



## ABAC Adjudication Panel Determination No. 45/20

**Product:** Wine  
**Company:** Vinomofo  
**Media:** Digital (Instagram)  
**Date of decision:** 18 May 2020  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Debra Richards  
Professor Richard Mattick

### Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns an Instagram marketing communication by Vinomofo (“the Company”) and arises from a complaint received 5 May 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 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 meeting 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 5 May 2020.
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 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 not obtained for this marketing communication.

## The Marketing Communication

10. The complaint relates to the following Instagram marketing communication by Vinomofu.



## The Complaint

11. The complainant objects to the advertisement as it:
- takes advantage of the fact that many people are working from home due to the COVID-19 pandemic;
  - is inappropriate and irresponsible to suggest people should drink alcohol while they are working;
  - “Thirstday” suggests alcohol will quench your thirst, which is inappropriate messaging for a product that causes significant harm to health; and
  - “You may feel more inspired for spreadsheets after a wine” suggests alcohol will contribute to a significant change in mood – section (3)(c)(i).

## The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
  - (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)(iv) suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation

## The Company's Response

13. The Company responded to the complaint by letter dated 14 May 2020. The principal points made by the Company were:
  - a) We take our obligations in retailing alcoholic beverages in Australia very seriously. We are a member of Retail Drinks Australia, and a signatory to the "Online Sale of Alcohol Code of Conduct". We take very seriously our obligations under this code and are very supportive of their measures, which are well over and above our obligations under both the liquor licensing requirements of VCGLR, as well as the liquor licensing requirements of all states and territories we deliver to. We also take very seriously the ABAC Responsible Alcohol Marketing Code (the Code) and have adhered to the Code for the 9 years we have been in business. We are also the holders of an interstate retail licence to sell alcoholic beverages within the NT, meaning we must abide by their minimum floor pricing on alcohol (of \$1.30), which we are very supportive of and abide strictly by. This further evidences how seriously we take our social responsibilities around the safe and responsible marketing and sale of alcohol.
  - b) We have been retailing wine for over 9 years now, and this is only our second ever complaint under the Code, the first of which was dismissed by the ABAC panel. We feel this shows our commitment to advertising alcohol in a safe and respectful manner. In marketing alcoholic goods, we are aware of our obligations under the Code not to suggest that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment or to suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation. It is our view that the Advertisement breaches neither Part 3(c)(i) or (iv) of the Code.
  - c) Firstly, the content of the Advertisement does not suggest that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment or that it offers any therapeutic benefit or is a necessary aid to relaxation. The Advertisement is intended to be a light-hearted statement about enjoying a glass of wine during these strange and unusual times we find ourselves in. Obviously, alcohol consumption is a serious matter, and we always seek to ensure we are encouraging people to consume it in moderation and responsibly, however, our view is this doesn't mean you can't be playful in advertising alcohol while still honouring community expectations to drink in a responsible manner. It is evident that the messages are intended to be light-hearted and do not proffer

serious claims about alcohol. This is in line with our overall branding – which is very down to earth and playful. We are confident that no reasonable person would actually be led to believe that consuming a glass of wine with lunch would assist them in working from home or feeling more inspired while looking at a spreadsheet. We do not believe a ‘reasonable person’ would find the message concerning in the way it is presented but rather would find it slightly amusing.

- d) Secondly, we understand our obligations under the Code not to suggest that the consumption or presence of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation. We do not make any assertion, representation or claim that consumption of a glass of wine results in a therapeutic benefit. No health claims are made and there is no language or imagery that suggests alcohol has any therapeutic benefit or is beneficial to a consumer's health. The Advertisement refers simply to "thirstday" as a play on "Thursday". This is a very common play on the word Thursday – the second last day of the working week. A search on Instagram of the #Thirstday hashtag brings up 89,400 posts. In the context, the Advertisement does not suggest in any way that alcohol has a hydrating effect or can quench thirst nor does it suggest that consumption of alcohol will result in a therapeutic benefit. Further, we are of the view that a reasonable person would take the messaging "thirstday" as a humorous play on words rather than a representation that alcohol can be used as a treatment of dehydration. We also point out that the Advertisement shows a closed bottle of wine and does not actually depict the consumption of any alcohol.
- e) We draw your attention to ABAC Adjudication Panel Determination No. 121/18, which concerned a marketing communication which featured the slogan "Iron Jack Thirst Crushing Refreshment". The Panel dismissed the complaint, providing that no positive assertions that the product will provide a benefit to health or wellbeing were made about the impact of the product and taken as a whole a reasonable person would not understand the ad as making claims about the health benefits of the product. As outlined above, we understand that the test employed by ABAC in determining whether an advertisement suggests that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment or suggests that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to the relaxation of a reasonable person depends on how a reasonable person would interpret the Advertisement. The Advertisement is intended to be humorous and not taken literally, and we believe a reasonable person would see it as such.
- f) We are of the opinion that the complaint should be dismissed on the basis that the Advertisement is not in breach of the Code. The Advertisement is extremely light-hearted in nature and is likely to be understood as such by reasonable persons. A reasonable person would not interpret the Advertisement as a suggestion that the consumption of wine either offers a therapeutic benefit or can lead to a change in mood or environment.

