



ABAC Adjudication Panel Determination No 104/24

Product: Alcohol
Company: Four Points by Sheraton
Media: Digital – Facebook
Date of decision: 18 July 2024
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Louisa Jorm
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 9 July 2024 in relation to a social media post by Four Points by Sheraton (“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 July 2024.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint and this determination was made within the target 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 social media post.

The Marketing

10. The complaint relates to a post made to the Company's Facebook and Instagram pages:



Complaint

11. The complainant objects to the marketing as follows:
 - *There's a child drinking champagne.*

The ABAC Code

12. Part 3 (b) of the Code provides that An Alcohol Marketing Communication must NOT:
 - (ii) depict a person who is or appears to be a Minor unless they are shown in an incidental role and there is no implication they will consume or serve Alcohol.

The Company Response

13. The Company responded to the complaint by letter emailed on 12 July 2024. Its primary comments were:
 - The Four Points by Sheraton Perth respectfully informs that the hotel's social media marketing activities fully comply with the provisions outlined in the Responsible Alcohol Marketing Code. Below is the hotel's response to the questions outlined in the complaint.
 - The marketing material was not submitted for Alcohol Advertising Pre-vetting Service Approval as the beverages consumed by the minors were not alcoholic and, therefore, is not promoting the consumption of alcohol or any alcoholic beverage.
 - The two children shown in the photograph are holding a flute glass and are drinking a watermelon flavoured lemonade soft drink. The hotel does not provide any alcoholic beverage as a welcome drink to the hotel. We have since removed the image from our social media pages as the glassware of choice may have been misleading.
 - The names and dates of birth of the people shown in the marketing at the time the photo was taken on 27 April 2024:
 - IP – Born in 2013
 - AP – Born in 2015
 - The children are not consuming champagne or sparkling wine.
 - We appreciate your diligence in this matter and should you require any additional information or clarification, please do not hesitate to contact me.

The Panel's View

14. This is an unusual case. It involves a social media post from the hotel Four Points by Sheraton in Perth. The post comprises a photograph of a woman (presumably a parent or guardian) and two young girls advised by the Hotel to be aged 11 and 9 sitting in the foyer of the hotel. Each person is holding a champagne flute containing a sparkling amber coloured beverage. The post is accompanied by text referencing the school holidays being a good time to stay at the hotel. The text makes no reference to the beverage seen in the photograph.
15. The complainant has made the reasonable assumption given the use of the champagne flute and appearance of the beverage that the two girls shown in the post were holding and implicitly consuming champagne/sparkling wine. Hence the complaint about advertising showing minors consuming alcohol.
16. The Hotel has advised that the beverage in the champagne flutes is not alcohol but a 'watermelon flavoured lemonade soft drink'. It states that it does not serve alcohol as a welcome drink to guests checking into the hotel. While arguing that there is no breach of the ABAC standards, it has accepted that the glassware choice may have been misleading and removed the post.
17. It is unlawful under the Western Australian Liquor Control Act to serve alcohol to a minor. Equally it is breach of the ABAC standard in Part 3 (b)(ii) to depict a minor in an alcohol marketing communication unless they are shown in an incidental role and there is no implication that they will consume or serve alcohol.
18. Before turning to whether a breach of the standard has occurred, there are a couple of threshold points to be considered, namely:
 - is the Hotel captured by the ABAC obligations; and
 - is the social media post an alcohol marketing communication for ABAC purposes.
19. The ABAC Scheme applies to alcohol producers, distributors and retailers. Four Points by Sheraton is principally a hotel providing accommodation, however its facilities include a lounge bar and a licensed restaurant. To this extent the Hotel is an alcohol retailer within the potential purview of the ABAC Scheme.
20. Given that it is a mixed business, not every marketing communication from the Hotel can be regarded as an alcohol marketing communication. In fact the great majority of the marketing from the Hotel would not fall within the intended scope of the ABAC Scheme. This is because the marketing will not reference alcohol products. But if the Hotel is marketing itself by reference to the

availability of alcohol or through featuring an alcoholic beverage, then its portrayal of alcohol needs to be undertaken consistently with the ABAC standards.

21. So putting these two things together, a social media post from the Hotel that promotes its business by showing or referencing alcohol use on its face would be an alcohol marketing communication for ABAC purposes. This then leads to the question of whether the fact that the beverage shown is not alcohol means the post cannot be regarded as an alcohol marketing communication?
22. The Preamble to ABAC provides that the Code is to be applied mindful of the 'spirit and intent' of the ABAC Scheme. From this guidance the Panel has always followed a common sense and non legalistic approach to applying the Code consistent with the 'reasonable person' benchmark found in Part 7 of the Code in terms of how compliance with Code standards is assessed.
23. This means the test is how a reasonable person would probably understand the post. And the Panel believes, like the complainant, most people would see the post and be surprised that two young girls are apparently consuming alcohol. It is a perfectly reasonable assumption to make that a sparkling beverage which is the colour of champagne/sparkling wine in a champagne flute is indeed champagne.
24. The fact that the beverage is not champagne or an alcoholic product at all, does not alter how the image in the post would most likely be understood. It is not uncommon in a staged photo for marketing purposes to use props that aren't the actual item being portrayed because the 'fake' prop looks better in the photograph than the real thing.
25. The Panel accepts that the Hotel did not serve alcohol to the girls and no doubt the beverage was a flavoured lemonade. And it can be readily accepted that there was no intention to give the impression that it's ok for minors to drink alcohol. The test however is not what was the intention of the marketer, but how a reasonable person would probably understand the marketing material.
26. The Hotel acted appropriately in removing the post upon receiving the complaint and presumably it will be more careful in the future when showing beverages in its marketing material. That said, the complainant's concern was justified and the complaint is upheld.