



ABAC Adjudication Panel Determination No 28/24

Product: Margaritas
Company: Robo Diner
Media: Digital (Website & Instagram)
Date of decision: 16 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 9 February 2024 in relation to digital marketing promoting \$1 Margaritas (“the product”), by Robo Diner (“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 9 February 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 advice was not obtained for the content of the marketing.

The Marketing

10. The complainant provided the following digital advertisements on the Company's website and Instagram account in support of its complaint.

Website



Instagram Posts

 **Robo Diner**
3 d · 🌐

THIS JUST IN! Our **\$1 Margarita deal** has been updated and due to popular demand it is now available **7 Days a WEEK!!!**


Score **\$1 Margaritas 🍹**, with a **\$20** spend at Robo Diner! A deal so incredible, it's hard to believe. 🤪


Enjoy a refreshing Margarita 🍹 alongside amazing burgers, souvlakis and burritos! 🍔! Yum!

🔥 Margaritas capped at **5** per person/day.

📍 **20 Station St, Moorabbin.** No bookings needed.
Web > ... See more



 **robodiner_au**



Liked by eamonwebb2020 and others
robodiner_au THIS JUST IN! Our **\$1 Margarita deal** has been updated and due to popular demand it is now available **7 Days a WEEK!!!**

Score **\$1 Margaritas 🍹**, with a **\$20** spend at Robo Diner! A deal so incredible, it's hard to believe. 🤪



Enjoy a refreshing Margarita 🍹 alongside amazing burgers, souvlakis and burritos! 🍔! Yum!

🔥 Margaritas capped at **5** per person/day.

📍 **20 Station St, Moorabbin.** No bookings needed.
Web > www.RoboDiner.com.au

(clickable link in our bio)

#robodiner #margarita #cheapeats #melbourneats
View all 6 comments
3 days ago



Liked by eamonwebb2020 and others
robodiner_au THIS JUST IN! Our **\$1 Margarita deal** has been updated and due to popular demand it is now available **7 Days a WEEK!!!**

Score **\$1 Margaritas 🍹**, with a **\$20** spend at Robo Diner! A deal so incredible, it's hard to believe. 🤪

Enjoy a refreshing Margarita 🍹 alongside amazing burgers, souvlakis and burritos! 🍔! Yum!

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#robodiner #margarita #cheapeats #melbourneats
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thirdwavecafe and robodiner_au
altego_music • LOVIN ON ME X CANDY SHOP (ALT...



\$1 MARGARITAS

min \$20 spend per person
max 5 per person

20 STATION ST, MOORABBIN
www.robodiner.com.au

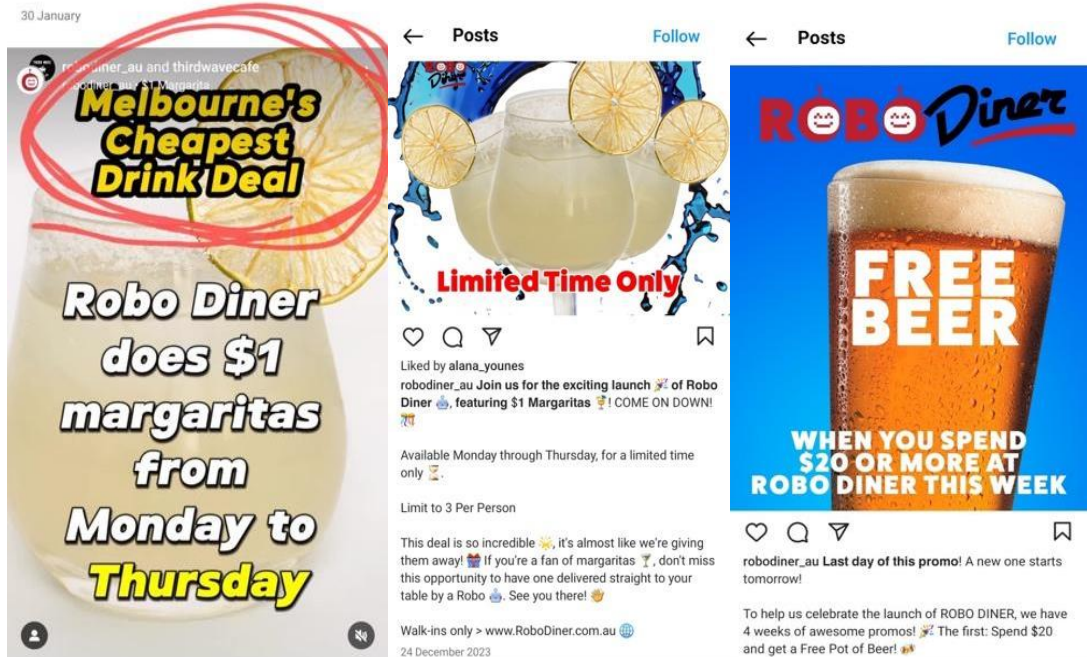


Liked by xenlist
robodiner_au Score **\$1 Margaritas 🍹, Monday - Thursday**, with a **\$15+** spend at Robo Diner! A deal so incredible, it's hard to believe. 🤪

