



ABAC Adjudication Panel Determination No 201/21

Product: State of Light Wine
Company: Constellation Brands
Media: Instagram Post
Date of decision: 13 September 2021
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 post for State of Light wine by Constellation Brands (“the Company”). It arises from a complaint received on 23 August 2021.
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:
 - 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;

- 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 23 August 2021.
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 the Instagram posts

The Marketing

10. The complaint concerns the following Instagram post:



The Complaint

11. The complainant objects to the marketing communications as follows:
 - *Does not promote moderate consumption and highlights drinking near open bodies of water.*

The ABAC Code

12. 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.
 - (d) show (visibly, audibly or by direct implication) the consumption of an Alcohol Beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical co-ordination, such as the control of a motor vehicle, boat or machinery or swimming.

The Company's Response

13. The Company responded to the complaint by letter emailed on 26 August 2021. Its principal comments were:
 - We refer to your letter dated 23 August 2021 in relation to a complaint received by ABAC about an Instagram story featuring State of Light Wine created by digital influencer Tahlia Brown on August 20 2021 as reposted by Dialogue PR & Communications Pty Ltd (Dialogue PR) on the same day (the Instagram Posts).
 - Firstly, thank you for raising this complaint with us and providing us with the opportunity to respond to the issues raised by the complainant. Constellation New Zealand Brands Limited (Constellation) takes its obligations to responsibly promote its products very seriously and is committed to the ABAC Scheme.
 - For the reasons set out below, and with respect to the complainant, we submit that there has been no breach by Constellation of Part 3(a)(i) of the Code or Part 3(d) of the Code and complaint 201/21 should be dismissed.

- Separately, we confirm that the Instagram Posts the subject of this complaint have already been removed as they were in the form of an Instagram story which by their very nature expire **24 hours** after posting.

Alcohol Advertising Pre-vetting Service Approval

- The Instagram Posts referred to in the complaint did not receive Alcohol Advertising Pre-Vetting Service (AAPS) Approval for its content. ABAC indicates that AAPS Approval is not compulsory for digital content.

Scope of the Code

- Whether the Instagram Post falls within the definition of a Marketing Communication will depend on whether the post itself is within the reasonable control of Constellation. While the post itself was not within the immediate control of Constellation, Constellation acknowledges that the Marketing Communication formed part of a public relations campaign facilitated by its PR agency, Dialogue PR.
- Dialogue PR has been working with Constellation since July 2019 under a retainer agreement to perform ongoing public relations activities in connection with the State of Light brand and other brands within the Constellation portfolio. Dialogue PR's scope includes the engagement of social media influencers to promote its products online. Dialogue PR is considered one of Australia's leading PR agencies in the alcohol and beverage industry.
- The Instagram Posts were not generated by Constellation. However, as part of a public relations campaign Tahlia Brown initiated the first post in connection with the receipt of a range of gifted State of Light wines. Tahlia's post was subsequently shared by Dialogue PR.
- In discussing these issues with Dialogue PR, we understand that Dialogue PR could have requested that Tahlia Brown delete or modify the post however as Dialogue PR was not of the view that the post was in breach of the ABAC Code, it did not do so. Similarly, Dialogue PR would not have shared the post if it believed that the post was in breach of the ABAC Code.

Responsible and moderate portrayal of Alcohol Beverages

- The picture and the accompanying words do not imply directly or indirectly that the wine should be consumed in a manner which causes excessive or rapid consumption of alcohol. We do not believe that there has been any breach of Part 3(a)(i) of the Code because:

- There are no persons visible in the photo and no direct implication of consumption can be drawn;
- The wine is not open, there are no wine glasses in or around the photo which imply that the wine is going to be consumed, let alone rapidly or excessively;
- The Instagram Post includes the following words “What a package to receive on a Friday! @stateoflightdrinks”. These words do not add any further contextualisation to the photo which encourage the rapid consumption of alcohol, but rather acknowledge the receipt of a gift;
- The wine is lower in alcohol than typical wines, which is also referenced in the text accompanying the photo.
- For these reasons, it seems quite unlikely a reasonable person would take the post as a whole as encouraging the excessive or rapid consumption of alcohol or abuse of alcohol.

