



ABAC Adjudication Panel Determination No. 33/18

Product: Premix King
Company: Premix King
Media: Digital (Facebook)
Complainant: Ms Pierce, McCusker Centre for Action on Alcohol & Youth
Date of decision: 9 April 2018
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 Facebook posts promoting a variety of products by Premix King at Ascot Vale (“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 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 on 22 February 2018.
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.
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 not obtained for the marketing communications.

The Marketing Communication

10. The complaint refers to posts on the Premix King Facebook page. Specific mention is made of two of these posts.
11. The first post is dated 18 February 2018 and consists of a video in which a Premix King staff member is shown in a store standing next to and displaying product as he discusses a special deal and delivers the following message:

“Hey Facebookers, if you’re a uni student or a bargain hunter, turn up the volume, grab yourself a chair and sit down, ‘cos your gonna want to listen to this. We all know uni’s back, we all know O week’s comin up, we got unofficial O week, we got O week next week depending on what uni you’re at, so we’re gonna be doing 5 specials for 5 days. So grab your pen and write it down so you can have a listen. Right, day 1, Monday, we’re doing Fat Lambs for \$3.99 a bottle, but better yet, you get a bonus stubby holder, so that’s right, we’ve got Fat Lamb 1.25 stubby holders ready to go for ya. So that’s Monday. On Tuesday, we’re doin Trivoski 22% cheap vodka, 500ml for \$3.99 a bottle, that’s right, this is a perfect mixer, drink it straight, put it with orange juice, put it with raspberry lemonade, whatever you want to do. \$3.99 a bottle for Tuesday only. Right, Wednesday, we’ve got the Big Shots, 8% 250ml cans available in Marguerita Lime, Cola and Berry. This stuff is \$2 a can so you get 2 standard drinks per can for 2 bucks, Wednesday only. Thursday, we’re doing Somersby Apple, Pear, Cloudy Apple 10 packs, \$13.99. That’s right \$13.99 for Somersby Apple, Pear and Cloudy Apple. As you can see it retails at 20 bucks. We’re doing for \$13.99 for Thursday only. And lucky last, Friday, we’re doing the Somersby long necks, we’re going to bang these out the door for \$2.99 each. So 750ml 4.5% \$2.99. So remember, if you’re not shopping at the Premix King, you’re getting ripped off.”

The accompanying post is “Listen up Uni Students. The Kings running 5 specials for 5 days ... each day we’re running a new special. Monday we have Fat Lambs for \$3.99 and buy 3 you get a free stubbie cooler!! Get a pen and paper and write it down. If ya Not Shoppin at the Premix King ya Getting Ripped Off!”

12. The second post is dated 12 October 2017 and shows a game show compare (?) of Eddie McGuire apparently during the television game show ‘What wants to be a millionaire’ where the question and possible answers appear as “Which Fat Lamb has made you lose all your dignity? A. Strawberry and Lime B. Berry C. Ginger D. All of the above”. The accompanying text is “Well Eddie there was this one time [3 laughing emojis]. 3 for \$20 or \$24.99 for a 10pk of cans. If Ya Not Shopping at the Premix King Ya Getting Ripped off.”

The Complaint

13. The complainant is concerned that the posts focus on cheap alcohol, encourage excess consumption of alcohol and irresponsible behaviour and would have strong appeal to young people. It is also stated that the Facebook page appears to have no age gating control in place.

The ABAC Code

14. 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.
- (a)(ii) show (visibly, audibly or by direct implication) or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage;
- (b)(i) have Strong or Evident Appeal to Minors;

15. Definition in Part 6 of the ABAC provides:

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

16. The Company responded to the complaint by email dated 11 March 2018. The principal points made by the Company were:

- To advertise a post on Facebook like the one I Posted you need to set age guide lines therefore the age bracket needs to be min 18years of age therefore anyone under this age can't see this post.
- Also in regards to the pricing that I was advertising.... these products were not being sold under my cost price they were above my cost price and included any taxes that the government has set in place for the industry i.e. Alco pop tax.