Enjoy a refreshing Margarita 🍹 alongside a delectable **\$6.90 Pulled Pork Burger** 🍔! Yum!

🔥 Margaritas capped at **5** per person/day.

📍 **20 Station St, Moorabbin.** No bookings needed.
Web > www.RoboDiner.com.au



Complaint

11. The complainant is concerned that the Company is publicly advertising \$1 Margaritas every day of the week when you spend \$20 or more on food, with a limit of five margaritas per person and this promotes excessive drinking.

The ABAC Code

12. Part 3 of the Code provides that a marketing communication must not:
 - (a)(i) show (visibly, audibly or by direct implication), encourage, or treat as amusing, consumption inconsistent with the Australian Guidelines to Reduce the Health Risks from Drinking Alcohol, such as:

- (A) Excessive Alcohol consumption (more than 10 standard drinks per week or more than 4 standard drinks on any one day);

The Company Response

13. The Company responded to the complaint by email on 6 March 2024 advising that they had communicated with Victorian liquor licensing about the complaint, and they did not find any issues with the marketing.

The Panel's View

Introduction and background

14. As mentioned in paragraph 2 above, alcohol as a product and alcohol marketing and promotion falls within a shared regulatory domain involving direct government regulation and industry initiatives such as the ABAC Scheme. This determination concerns marketing that is at the intersection of the government and industry regulatory requirements.
15. The Robo Diner is a new restaurant located in the Melbourne suburb of Moorabbin. Its menu covers burgers, toasties, souvlaki and Mexican dishes such as tacos. The restaurant holds a liquor licence and offers beer, wine and a range of cocktails including a margarita.
16. As a licenced premise, the restaurant is regulated by a Victorian government agency, Liquor Control Victoria, pursuant to the provisions of the Liquor Control Reform Act (1998). In the normal course of events the activities of restaurants including their marketing will not bring into play the ABAC Scheme. This is because the regulation of the responsible service of alcohol (RSA) at a restaurant is not a matter for the ABAC Scheme and rests solely with the relevant State Liquor body such Liquor Control Victoria.
17. Where the activity of a restaurant can enliven the remit of the ABAC Scheme is if the restaurant seeks to market itself by reference to the use of alcohol products. Generally it is the food of a restaurant that is featured in marketing, and a quick review of the social media posts of the Robo Diner shows this is the restaurant's approach. However, there is one promotion from the restaurant which is featuring alcohol and this is the availability of \$1 margaritas. It is this promotion and the social media posts that reference the discount margaritas which has drawn the complaint.

Victorian Responsible Alcohol Advertising and Promotion Guidelines and the ABAC

18. Liquor Control Victoria has issued Responsible Alcohol and Promotional Guidelines to explain how the State regulates the marketing of licensees. The guidelines set out 7 principles to be followed in promoting alcohol and venues. Principles 1 and 2 provide that advertising or promotion of alcohol must not encourage excessive or rapid consumption. Principle 1 goes to promotions such as drinking games and emotive language encouraging excessive drinking. Principle 2 is directed at extreme discounts or limited time cheap drinks driving excessive use.
19. For its part, the ABAC Code provides in Part 3 (a) that an alcohol marketing communication must not show or encourage consumption inconsistent with the Australian Guidelines to Reduce Health Risks from Drinking Alcohol such as

excessive alcohol consumption (more than 10 standard drinks per week or more than 4 standard drinks on any one day).

20. While the Victorian Guidelines and the ABAC standard are going to the same theme of advertising/promotions not encouraging excessive alcohol consumption, there are differences between the two sets of requirements. The Victorian requirements:

- primarily assume a direct connection between the promotion and the level of consumption that may be encouraged within the licenced premises ie purchase and then consumption occur immediately;
- acknowledge the impact price might have on consumption ie extreme discounts leading to more consumption; and
- what amounts to 'excessive consumption' is not specified as such.

