



## ABAC Adjudication Panel Determination No 18/24

**Product:** Wine  
**Company:** The Wine Group  
**Media:** Telephone  
**Date of decision:** 4 March 2024  
**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 24 January 2024 in relation to telemarketing for wine (“the product”) by The Wine Group (“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 24 January 2024.
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 Advice**

9. A component of the ABAC Scheme is an advice service by which an alcohol marketer can obtain an independent opinion of a proposed alcohol marketing communication against the ABAC standards prior to public release. Pre-vetting advice is separate from the complaint process and does not bind the Panel but represents best practice on behalf of alcohol marketers. Pre-vetting approval was not obtained for the marketing.

### **The Placement**

10. The complaint relates to telemarketing calls from The Wine Group.

### **Complaint**

11. The complainant objects to the marketing as follows:
  - *I receive constant telemarketing calls, multiple times a week from a bot that says "Hi I'm, James from the wine group";*
  - *I have requested for them not to call me, but the calls persist. Each call they use a different number (but same voice) so I can't even block the number;*
  - *These are horrible nuisance calls and I have no idea how to get them to stop.*

### **The ABAC Code**

13. Part 4 (e) of the Code provides that an Alcohol Marketing Communication must not be delivered directly to:
  - (iii) any person that has sought removal from the marketer's mailing list.

### **The Company Response**

14. The Company acknowledged receipt of correspondence in relation to the complaint but did not provide a response.

## **The Panel's View**

### **Introduction**

14. On 1 August 2023 a revised version of the ABAC Code came into operation. One of the revisions to the Code was the addition to the Placement Standards contained in Part 4 of a new requirement on alcohol marketers, namely that an alcohol marketing communication must not be delivered directly to any person that has sought removal from the marketer's mailing list. - Part 4 (e) (iii)
15. This is the first occasion that the Panel has considered a complaint raising an issue potentially triggering the requirement in Part 4 (e) (iii). As a result this determination will provide some context about the Code requirement so as to provide guidance to the public and industry as to how the standard is to be understood and applied.

### **Understanding the ABAC Requirement**

16. The ABAC Code consists of content standards and placement standards with which alcohol marketers must comply when marketing alcohol (and alcohol alternative i.e. zero alcohol style products) beverages. The content standards go to the messaging which a reasonable person would probably take from a marketing communication whereas the placement standards go to where a marketing communication can be located and the audience the marketing is directed at.
17. The placement standards are contained in Part 4 of the Code. In large part, these placement standards have a policy objective that alcohol marketing should be directed towards adults and to the extent possible away from minors. Part 4 (e) goes to the delivery of marketing information to a specific individual (as opposed to a wider group via broadcast or narrowcast media) and consists of three requirements. The first requirement prohibits physically handing a minor a flyer or other printed material about alcohol. The second prohibits sending electronic direct mail about alcohol to a minor.
18. The third requirement contained in Part 4 (e) (iii) is an exception to the 'protection of minors' focus of the placement standards. This requirement is framed to apply to 'any person' and not simply minors. It places an obligation on marketers to respect the wishes of a person who has 'sought removal from the marketer's mailing list'.
19. Hence, the requirement envisages that a person has taken an action to communicate their wish that they do not want the marketer to contact them. This could arise in several ways- such as telling the marketer directly of their desire not to receive marketing material or it could be through the use of the Do Not Call Register as discussed below.

20. The term 'mailing list' should be understood to apply not simply to a list of names and addresses used to send marketing material by physical post but to be a generic expression to capture a contact list or database of names and contact details of potential consumers of the marketer's products. So a list used by a marketer to communicate with 'any person' be that communication by way of electronic direct mail, telephone, SMS message, social media platform/app or by the postal service.
21. Drawing this together, the Part 4 (e) (iii) standard comes into play if:
  - an alcohol marketer employs direct communication techniques to contact individual consumers or potential consumers;
  - the marketer has access to a list or database that contains names and contact details of persons (of any age not simply minors); and
  - a person takes an action to seek the removal of their name or contact details from the list used by the marketer.

