



ABAC Adjudication Panel Determination No. 17/20

Product: Cocktails Nightclub
Company: Cocktails Nightclub
Media: Digital (EDM)
Date of decision: 4 March 2020
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns email direct marketing by Cocktails Nightclub (“the Company”) and arises from a complaint received 12 February 2020.
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 retail and wholesale sale of alcohol, and contain some provisions dealing with alcohol marketing;

(b) Industry codes of practice:

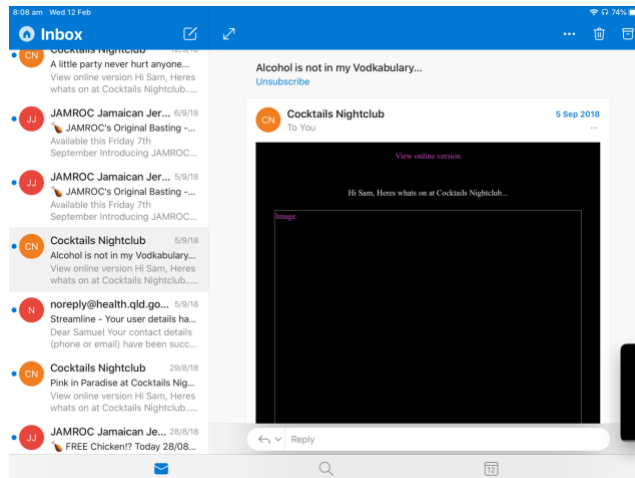
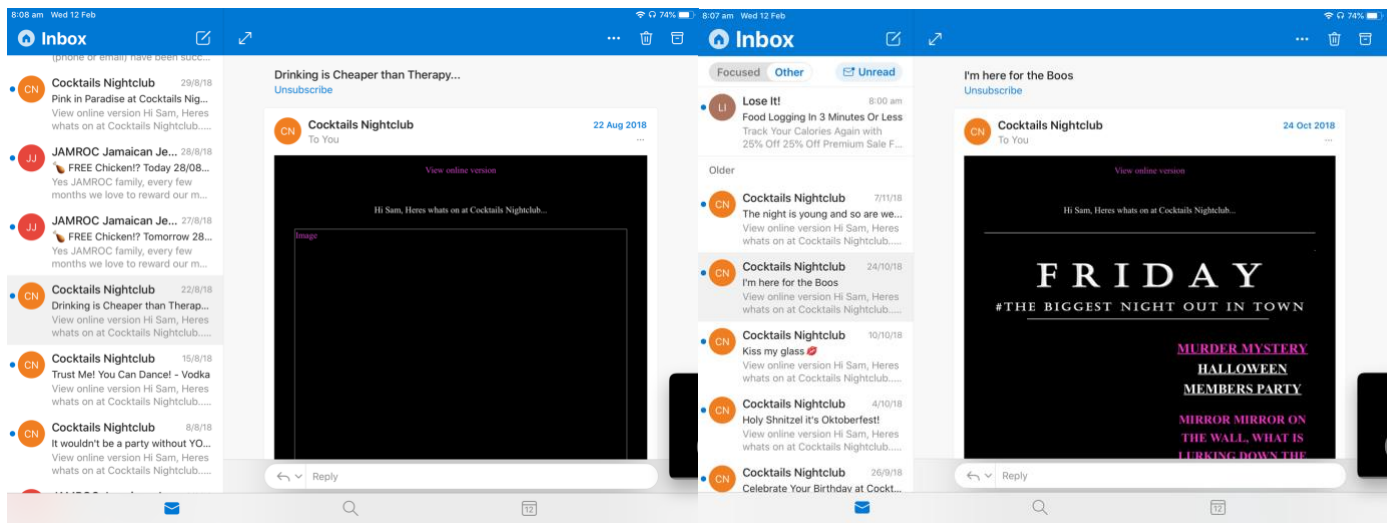
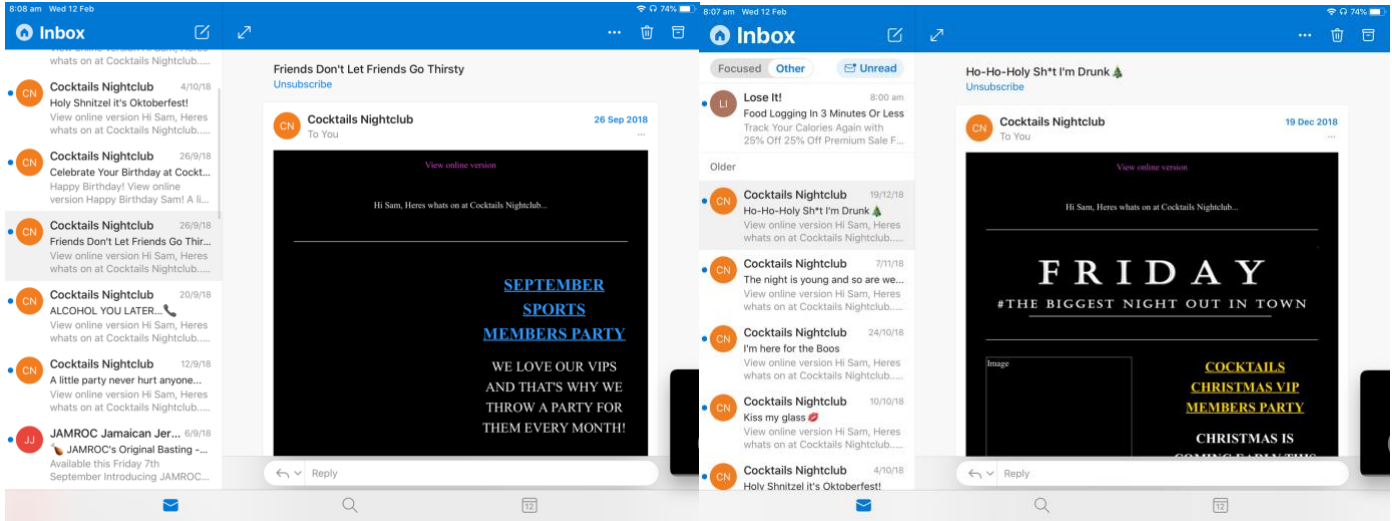
- AANA Code of Ethics – which provides a generic code of good marketing practice for most products and services, including alcohol;
 - ABAC Responsible Alcohol Marketing Code (“ABAC”) – which is an alcohol specific code of good marketing practice;
 - certain broadcast codes, notably the Commercial Television Industry Code of Practice – which restricts when advertisements for alcohol beverages may be broadcast;
 - Outdoor Media Association Code of Ethics – which places 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 the other codes as well as meeting the standards contained in the ABAC.
 4. For ease of public access, Ad Standards (AS) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by AS, 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 AS 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 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 12 February 2020. The Panel endeavours to make a decision within 30 business days of the receipt of a complaint and this complaint has been determined within that timeframe.
8. The quasi-regulatory system for alcohol beverage marketing features 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 Communications