21. In contrast, as the ABAC standard is not aimed at RSA within licenced premises but at more general community messaging regarding moderate alcohol use, therefore the Part 3 (a) (i) provision:

- assumes a distinction between purchase and consumption ie it is not assumed that a purchased product (typically packaged alcohol not consumed at the place of purchase) will be immediately consumed;
- does not go to issues of price of alcohol products; and
- what amounts to excessive consumption is specified ie consumption beyond that contained in the Australian Guidelines to Reduce Health Risks from Drinking Alcohol

22. It should be noted that the ABAC standard is not to be understood as saying price is not important in influencing both quantity and choice a consumer might make about purchasing an alcohol product. Rather within the regulatory system, questions of price and issues like taxation rates on alcohol rest directly with government and not the ABAC Scheme.

Does the digital marketing fall within the ABAC Scheme and if so, does it breach the ABAC standard

23. The Company's website and Instagram account posts explain the margarita promotion. It involves \$1 margaritas when a customer spends a \$20 minimum amount with a limit of five margaritas per person/day. Earlier versions of the advertisements supplied by the complainant had variations of the promotion that was limited to Monday to Thursday and/or required a \$15 spend or no spend and a 3 margaritas per person limit. Another promotion offered a free pot of beer with a \$20 spend.

24. The complainant contends that excessive consumption is being promoted by the Robo Diner with the \$1 margarita offer. The restaurant declined to respond substantively advising that it communicated with the Victorian liquor licensing authority and was advised there was no issue with the marketing.
25. As has been made clear, the Panel does not have a remit to assess if the actual promotional activity as run within the restaurant amounts to responsible service of alcohol. This is a matter for Liquor Control Victoria. Nor is the Panel assessing if the digital marketing meets the Responsible Alcohol and Promotional Guidelines, which again is a question for the Victorian regulator.
26. The threshold question is whether the marketing falls within the remit of the ABAC Scheme or is it solely within the jurisdiction of the Victorian regulator. The RSA question is for Liquor Control Victoria but the marketing over digital channels is to the wider community and it speaks not only to how alcohol is available within the restaurant but also has a message about acceptable alcohol consumption more widely. It is this dimension which is within the ABAC Scheme's remit.
27. The Panel is to assess digital marketing communications against the ABAC standard. In doing this, the Panel places itself into the shoes of a reasonable person and asks, what is the probable understanding of the marketing material. The reasonable person test means that the benchmark is the values, attitudes and life experiences found in most of the community.
28. The core marketing message is that \$1 margaritas can be purchased if a patron spends \$20. This of itself is not a breach of the ABAC standard as the standard does not seek to regulate the price of alcohol products. The marketing then goes on to state there is a 5 drink limit on the number of \$1 margaritas that can be purchased under the offer.
29. It is at this point that the marketing message becomes problematic. The direct implication is that it is acceptable for a person to consume 5 margaritas at a single occasion. The Australian Guidelines to Reduce the Health Risks from Drinking Alcohol state that no more than 4 standard drinks should be consumed on any one day.
30. Typically a margarita consists of a combination of tequila, triple sec or cointreau, lemon juice and syrup. While no alcohol content is noted in the marketing, the photograph of the cocktail appears to be a normal serving in a regular sized glass. Even if the cocktail was on the weak side, a single margarita would be reasonably assumed to equate to at least one standard drink. In fact typically 5 margaritas would be 8.5 standard drinks. This exceeds the Australian Guidelines and hence amounts to excessive alcohol consumption for the purpose of Part 3 (a) (i).

31. Accordingly the Panel believes a reasonable person would probably understand the marketing as conveying that it is acceptable to consume up to 5 margaritas exceeding 4 standard drinks in a single drinking occasion. This means the website ad and the first 5 Instagram posts included at paragraph 10 are in breach of the standard.
32. The other posts which either contain a 3 drink cap, or a single free beer are not in breach as they would not be understood as necessarily suggesting more than 4 standard drinks on a single occasion is acceptable.

Concluding comments

33. It is noted that the Robo Diner is a new venture and naturally its prime focus for marketing is on the various food choices on its menu. Its status as an alcohol retailer within the scope of the ABAC Scheme would not have featured highly in its operations to date and it would be a reasonable assumption to think it was unaware of the ABAC standards prior to receiving the complaint. Certainly the Company is not a signatory to the ABAC Scheme and has not given a prior commitment to market consistently with the ABAC standards.
34. That said, responsible depiction of alcohol use is important for all businesses that include alcohol products within their marketing materials. It is hoped that the restaurant will be mindful of its alcohol marketing messaging going forward.
35. The complaint is upheld in relation to the 5 marketing communications identified and otherwise dismissed.