### **The Current Case**

22. The Wine Group is an on-line alcohol retailer with its business model including 'cold call' telemarketing of potential customers. The Company is not a signatory to the ABAC Scheme and hence has not made a prior commitment to market consistently with the ABAC Standards. While initially the Company advised it would respond to the complaint, no substantive information was provided prior to the Panel making this determination.
23. The complainant advises that the Company has made or caused to be made a series of telephone calls seeking to engage the complainant in the purchase of products from the Company. The complainant contends the calls are from a 'bot' and that each time the complainant makes clear that there is no interest in the products and that a request is made to cease all further calls.
24. In order to investigate the complaint, the ABAC Complaints Officer contacted the complainant to ascertain if permission would be given to supply their name and number to the Company to seek an explanation as to why the request to cease the calls was not acted upon. The complainant however did not wish their details to be given to the Company.
25. In light of the failure of the Company to respond to the complaint and the complainant not giving permission to pass on contact information, the exact circumstances of the case cannot be definitively assessed. However, some observations and balance of probability conclusions can be made.
26. Firstly, the Panel has no reason to believe that the complaint isn't completely genuine. There is no apparent reason why the complainant would go to the trouble of making the complaint if the experience of the repeated marketing calls had not occurred. Further, clearly the complainant found the calls to be

unwelcome and a nuisance and again there is no reason to believe that the complainant did not request that no further calls be made.

27. Secondly, it seems that the Wine Group has had some past history in not respecting requests made by consumers to stop telemarketing activity. In May 2022 the Australian Communications and Media Authority (ACMA) announced that the Company had paid over \$200,000 in infringement notices for multiple breaches of spam and telemarketing laws. In its media release, ACMA Chair Ms O'Loughlin stated that the Authority had received a number of complaints about the Wine Group making unwanted marketing telephone calls and the Wine Group had not taken the opportunity to fix compliance prior to ACMA launching a formal investigation.
28. The Company's actions had breached the Spam Act, the Do Not Call Register Act and the Telecommunications (Telemarketing and Research Calls) Industry Standard. Together these Federal legislative requirements make it an offence for a marketer (of all types but including alcohol retailers) from contacting consumers who had added their telephone numbers to the Do Not Call Register maintained by ACMA. In addition, the provisions provide other consumer protections.
29. The Do Not Call Register is a key step that a consumer can take to limit the number of calls and SMS messages from marketers. Once a telephone number is added to the Register, a marketer has an obligation to 'wash' their contact lists against the numbers on the Register and ensure the number is not contacted for marketing purposes. While there are carve outs for classes of 'marketers' not obliged to follow the Register such as Education Institutions and political parties, the Register is a very useful measure members of the public can take if there is a concern about unwanted marketing calls.
30. It does not seem in the current case that the complainant had used the Do Not Call Register. While noted, the ABAC Standard does not require that a person take this step. All that is required is that a person seek removal of their details from the marketer's mailing list. It would be best to do this in a way that provides evidence of the request, but making a verbal request over the phone in response to the marketing call would prima facie be sufficient.
31. It should be stressed that the fact that the Company was found to have breached Federal telemarketing provisions in 2022 does not mean they did so again in late 2023 or early 2024. Each complaint must be assessed on its own facts and merits.
32. Without any information from the Company, the Panel is obliged to make a balance of probabilities assessment on the complaint with the information provided by the complainant. As mentioned, there is no reason to think the complaint is not genuine and in those circumstances the Panel finds it more probable than not:

- that a series of telemarketing calls were made by the Company to the complainant's telephone number;
- that these calls were not solicited by the complainant and were unwelcome;
- that the complainant in response to the calls, requested that further calls not be made;
- the making of this request can be taken to amount to the seeking of the removal of the complainant from the Company's contact list; and
- hence, Part 4(e)(iii) has been breached.

33. The complaint is upheld.