9. The complaint refers to the following email direct marketing communications.



The Complaint

10. The complainant is concerned that the marketing encourages excessive drinking.

The ABAC Code

11. 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;

The Company's Response

12. The Company responded to the complaint by email on 2 March 2020 as follows:
 - I am hoping to successfully address this complaint in a polite way and show that we have not breached section 3(a)(i) or (ii) of the ABAC code and I intend to do so by describing the reason why these email subject lines were used and to conclude that using humour, puns and slang does not equate to Cocktails Nightclub encouraging excessive drinking, the misuse of alcohol nor encourage irresponsible behaviour that is related to the consumption of alcohol.
 - The subject lines in question are from our weekly email campaign that is sent out to people who have physically and willingly subscribed to our emailing list. The reason the subject lines in question were used, is because statistics have suggested that using humour in email subject lines as well as speaking in the language and style that your subscribers use themselves, can increase your email open rate. The aim of these subject lines was to be humorous and interesting enough for subscribers to open up the email – not to encourage reckless drinking.
 - The first two headlines mentioned are from 2018 and not the year 2020 as it states in the complaint document. In relation to each subject line:
 - Friends don't let friends go thirsty (12/2/18) - "Friends don't let friends go thirsty" is too vague to breach code 3(a)(i) or (ii). Code 3(a)(i) or (ii) both suggest irresponsible consumption and behaviour related to the use of alcohol, but this email subject line does not mention alcohol. The goal of this subject line was to encourage friends to come out in groups, no alcohol mentioned.
 - Ho-Ho-Holy Sh**t I'm Drunk (12/2/18) - This subject line was sent around Christmas time, hence the "Ho-Ho-Ho". This email subject line is considered a pun that is (admittedly) drinking and Christmas related but it was also sent due to the Christmas fashion trends we have been seeing both online and in our venue. I have attached a link where one could buy shirts, mugs, bags, wine labels all with the same wording – this is one of MANY sites that sell items with the same wording. https://www.etsy.com/market/holy_shit_im_drunk. Once again,

the aim of this email subject line was to be punny (due to the Christmas season), eye catching (due to swear words usually not being in email subject lines) and to also keep up with what's trending online. I understand that the use of the word "drunk" may insinuate excessive consumption or irresponsible behaviour and words like that will not be used in any future email campaign subject lines.