## The Panel's View

14. Vinomofu is an international online wine sales and distribution business headquartered in Melbourne. The business started initially in 2007 as an online wine community site (Qwoff) which reviewed and promoted discussion about wine and in 2011 the Company moved into wine marketing, sales and delivery. The marketing style of the Company is irreverent, playful and conversational in tone.
15. This determination concerns an Instagram sponsored post from the Company which has been accessed by the complainant. The post shows a photograph of a bottle of wine being held in a women's hand. The photo is accompanied by text which reads, 'vinomofu Thirstday WFH tip: you may feel more inspired for spreadsheets after a wine on your lunch break. 🍷😌'. The complainant takes issue with the post on several grounds namely:
  - it inappropriately takes advantage of current pandemic restrictions;
  - it is irresponsible to suggest alcohol consumption while working; and
  - 'Thirstday' implies alcohol will quench your thirst when it is detrimental to health; and
  - the reference to feeling inspired for spreadsheets suggests alcohol will contribute to a significant change in mood.
16. The ABAC provides in part that alcohol marketing communications (including social media posts) must not:
  - encourage irresponsible or offensive behaviour related to alcohol use (Part 3(a)(ii));
  - suggest alcohol use may create or contribute to a significant change in mood (Part 3(c)(i)); or
  - suggest that alcohol consumption offers any therapeutic benefit (Part 3(c)(iv)).
17. In assessing the consistency of a marketing communication with an ABAC standard, the Panel is to adopt the standpoint of the probable understanding of the communication by a reasonable person taking its content as a whole. The 'reasonable person' test is drawn from the common law system and means the life experiences, values, opinions and common sense found in a majority of the community is the benchmark. If the message within the marketing item could be interpreted in several ways, it is the most probable interpretation rather than a possible but less likely interpretation which is to be preferred.
18. The Company argues that the post is consistent with ABAC standards. It is contended:
  - the post is intended to be lighthearted and playful which is in line with the Company's overall branding;
  - it is self-evident that the message being light-hearted, does not proffer serious claims about alcohol and a reasonable person would not actually believe that consuming a glass of wine with lunch would assist in working from home or feeling inspired while looking at a spreadsheet;
  - no claim is made as to wine offering a therapeutic benefit or that alcohol has a hydrating effect; and

- Thirstday is a common play on Thursday and would be understood as a humorous play on words.
19. The post makes a relatively oblique reference to the current COVID-19 pandemic and associated governmental restrictions through the abbreviation 'WFH' which presumably means 'work from home'. It is not surprising that marketing, particularly that conducted through highly responsive online channels, might reference the pandemic given its profound impact on everyday life. There is nothing inherently irresponsible in mentioning the pandemic in alcohol marketing. While it is possible that an alcohol marketing message might be framed to reference the pandemic and government controls in an irresponsible manner and contrary to the ABAC standards, simply alluding to the reality of the pandemic and nothing more is not inconsistent with the Code. What is important is that alcohol is marketed and portrayed consistently with the ABAC standards irrespective of a background event being referenced e.g. Christmas, a season, football finals or some other significant occurrence.
  20. Humour in marketing is a relevant consideration in how a reasonable person will interpret a marketing communication. Australians have a robust sense of humour and the common sense to understand if something is being said ironically or in a highly exaggerated manner. That said, humour will not save a marketing communication if the humour itself is based upon behaviours related to alcohol use which are evidently inconsistent with the responsible use of alcohol. For instance, an ad which portrayed a drunk person engaging in ostensibly amusing behaviour would likely breach the ABAC standard on not encouraging excessive alcohol consumption.
  21. It can be accepted that the Company did not intend to convey a message inconsistent with the ABAC standards and that it did intend for the post to be consistent with its overall irreverent and playful brand positioning. The test however is not the intention of the marketer but how the marketing communication would be probably understood by a reasonable person. In this case the viewer is taking their understanding from the Instagram post alone and it cannot be assumed that the viewer is otherwise familiar with the tone of the Company's usual communication style as say found on the Company website.
  22. The Panel believes the post does breach the Part 3(c)(i) standard through suggesting that the consumption of alcohol might contribute to a significant change in mood. This arises from the statement 'you may feel more inspired for spreadsheets after a wine on your lunch break' as it suggests that alcohol will contribute to a change in mood and a person having greater enthusiasm to tackle a boring or difficult task. Even if the Company's argument is accepted, that the statement is light-hearted and humorous and wouldn't be taken as proffering serious advice, this humour is based upon an assumed shared common experience of using alcohol to help with an unpleasant situation. This sentiment is inconsistent with the ABAC standard.
  23. The Panel does not believe the post otherwise is inconsistent with the ABAC standards. In reaching this conclusion the Panel noted:

- a reasonable person would not take the post as suggesting alcohol is hydrating or offers a positive health benefit;
- there is no reasonable implication that alcohol should be consumed to excess or beyond the levels recommended in Australian Alcohol Guidelines; and
- referring to 'a wine' (reasonably taken to mean a single glass of wine) at lunch is not of itself inconsistent with Australian Alcohol Guidelines or the moderate and responsible consumption of alcohol.

24. The complaint is upheld in relation to Part 3(c)(i) and dismissed in all other respects.