



ABAC Adjudication Panel Determination No. 56/16

Product: Jacobs Creek
Company: Pernod Ricard Winemakers Pty Ltd
Media: Digital
Complainant: Ms Menezes
Date of decision: 3 May 2016
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns a digital advertisement for Jacobs Creek by Pernod Ricard Winemakers (“the Company”) and arises from a complaint received 6 April 2016.
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. Within this framework, some of the requirements go to the placement of alcohol marketing, while others go to the content of the marketing. The ABAC is a content code, which means the standards of good marketing practice within the Code apply irrespective of where the marketing occurs (e.g. in print, in digital formats, or by broadcast mediums). Equally, the fact that the marketing is placed in a particular medium or in a particular location will not of itself generally be a breach of the ABAC. In contrast, the placement codes applying to outdoor sites or free to air television don't go to what is contained within alcohol marketing but the codes will be potentially breached if the marketing occurs at particular timeslots or is placed near a school.
4. For ease of public access, the Advertising Standards Bureau (ASB) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the ASB, 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 the ASB 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 ASB 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 6 April 2016.
8. The Panel endeavour 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 has been determined within this timeframe.

Pre-vetting Clearance

9. 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 obtained for the marketing communication.

The Marketing Communication

10. The digital advertisement was delivered via Instagram as a sponsored post with a short video clip. The post was “Cheers to the Easter long weekend”.
11. The video clip showed 4 glasses of sparkling wine being raised in a ‘Cheers’ gesture with a rural scene in the background. The scene was superimposed with the text “Just getting together is worth celebrating”. As the ‘Cheers’ gesture is completed the scene is superimposed with the Jacobs Creek ‘Made True’ logo and the text “Sparkling around the world”.

The Complaint

12. The complainant is concerned that:
 - a sponsored alcohol ad appeared on her daughter’s social media account which is either deliberate targeting or having inadequate ways of determining target audience age;
 - the association between consuming alcohol with friends and having a great Easter long weekend;
 - Jacob’s Creek have a responsibility to ensure that their advertising is targeting those 18 and over at the very least and if there is no way of knowing who will receive a sponsored ad it should not be allowed on a social media platform that allows thirteen year olds access (morally and ethically not the right thing to do), noting:
 - her daughter was targeted when she has a social media account on Instagram only that is supervised by me at all times, she does not have Facebook, has never liked alcohol ads or followed alcohol related things;
 - when clicking into the reasons she was chosen to receive this ad it said “We want to show you ads from businesses that are interesting and relevant to you, and to do that, we use information about what you do on Instagram and Facebook (our parent company) as well as information from third party sites and apps you use. For example you might see ads based on the people you follow and the things you like on Instagram, your information and interests on Facebook and the websites and apps you visit.”

The ABAC Code

13. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (b)(i) have Strong or Evident Appeal to Minors;
 - (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)(iii) if an Alcohol Beverage is shown (visibly, audibly or by direct implication) as part of a celebration, imply or suggest that the Alcohol Beverage was a cause of or contributed to success or achievement;
14. Definition in Part 5 of the ABAC provide:
- Strong or Evident Appeal to Minors means:
- (i) likely to appeal strongly to Minors;
 - (ii) specifically targeted at Minors;
 - (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
 - (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; or
 - (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

A 'Minor' means a person who is under 18 years of age and therefore not legally permitted to purchase an alcohol beverage in Australia.

The Company's Response

15. The Company responded to the complaint by letter dated 18 April 2016. The principal points made by the Company were:
- The Company is a signatory to the ABAC Code and takes compliance very seriously. We are committed to ethical marketing of our products and endeavour to abide by not only the Code, but also any other applicable advertising codes and the law. As a member of the global Pernod Ricard Group, we are also committed to the promotion of responsible consumption through compliance with the Pernod Ricard Code for Commercial Communications.
 - We disagree that the Instagram platform has a strong appeal to minors. Instagram is a social media platform where users can post and view

photographs and videos and follow people or areas of interest. The most recent statistics supplied by Instagram (April 2016) relating to Australian users show that only 11% of Instagram users are under 18 years of age. Accordingly it appears very doubtful that the platform itself could have a strong appeal to minors. Further, it has been clearly established in many prior decisions that the ABAC is a content Code and not a placement Code (for example determinations 159/08, 71/07 and 6/12) as well as being addressed in section 2(b)(vi) of the Code. It is therefore difficult to see the relevance of the placement of the ad to a complaint under the ABAC Scheme.

