a marketing communication must NOT suggest that the consumption or presence of an Alcohol Beverage may create or continue to contribute to a significant change in mood or environment”.*
- *In this case, the advertiser has applied a metaphorical message to suggest that drinking alcohol at the Empire Hotel will ‘make me feel happy’.*

Video 3

- *For Video 3 (Makeba dance) we have concerns that this reel is in breach of ABAC Code 3 (a)(ii) whereby ‘a marketing communication must NOT show or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage.*
- *The message of the video implies that drinking a certain volume of alcohol will alter one’s mood and influence them to withdraw money from a savings account in order to continue drinking. The caption shows a person dancing and expressing celebratory gestures.*

- *Our contention is that the advertising encourages excessive and irresponsible consumption of alcohol, which the ABAC Code does not permit.*

The ABAC Code

12. On 1 August 2023 an updated version of the ABAC Code came into effect. However, as the complaint relates to marketing communications that were in market prior to 31 July 2023 the marketing communications will be considered against the earlier Code. References in this determination are therefore to Code standards as contained in the earlier Code.
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;
 - (c)(i) suggest that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment;
 - (c)(ii) show (visibly, audibly or by direct implication) the consumption or presence of an Alcohol Beverage as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success;

The Company Response

14. The Company responded to the complaint by email on 4 August 2023. The principal comments made by the Company were:
 - Respectfully, it is my view that TikTok is a very visual, playful and humorous medium, one that forms part of any marketing mix for businesses such as ours (hotels/bars catering to 18-23 yrs). Like other mediums within our mix, we tailor our tone of voice and visuals to suit the medium and its audience. In the case of TikTok, we purposefully apply a more amateurish and comedic approach - with pop-art style graphics, chart music and playful text - referencing people and moments-in-time in pop culture. It is my

view that this is the purpose of, and the most effective use of TikTok, for businesses such as ours.

- Further, I believe any reasonable person viewing the three videos in question, would understand and appreciate that we are not encouraging the excessive consumption or abuse of alcohol. In addition, I believe that any reasonable person would understand and appreciate that the aim of the posts is to engage and entertain the audience and to encourage 'a good time', through the comedic lens of TikTok, as mentioned above. Within the videos the subjects in question are not consuming alcohol, there is no alcohol on display, nor have we advertised any alcoholic product or price.
- We screen marketing and promotional material prior to publishing.

Video 1

- It is our opinion that any reasonable person viewing this post will understand that it is not encouraging the abuse or excessive consumption of alcohol, and that the post is simply aiming to engage the audience in a humorous and light-hearted way. Further, the subject in the post is clearly not intoxicated, or even consuming any alcohol.

Videos 2 and 3

- It is our opinion that any reasonable person viewing this post will understand that it is not encouraging the abuse or excessive consumption of alcohol, and that the post is simply aiming to engage the audience in a humorous and light-hearted way.

The Panel's View

Introduction

15. The Empire Hotel is located in Fortitude Valley, Brisbane, from where it has been operating in various forms since 1865. Like most venues it engages with its customers via social media, and it is a complaint about three video posts to its TikTok account that has given rise to this determination.
16. The complainant is concerned that the three posted videos variously encourage the excessive consumption of alcohol and irresponsible behaviour, suggest that alcohol can cause a change in mood and/or suggest that its consumption can lead to social or other success.

17. These concerns enliven the following Code provisions that an alcohol marketing communication must not:
- show or encourage:
 - the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines – Part 3 (a)(i);
 - irresponsible behaviour that is related to the consumption or presence of alcohol – Part 3 (a)(ii);
 - suggest that the consumption or presence of alcohol may create or contribute to a significant change in mood or environment – Part 3 (c)(i); and
 - show the consumption or presence of alcohol as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success – Part 3 (c)(ii).
18. The Company argues the videos would not be considered by a reasonable person as encouraging excessive consumption or inappropriate use of alcohol. It is contended that TikTok is a playful and humorous medium and the videos adopt this style and are designed to engage and entertain. It is pointed out that consumption is not depicted and no one shown appears affected by alcohol.

General Considerations

19. In assessing the consistency of a marketing communication with an ABAC standard, the Panel is to adopt the standpoint of the probable understanding of the marketing item by a reasonable person. This means the benchmark is based on the attitudes, opinions, values and life experiences shared commonly in the community. If a marketing communication could be interpreted in several ways, it is the most probable interpretation which is to be preferred over a possible but less likely understanding of the marketing message.
20. Humour is a common component of marketing across the board and is often used in alcohol marketing. There is of course nothing wrong with marketing material being funny and engaging and the ABAC does not seek to stifle creative ways to message product and brand attributes. Equally the notion of a 'reasonable person' incorporates the robust nature of the Australian sense of humour.
21. While recognising the legitimate use of humour and that a reasonable person understands the difference between exaggerated and fanciful scenarios and a serious call to action, humour is not a leave pass for messaging about alcohol that is inconsistent with moderate and responsible consumption.

22. Humour in an alcohol marketing communication might be inconsistent with the Code if the source of the humour is drawn from an underlying assumption that it is socially acceptable to consume to excess or that an average person can easily relate to antisocial alcohol induced behaviour. Hence while the marketing might not be taken as serious advocacy to act in a particular way, the humour itself is based on alcohol being used irresponsibly.

Video 1

23. The first video shows character Ron Burgundy from the Anchorman movies, superimposed over a bar background, saying "*I don't know how to put this, but I'm kind of a big deal. People know me.*" The video is headed up by the words "Me after I drink 10 beers".
24. The Panel believes that the video does breach the standards in Part 3 (a)(i), (c)(i) and (c)(ii). While the background image of the bar scene is not problematic, the positioning of the prominent text of 'Me after I drink 10 beers' clearly frames the understanding of the post by:
- (a) establishing excessive consumption is acceptable; and
 - (b) implying alcohol consumption leads to a significant change in mood and to a person becoming more socially confident.

Video 2

25. Video 2 video shows people working behind the bar. It is superimposed firstly with the words 'I need to feel happy' followed by 'Drinks at the Empire [winking emoji]'
26. The Panel believes that Video 2 breaches Part 3 (c)(i) of the Code by suggesting that the consumption or presence of alcohol may create or contribute to a significant change in mood. In particular the words 'I need to feel happy' imply that a person is not currently happy and the video then suggests that drinks at the Empire will make them happy.

Video 3

27. Video 3 shows the comedian and actor Bill Hader dancing to Makeba by Jain. The caption for the video reads 'When the drink starts tasting like I should transfer out of my savings'.
28. The Panel believes that the video is inconsistent with Part 3 (a)(i) and (c)(i) of the Code due to the probable understanding given by the text 'When the drink starts tasting like I should transfer out of my savings'. This message implies that a person's level of alcohol consumption has significantly altered mood and behaviour.

29. The Panel does not accept the complainant's contention that the video also encouraged offensive behaviour. While 'transferring savings' might be unwise, it is not anti-social behaviour within the intended scope of the provision.
30. The complaint is upheld as follows:
- Video 1 breaches Part 3 (a)(i), (c)(i) and (c)(ii);
 - Video 2 breaches Part 3 (c)(i); and
 - Video 3 breaches Part 3 (a)(i) and (c)(i).