



ABAC Adjudication Panel Determination No. 43/20

Product: Wine
Company: Magnum + Queens
Media: Digital (Instagram)
Date of decision: 3 June 2020
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Debra Richards
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns the content and placement of an Instagram advertisement by Magnum + Queens (“the Company”) and arises from a complaint received on 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”) – 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 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, 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 5 May 2020.
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 was determined within this timeframe.

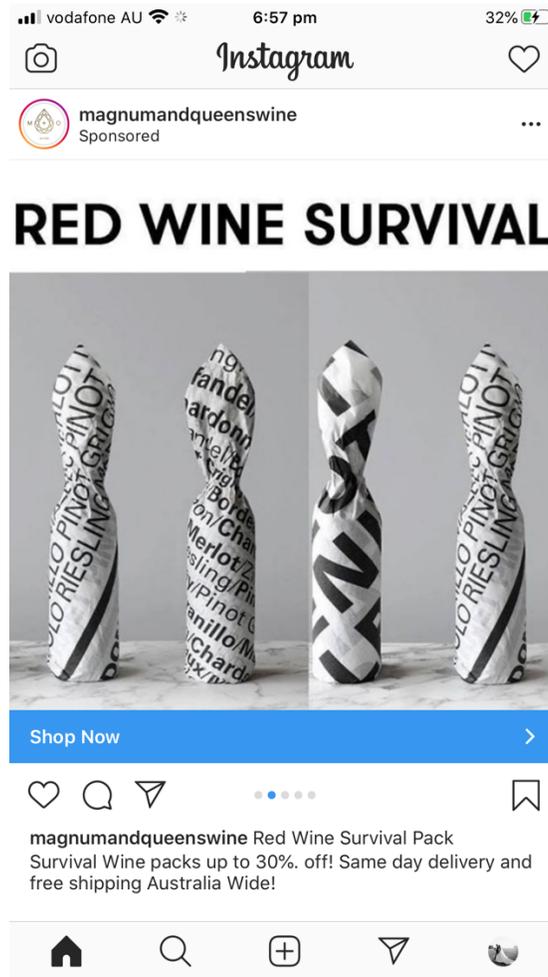
Pre-vetting

9. The quasi-regulatory system for alcohol beverage marketing features independent examination of the content of most proposed alcohol beverage

marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for the content of the advertisement.

The Marketing Communication

10. The complaint relates to the following post seen by the complainant on their Instagram feed on 17 April at 6:55pm.



The Complaint

11. The complainant is concerned that the advertisement:
- implies that alcohol is a necessity;
 - suggests that wine would make it easier to survive the COVID-19 restrictions – sections (c)(i) and (c)(iv) – when the evidence shows that in the long-term, alcohol consumption can contribute to increased stress, anxiety, and depression and so it should not be promoted as a solution to surviving the COVID-19 pandemic; and
 - is not age-gated.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (b)(iv) be directed at Minors through a breach of any of the Placement Rules
 - (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

13. Part 6 of the ABAC Code includes definitions including:

Placement Rules means:

- (i) A Marketing Communication must comply with codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Alcohol Guidelines).
- (ii) If a media platform on which a Marketing Communication appears has age restriction controls available, the Marketer must utilise those age restriction controls to exclude Minors from the audience
- (iii) If a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, a Marketing Communication may only be placed where the audience is reasonably expected to comprise at least 75% Adults (based on reliable, up to date audience composition data, if such data is available)
- (iv) A Marketing Communication must not be placed with programs or content primarily aimed at Minors.

The Company's Response

14. The Company responded to the complaint by letter dated 19 May 2020. The principal points made were:
 - a) Magnum + Queens is a small independent business and not a member of ABAC. However, it agrees with the overarching principles in the Code and takes its obligations with respect to responsible marketing very seriously. Magnum + Queens would not intentionally breach the Code and because the business is not a member, it did not submit the advertisement for Pre-Vetting.
 - b) The advertisement is part of an overall marketing campaign which adopts a thematic nomenclature, borrowed from populist culture, for adults who have been prevented from doing traditional activities because of COVID-19.