The Panel's View

Introduction

17. Premix King is a liquor retailer operating in Melbourne. The Company promotes itself via a company branded Facebook page. The Company posts onto the page various entries, including videos which feature company representatives explaining products and prices available at the outlet.
18. The complainant has identified particular posts on the Company's Facebook page which it believes is promoting alcohol products in an irresponsible manner. The concern is at two levels. Firstly, it is argued that the content of the posts encourage irresponsible alcohol use and excessive consumption as well as the posts having strong appeal to minors. Secondly, it is noted that the Facebook page does not appear to be age gated.
19. The Company is not a signatory to the ABAC scheme and has not contractually bound itself to comply with the Code. That said, the Company has responded to the complaint and the Panel's processes and enabled the determination to be made.

Age gating and the ABAC requirements

20. Since November 2017, the ABAC has contained requirements regarding the placement of alcohol marketing. These Placement Rules apply to digital media platforms such as Facebook and require alcohol marketers to use available age restriction controls to limit to the extent possible the access of under 18 year olds to online alcohol marketing material.
21. The Company advised that it did 'set age guidelines' and it believed that those under 18 years old would not be able to access the Facebook posts. The complainant did not believe age restriction controls had been activated.
22. The operation of age restriction controls can be difficult to independently verify and from the Panel's experience since the commencement of the Placement Rules, the way in which various digital sites operate and interact with each other is somewhat byzantine in complexity.
23. The Panel's Executive Officer however was able to access the Company's Facebook page from the account of a 15 year old and this does strongly suggest that age restriction controls have not been utilised. The Company was invited to respond further to this point, but it did not do so.
24. Based on the available information, it seems the Company has not utilised available age restriction controls (even if it had the intention to do so), and hence Placement Rule 2 has been breached.

The content standards

25. The complainant argues that posts on the Facebook page are inconsistent with the ABAC standards. This is because of:
 - The emphasis on cheap prices and the appeal of this to younger drinkers as well as encouraging excessive consumption;
 - The referencing of 'university' students and these students can be as young as 17 years of age; and
 - Posts which imply excessive consumption is encouraged.
26. The Company did not respond extensively to these concerns but did make the point that the products featured on the posts were not sold under cost price and included all applicable government taxes.
27. In assessing if Code standards have been breached, regard is to be had to the probable impact of the marketing communication by a reasonable person taking its content as a whole.
28. The Company's Facebook page contained numerous posts and it is not practical to comment individually on each post. Overall, the Panel believes the page contains a number of posts which are inconsistent with Code standards.
29. For instance, the post which is a mock up of the TV quiz show 'Who wants to be a millionaire', refers to an alcohol product leading to a loss of dignity. This post suggests excessive alcohol consumption and irresponsible alcohol related behaviour in breach of section 3(a) of the Code.
30. The several posts which reference 'university students' would not be taken by a reasonable person as a deliberate strategy to target under age drinkers. While university students can be 17 years old, a more reasonable interpretation of the references overall would be that they are directed at university students who are adults and over the legal age to consume alcohol.
31. That said, the video identified in the complaint refers to 'O' week, which is the orientation period for first year students. This group are more likely to include a higher proportion of school leavers and hence students aged 17. On balance, this post might be taken as being directed at young students and is in breach of the standard in section 3(b).
32. The relationship between price and alcohol use is beyond the scope of this determination to canvass. The Code does not specifically deal with the price of alcohol products and generally an advertisement which states that a product is on 'special' or is cheaper if purchased in multiple will not breach the Code standard on encouraging excessive consumption. This is because:

- The Code goes to the level of consumption rather than inducements to purchase;
 - There is a clear distinction between the purchase of alcohol and its subsequent pattern of consumption;
 - A 'discount' or cheaper price might reasonably be taken as encouraging the choice of the discounted product over the non discounted product; and
 - Further, given that alcohol by its nature has a relatively long shelf life, a 'good price' might, for instance, see a case of wine purchased rather than a single bottle, but this doesn't imply the alcohol will be then consumed in an irresponsible manner. The product might be stored and consumed over time or by many people and not a single consumer.
33. Each case has to be assessed on its own merits and it is possible that a reference to price could indicate a breach of the standard regarding excessive consumption. For example, if the on premise sale of alcohol for immediate consumption was promoted in a 'happy hour' style, which clearly encouraged rapid consumption.
34. The Panel does not believe the Company's reference to cheap prices can be fairly said to be encouraging excessive or irresponsible patterns of consumption.
35. The Company is strongly encouraged to seek advice in relation to its marketing messages. The use of the ABAC pre-vetting service could give guidance to the Company in the tone of its marketing to better align it with the Code standards.
36. Accordingly, the complaint is upheld.