Alcohol and Safety

- We do not believe there has been any breach of Part 3(d) of the Code for the following reasons:
 - There are no persons visible in the photo and no direct implication of consumption can be drawn whilst swimming;
 - The wine is not open, there are no wine glasses in or around the shot which imply or connect the drinking of alcohol with the act of swimming;
 - There is nothing in the ABAC Code which prohibits the placement of alcohol next to a body of water. The offending conduct is where that placement links the act of drinking to the act of swimming, which is not evident here for the reasons set out above.
 - To the extent that the photo is contextualised by the accompanying text, there is no suggestion in the text that swimming will be undertaken whilst drinking the wine. The text merely points to the fact that the wine was gifted and that it is lower in alcohol;
 - The purpose of the photograph is to provide a pleasing setting to highlight the wine itself. This is consistent with another post made by Tahlia showcasing products that she promotes. For example, on 28 July 2021 Tahlia posted four tubes of lip gloss next to the same

pool. A reasonable person would not assume that Tahlia intends to swim whilst applying four different colours of lip gloss. Just as the same reasonable person would not assume that Tahlia intends to swim and drink three bottles of wine. Rather, a reasonable person would believe that Tahlia has placed the products next to the pool as a pleasing way to display the products for the purpose of promotion to her followers.

- Whilst we acknowledge that each case will be determined on its merits, we respectfully draw the Panel to its previous decisions in:
 - Hawkers Pale Ale Instagram Advertisement; and
 - Capital Brewing XPA Instagram Post
- In both of the above cases the Panel dismissed the complaints in similar factual scenarios, where there were no people pictured in the photos drinking the alcohol which was being promoted.
- For the reasons set out above we submit that there has been no breach by Constellation of Part 3(a)(i) of the Code or Part 3(d) of the Code and complaint 201/21 should be dismissed.

The Panel's View

14. This determination deals with the consistency of an Instagram post with the ABAC standard in Parts 3 (a)(i) and 3 (d) of the Code. The post is a photograph of three bottles of the Company's product next to a swimming pool. The accompanying text reads – "What a package to receive on a Friday! [@stateofflightdrinks](#) These bottles are only 7% alcohol which is pretty much half of a typical w". The complainant contends the post is not encouraging moderate consumption of an alcohol beverage and highlights drinking near open bodies of water.
15. The ABAC applies to alcohol marketing communications generated by or within the reasonable control of an Australian producer, distributor, or retailer of alcohol beverages. While the post identified by the complainant was sourced on the Dialogue PR Instagram account, the Company has acknowledged that the post was by its agency and within its reasonable control, making it a marketing communication for ABAC purposes.
16. The ABAC standards do not permit:
 - excessive or rapid alcohol consumption to be shown or encouraged; or

- the depiction of any alcohol consumption before or during an activity that, for safety reasons, requires a high degree of alertness or physical co-ordination, such as swimming.
17. Assessment of the consistency of a marketing communication with an ABAC standard is from the standpoint of the probable understanding of the marketing by a reasonable person. This means the life experiences, values and opinions held in most of the community is the benchmark. If the message in a marketing communication can be interpreted in several ways, it is the most likely interpretation which is to be preferred over a possible but less likely meaning.
18. The Panel does not believe the post is inconsistent with the ABAC standards. It is noted:
- the photograph is staged to highlight the product and does not show any person in the shot;
 - the bottles do not appear to be opened, no wine glasses are shown, and no direct implication of consumption, excessive or otherwise, can be drawn;
 - the accompanying text supports the photograph being a staged shot, and includes no implication of excessive consumption or consumption before or during activities in the pictured swimming pool; and
 - it is consistent with the ABAC to place an alcohol product in a pleasing setting and a reasonable person would not take the post as encouraging excessive consumption of wine or drinking wine before or during an activity that requires a high degree of alertness or physical co-ordination.
19. The complaint is dismissed.