- c) The statement which is the subject of the complaint is the headline “Red Wine Survival” on the Magnum + Queens Instagram page. The advertisement has been removed pending the outcome of the complaint process.
- d) The wording used in the advertisement is to be read in context of the current COVID-19 environment. It is not to be read as making any assertions that the consumption or presence of an Alcohol Beverage:
- *“may create or contribute to a significant change in mood or environment” [section 3(c)(i)]; and*
 - *“offers any therapeutic benefit or is a necessary aid to relaxation” [section 3(c)(iv)] .*
- e) Magnum + Queens is a specialist retailer of fine beverage products from all over the world. Accordingly, the “average person” who purchases from Magnum + Queens is more educated / has a deeper understanding about the contents and health effects of wine.
- f) The word “Survival”, in the context of the post as a whole, is an obvious reference to COVID-19 restrictions on in-store shopping. The word “Survival” is a play on the understood concept of being stranded on a desert island and unable to access things in the normal course. This is the current environment that COVID has presented to consumers. The advertisement is not intended to mean that alcohol provides a health benefit and is essential to “survive” the COVID-19 restrictions.
- g) A reasonable person, reading the post as a whole would not believe any “therapeutic benefit” was being attributed to the “Red Wine Survival” pack. The word “Survival” would be seen as an obvious reference to the circumstances brought upon by COVID-19.
- h) The Red Wine Survival package does not provide any special or additional features to that of the other wine packages advertised by Magnum + Queens which are all a play on colloquial phrases. The statement “Red Wine Survival” is used as a headline, which is a commonly understood location for statements of puffery and/or humour. In this case there is no call to action urging potential consumers to choose wine as a way of improving their health to survive the COVID-19 restrictions. We would not expect any consumers to seriously consider red wine as a food or water source that enables them to “survive” the COVID-19 restrictions, as it is well know that alcohol overconsumption can cause serious health issues.
- i) Magnum + Queens is committed to distributing promotional and marketing material that doesn’t promote or encourage the irresponsible consumption of alcohol. Our aim is for consumers to enjoy our products responsibly and in moderation.
- j) The Complaint is against a post on the Magnum + Queens Instagram page. Followers of this page typically come from purchasing products on the Magnum + Queens website (www.magnumandqueens.com.au).

Followers of the Magnum + Queens Instagram page are typically adult consumers who:

- attended the Magnum + Queens physical store and legally purchased alcohol;
- purchased products through the online store and subscribed as a member of the “Queens Subscription” which provides information to subscribers about the business and its products;
- were recommended by other adults; or
- have a deeper interest and understanding of wine and purchase original and different spirits that come from smaller and boutique suppliers as the typical customer is not someone that would purchase based purely on price and without an understanding of the products.

Accordingly, it is highly unlikely that minors would know about Magnum + Queens or its Instagram page.

- k) For the reasons outlined above, we kindly request that the Complaint be dismissed.

The Panel’s View

15. Former Rockpool sommelier Virginia Selleck in collaboration with Kristen Dickie launched an online wine store- Magnum+Queens- in 2017. A physical store was subsequently opened in South Melbourne in 2018. The Company markets its products and home delivery via social media channels and this determination concerns an Instagram post of 17 April 2020 during the most restrictive phase of government measures to deal with the COVID-19 pandemic.
16. The post is titled 'Red Wine Survival' and shows a black and white photograph of four wine bottles each wrapped in paper. The wrapping paper is printed with the names of wine varieties such as Riesling, Merlot and Pinot Grigio. Brief accompanying text reads- 'Red Wine Survival Pack- Survival Wine packs up to 30% off! Same day delivery and free shipping Australia wide!' The complainant believes the post implies alcohol is a necessity and that wine would make it easier to survive COVID-16 restrictions. Further, it is contended the Company's Instagram account is not age gated.
17. Accordingly, the complaint brings into consideration both the ABAC content standards and the Placement Rules. The relevant content standards provide that alcohol marketing must not suggest that the consumption of alcohol may create or contribute to a significant change in mood nor offer any therapeutic benefit. To the complainant the reference to 'survival' in the post implies use of alcohol in a manner which breaches these standards.
18. The Company contends the standards have not been breached and the word 'survival' is contextualised by the post and would be taken as simply a reference to the pandemic and not a suggestion about the effect of consuming the product. It is contended a person needs food and water to survive and no reasonable consumer would take the post as placing red wine into that category.

19. The Panel does not believe the post breaches the Part 3(c) standards. The reference to 'survival' would most probably be understood as a colloquial way to draw upon the background circumstances of the pandemic and the associated government measures to contain the spread of the virus. The photograph used in the post and the accompanying text do not impute to the product any positive health benefits nor does the post use language or other prompts to suggest the product is contributing to a significant change in mood. Taken as a whole, the post would not be interpreted by a reasonable person in the manner argued by the complainant.
20. The ABAC Placement Rules have the policy aim that alcohol marketing should be directed toward adults and to the extent possible away from minors. The Rules endeavour to achieve this goal by creating obligations on marketers to use the technical capacity of different media to target the audience of alcohol marketing communications. Broadcast mediums such as free to air television have no particular technical capacity to target audiences so proxy requirements are used such as the reasonably expected audience of a program with which an advertisement is broadcast. In contrast, social media channels such as Instagram do have technical capacities to target audiences based on a range of characteristics such as age.
21. Placement Rule 2 provides that if a media platform such as Instagram appears to have age restrictions controls available, then a marketer must use those controls to exclude minors from the audience. Age restriction controls offered by social media platforms are not always particularly easy to navigate and available age controls can vary between private and corporate users of the platform and even between different categories of corporate account holders. That said, Instagram does have age restriction controls which the Company should have been able to utilise.
22. The Company mounts an argument about the background of its customers and how it believes a person would come to view its Instagram posts. It is submitted that it would be highly unlikely that minors would know about the Company or its Instagram account. It can be accepted that the Company knows the characteristics of its customers, but this is a different question than whether Instagram affords the Company the choice to age restrict its Instagram account and if, as a matter of fact, the Company utilised the available controls. In relation to the ABAC requirement it seems the Company did not use the age restriction controls reasonably open to it and hence it was in breach of Placement Rule 2.
23. The complaint is dismissed in relation to Part 3(c) and upheld in relation to Placement Rule 2.