- Drinking is Cheaper than Therapy (22/8/18) - This email subject line was meant to be humorous. I believe it does not state nor encourage excessive drinking nor irresponsible behaviour related to alcohol.
- I'm here for the Boos (24/10/18) - This subject line was sent for Halloween weekend. Ghosts make a "Boo" noise so "Boos" sounds similar to "Booze". We were trying to incorporate puns and humour into an interesting subject line – I believe it does not state that alcohol should be drunk excessively nor should one behave irresponsibly.
- Alcohol is not in my Vodkabulary (5/9/18) - Running on everything mentioned above, the email subject line was meant to be a clever play on words – "vodkabulary" isn't even a real English word, we just tried to make it an interesting subject line and I believe this does not breach Code (a)(i) or (ii).
- In conclusion, we understand why there are strict measures when it comes to advertising alcohol and we aim to adhere to the rules and regulations set out in the liquor licencing act. I genuinely hope these subject lines did not cause distress to anyone and I apologise if the lines had been blurred between what is considered humorous and what is encouraging rapid intoxication. I am hoping that since these complaints are from emails that are 2 years old, that we have since gotten better at sending catchy email subject lines without breaching the liquor licencing act.

The Panel's View

13. The Cocktails Nightclub is located at Surfers Paradise on Queensland's Gold Coast. It seems that patrons of the Club can subscribe to become members and receive weekly emails which advise of activities and promotions available at the Club. The complaint relates to several emails forwarded to subscribers in 2018.
14. The ABAC consists of a number of standards of good practice in alcohol marketing. The scheme applies across the alcohol industry and captures the marketing of alcohol retailers such as the Nightclub. It is noted that while the Nightclub has not made a contractual commitment to comply with the ABAC standards, it is committed to responsible practices in its operations and marketing. The Club has cooperated with the complaint process.
15. The complainant has referenced five emails from the Club dating from 2018. An email promotion is a marketing communication for ABAC purposes and needs to meet the Code standards for responsible marketing. It is not clear why material which is now relatively dated has drawn a complaint at this point and not earlier. That said the ABAC complaint process has no express time limit as to the age of a marketing communication about which a complaint can be raised.

16. The concern expressed about the emails is that they encourage excessive drinking. Part 3 (a) of the ABAC provides that a marketing communication must not show or encourage the excessive or rapid consumption of alcohol or consumption inconsistent with the Australian Alcohol Guidelines.
17. The issue raised is not about the substance of the emails but in each case the subject lines. The Company contends the subject lines used humour, puns and slang in order to be engaging in order to increase the rate at which the subscribers would open the emails and read them. It is argued that the subject lines would not be taken as encouraging reckless drinking.
18. A marketing communication is to be assessed based upon the probable understanding of a reasonable person. This means that the life experiences, values and opinions common in a majority of the community is to be the benchmark. It is fair say that Australians have a robust sense of humour and the email subject lines would be understood accordingly. That said, there are countless ways in which marketing communications can be crafted in a creative, humorous and engaging manner without the humour needing to assume that drinking excessively is a shared and acceptable experience.
19. For brevity the Panel concludes as follows on each of the five emails:
 - 'Friends don't let friends go thirsty' - no breach as it is not implicit that this entails excessive consumption.
 - 'Ho-Ho-Holy Sh**t I'm drunk'- breach as although the sentiment is endeavouring to be humorous and is related to the holiday season, it does imply the humour comes from it being funny that people drink to excess.
 - 'Drinking is cheaper than therapy'- no breach of Part 3(a)(i) of the Code as the line would be understood as being humorous and doesn't suggest excessive consumption as such. Possibly it is inconsistent with Part 3(c)(iv) of the Code which prohibits a suggestion that alcohol offers a therapeutic benefit although it would not be taken as offering serious advice. In any event, the concern expressed by the complainant was only about excessive drinking.
 - 'I'm here for the Boos' - no breach as the email related to Halloween with the subject line being a pun. This would be taken as a reference to the alcohol being at the Club but doesn't go to the level of consumption.
 - 'Alcohol is not in my Vodkabulary' - breach as the made up or misspelt word would be taken as humorous, but this humour would be taken to imply a person has been affected by excessive consumption.
20. The complaint is therefore upheld in relation to two emails and dismissed in relation to the other three emails.