

ABAC Adjudication Panel Determination No. 53/20

Product: Pure Scot
Company: Bladnoch Distillery
Media: Digital (Instagram)
Date of decision: 11 May 2020
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 an Instagram marketing communication for Pure Scot Whisky by Bladnoch Distillery (“the Company”) and arises from a complaint received 6 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

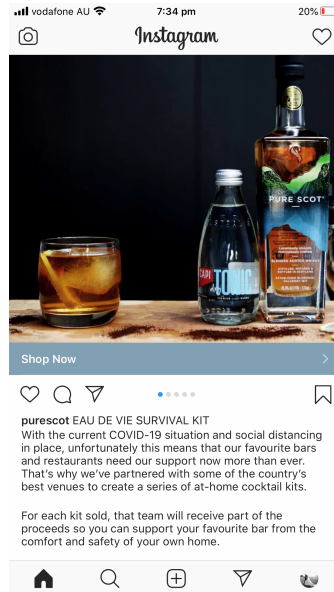
7. The complaint was received on 6 May 2020.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint 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 marketing communication on the Pure Scot Whisky Instagram account.



The Complaint

11. The complainant objects to the advertisement as it suggests that the Scotch is the 'water of life' and that the consumer needs this purchase in order to 'survive' isolation, which is a direct contradiction of the facts, blatantly ignoring the level of harm that alcohol can do in the long and short term.

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 email dated 7 May 2020. The principal points made by the Company were:
- a) As a small, independent brand, Pure Scot Whisky is not a member of the ABAC, however we agree with the overarching principles of responsible advertising of alcohol. Pure Scot Whisky would never intentionally aim to be in breach of responsible alcohol advertising standards. As we are not a member of ABAC, we did not submit this ad for Pre-Vetting.

- b) Pure Scot categorically rejects the premise of this complaint. In the use of the phrase 'Eau De Vie' in reference to its cocktail kits, Pure Scot was specifically referencing the award-winning and internationally recognised Melbourne and Sydney cocktail bars of this name (<https://eaudevie.com.au/>). Each cocktail kit sold is in support of these bars, as clearly described in the text of the ad. A Google search of this phrase gives a link to these venues as its top result; therefore, we suggest that a reasonable consumer would associate this phrase with the venues, and not by its literal translation from French into English as 'water of life'. The meaning of eau de vie as per Merriam Webster (<https://www.merriam-webster.com/dictionary/eau-de-vie>) is in fact a distilled alcoholic beverage, and the phrase eau de vie is the etymological origin of the word 'whisky' (<https://www.merriam-webster.com/dictionary/whisky>). Therefore, we reject the premise of the complaint that a reasonable consumer would infer that this ad suggested that Scotch Whisky is literally conferring 'life' or some other therapeutic benefit in contravention of guideline 3(c)(iv).
- c) The phrase 'Survival Kit' did not suggest that Pure Scot Whisky was providing any therapeutic benefits or that it was needed for the consumer to survive. The phrase was referencing the desire to support the survival of the hospitality industry while the country's lockdowns apply to these businesses and more specifically support our friends at Eau De Vie. This was explicitly stated in the body of the advertisement [...our favourite bars and restaurants need our support...] and no reference is made to the effects of Whisky consumption on mood, environment, or relaxation.

The Panel's View

14. Since around 23 March 2020 government-imposed restrictions to contain the COVID-19 pandemic has resulted in the temporary closure of in-house service within licensed premises across Australia. This means restaurants, hotels, bars and related venues have not been able to serve patrons within their venues although a number of businesses have continued to operate to some extent through supplying take away orders. Eau-De-Vie is the name of a bar with locations in Sydney and Melbourne which has been closed due to the pandemic.
15. Pure Scot is the brand name of a scotch whisky. The Company's website explains that the whiskey is distilled at the Bladnoch Distillery in the 'Scottish Lowlands' and that the Distillery is owned by an Australian named David Prior. In any event, Pure Scot is available on the Australian market and is promoted via social media channels. This determination concerns a post on the Company's Instagram account.
16. The post shows a photograph of a bottle of the product, a bottle of tonic water and a glass with ice presumably containing the product. The accompanying text refers to the pandemic and social distancing and explains 'our favourite bars and restaurants need our support...'. The message goes on to state the Company had partnered with 'some of the country's best venues' to create a series of at-home cocktail kits. The text has the title 'EAU DE VIE SURVIVAL KIT'. The Company states this relates to a cocktail kit it is selling in association with the Eau-De-Vie bar.
17. The complainant believes the post to be highly irresponsible in its message about alcohol. This stems from the phrase 'Eau De Vie' which translated from French to

English means 'water of life'. Presumably the complainant contends this means the post is saying that scotch whiskey is claimed to be the equivalent of water. Secondly, the 'survival kit' reference in the post is taken to mean that a consumer needs to purchase the cocktail kit in order to survive the personal isolation restrictions imposed by government to contain the spread of the COVID-19 virus.

18. The ABAC provides that an alcohol marketing communication such as an Instagram post must not suggest that alcohol may contribute to a significant change in mood nor can it be suggested that the consumption of alcohol offers any therapeutic benefit. The assessment of whether an ABAC standard has been breached is from the standpoint of the probable understanding of the marketing item by a reasonable person. This means that the life experiences, values and opinions common in a majority of the community is to be the benchmark.
19. The Company argues that the post is consistent with the ABAC standards. It is pointed out the title, 'Eau De Vie survival kit', relates to the cocktail bars of that name and that 'survival kit' is about helping the bar survive its closure due to the pandemic. It is contended that a consumer would not understand the post as making any claims about the product or a cocktail made with the product as having any therapeutic benefit.
20. It is to be expected that marketing communications might, during an event as significant as the pandemic, make a reference to impactful circumstances such as social isolation, lockdowns, and other restrictions on ordinary life. Marketing, including the promotion of alcohol beverages, often reference background events eg Christmas, the season, football finals etc. The ABAC standards don't restrain such references and it is no breach of the ABAC for marketers to be referencing the current pandemic per se.
21. Just as in other circumstances, references to background events such as the pandemic need to be consistent with the ABAC standards. In this case the Panel does not believe the standards have been breached. In reaching this conclusion the Panel noted:
 - The phrase 'Eau De Vie' might be recognised by some consumers as the name of the Sydney and Melbourne bars, but it is likely most consumers would not automatically associate the phrase with the bars. Equally, while a majority of viewers of the post might appreciate the phrase is French language, it is likely a majority would not know what the phrase translated to English means.
 - The body of the text establishes the relationship of the cocktail kit with the bars and restaurants and that sale proceeds in part will go to a bar associated with the cocktail.
 - The term 'survival kit' in the context of the post as a whole would be taken as referring to the pandemic and the restrictions placed on bars and restaurants.
 - A reasonable person reading the post as a whole would not believe any therapeutic benefit was being attributed to the 'survival kit' cocktail and the reference to 'survival' would be understood as simply referencing the pandemic.
22. The complaint is dismissed.