- We strongly disagree that the advertisement targets minors by its appearance in the newsfeed. We take great care to ensure that our ads are targeted only to users with a profile age over the legal drinking age. Following the complaint, our social media agency has checked with Instagram to ensure that the targeting was set up correctly, who have confirmed that it was. The age of a user is determined by the information provided when they sign up to Facebook/Instagram (both platforms are subject to the same ownership and accordingly they share information and functionality across each). Our understanding of Instagram, is that if a user does not provide any information about their age upon sign up, Instagram will ask the user to confirm their date of birth before it will allow the user to view content subject to age gating, such as the Jacob's Creek content – any users with a profile age under the age of the respective age gate will be locked out of the relevant content. Accordingly, unless the users age was entered incorrectly or the user was using another person's Instagram account, we are at a loss to explain how the advertisement appeared in the newsfeed as stated. In any event, the ad carries a download warning advice in the first frame stating it should not be viewed by persons under the legal age for drinking in the country of viewing and it has clearly been established that ABAC is not a code concerned with the placement of alcohol advertisements, but rather the content (unless the placement of the ad in some way affects whether it has a strong appeal to minors, which we deny is the case in this matter).
- The tagline itself suggests that the product is ancillary to the occasion. There is nothing about the raising of glasses of itself that suggests that consuming alcohol will contribute to a good Easter weekend. Rather the intent is that catching up with friends over the Easter break is a reason to celebrate, a glass of sparkling being ancillary rather than a cause or contributor to a significant change in mood or environment. The gesture of 'cheers' itself cannot conceivably suggest the product will result in a significant change in mood/environment. Rather it's a colloquial term used in Australia as a toast, in this context it's a toast to friends getting together and to the Easter long weekend.

- There is nothing in the advertisement that suggests the product caused or contributed to the success of the Easter long weekend, instead it implies a toast to the Easter long weekend in effect being an acknowledgement that people tend to look forward to and enjoy having a long weekend.

The Panel's View

16. The complaint concerns a digital advertisement in the form of a video clip posted on Instagram, with the description 'Cheers to the Easter long weekend'. The clip showed four glasses of sparkling wine being raised in a 'Cheers' gesture in a rural environment, superimposed with the words 'Just getting together is worth celebrating'.
17. The complainant is concerned that the advertisement was viewable by her daughter who is under the age of 18 and that the advertisement was deliberately targeted at minors or the website was insufficiently regulated to ensure that minors could not view the image. Further, the complainant is concerned about the association between consuming alcohol and having a great Easter long weekend.
18. The complaint raises issues under Part 3 of the ABAC Code. Section b(i) provides that a marketing communication must not have a strong or evident appeal to minors, which is further expanded in the Definitions in Part 5. Section c provides that a marketing communication must not suggest that the consumption of presence of alcohol may create or contribute to a significant change in mood or environment, nor suggest that alcohol shown as part of a celebration or was a cause of or contributed to success or achievement.
19. In response, the Company argues that Instagram is not a platform that has an extensive under 18 audience and that, in any event, the ABAC is a content rather than a placement Code. The Company contends that Instagram is an age-gated platform and provides a download warning stating that the advertisement should not be viewed by those under the legal age of drinking. Further, the Company argues that the product was used ancillary to the occasion rather than a cause or contributor to a change in mood or environment, with the term 'cheers' used as a colloquial term for a toast to the long weekend.
20. As is highlighted in paragraph 3, the ABAC is a content rather than a placement Code. This means that the fact that the video clip was placed on Instagram and accessible to a minor would not in and of itself be in breach of the Code, unless the content of the advertisement had a strong or evident appeal to a minor. The Panel does not believe that the content of the advertisement has a strong or evident appeal to under 18 year olds.
21. The Panel also does not believe that the advertisement is in breach of section c of the Code. There is no suggestion that anyone is affected by alcohol and each person is holding a single glass. Alcohol is depicted as part of a celebration, but the mood remains static throughout the advertisement. The images and phrases 'Cheers to the long weekend' and 'Just getting together is

worth celebrating' do not suggest to the reasonable viewer that the cause of any success was the alcohol itself, but rather the company of friends and the prospect of a long weekend.

22. Accordingly, the complaint is dismissed.