



ABAC Adjudication Panel Determination No 256/21

Product: Wine
Company: Good Pair Days
Media: Email
Date of decision: 6 December 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 email marketing by Good Pair Days (“the Company”). It arises from a complaint received on 5 November 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 meet 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 November 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 an 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.

The Marketing

10. The complaint concerns the following meme, which was contained in a newsletter emailed on 9 April 2021:

**Me handling sugar-high kids
vs.
Me with wine handling sugar-high kids**



Good Pair Days

The Complaint

11. The complainant objects to the marketing communication as follows:

The email contains a meme that may breach the ABAC Code. The meme shows two pictures of a rabbit (the email was received around Easter), one visibly angry and one relaxed with a caption 'Me handling sugar-high kids vs. Me with wine handling sugar-high kids'.

This seems like it breaches 3(c)(i) in the Code which states that a marketing communication must not 'suggest that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment'.

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.

The Company's Response

13. The Company responded by letter emailed on 11 November 2021. Its principal comments were:
- Wine Gallery Pty Ltd trading as Good Pair Days is a responsible retailer of alcoholic beverages and is aware of the requirements of the ABAC Responsible Alcohol Marketing Code (the Code).
 - We note that this complaint relates to our weekly newsletter sent to subscribers and others on our mailing list on 9 April 2021.
 - We question why a complaint has been made now about a weekly newsletter issued over 6 months ago. There have been 30 weekly newsletters sent to our customers since this one.
 - We have attached the entire weekly newsletter for important context in relation to the meme complained about. You will note that:
 - The meme was included in the newsletter under a clear heading – “Joke of the Week” and not connected to any offering of a product or service.
 - The newsletter contains product information, educational information and other matters of interest to our customers like matching recipes – and of course a joke.
 - This newsletter coincided with Easter and hence the joke had both a wine and Easter theme.
 - While there is an argument that the weekly newsletter is not subject to the Code, it is certainly the case that the “Joke of the week” does not of itself in

any way promote a service or product of Good Pair Days and as such is outside the scope of the Code.

- In any event, if the Code applies then we believe that the marginal change in expression on the face of the rabbit does not imply a “significant” change in mood. The use of the word “significant” in the Code is important and cannot be disregarded as it appears the complainant has done. We accept the meme shows and takes its humour from a change in mood due to the inclusion of wine in the scenario but do not agree that it suggests a significant change.
- Finally, we note the meme was used in this one newsletter and will not be used again.
- Neither the newsletter nor the meme received pre-vetting approval.
- For the reasons set out above we believe the meme did not breach the Code and request that you dismiss the complaint.

The Panel’s View

14. Good Pair Wines is an online alcohol retailer which provides personalised wine deliveries to its members. Each week, the Company emails its Weekly Wine Chats, a newsletter containing wine stories, food and drink recipes, wine pairing suggestions, and jokes about wine. It is a meme included in one of its newsletters that has drawn this complaint.
15. The meme shows two pictures of the same rabbit nibbling on some foliage. In the first picture, the rabbit has narrowed its eye and looks as though it is angry or stressed. In the second picture, the rabbit’s eye is more rounded, making it look more relaxed. The photos are captioned ‘Me handling sugar-high kids vs me with wine handling sugar-high kids’.
16. The complaint raises the concern that the marketing breaches Part 3 (c)(i) of the Code which prohibits the suggestion that the consumption or presence of alcohol may create or contribute to a significant change in mood or environment.
17. The Company does not believe that the meme breaches the Code and has requested that the Panel dismiss the complaint. Its primary contentions are:
 - there is an argument that the weekly newsletter is not subject to the Code;
 - the ‘Joke of the Week’ does not promote a service or product of Good Pair Days and as such is outside the scope of the Code;

- should the Code apply, the marginal change in expression on the rabbit's face does not imply a 'significant' change in mood; and
 - it is accepted that the meme shows and takes its humour from a change in mood due to the inclusion of wine in the scenario but it does not suggest a 'significant' change.
18. The Company is not a signatory to the ABAC Scheme and hence has not given a prior commitment to market consistently with ABAC standards. The Company however has fully cooperated with the complaint process and supports responsible alcohol marketing practices. As a result, the Panel is able to make its determination.
19. The initial question is whether the newsletter and the meme, entitled 'Joke of the Week' is actually a 'marketing communication' to which the ABAC Scheme applies. The ABAC applies to a 'marketer', which the Code defines as a producer, distributor or retailer of alcohol beverages. As the Company's business model involves the supply of wines to its members for payment, it is a 'retailer' for ABAC purposes. Not every 'communication' created by a marketer is captured by the ABAC. For instance, emails sent by the Company to its contractors or employees about HR issues would not be an alcohol beverage marketing communication.
20. The complaint concerns one edition of a weekly newsletter the Company sends to its members. The purpose of the newsletter is to connect the Company with its customers, establish and reinforce its wine industry credentials and promote its ability to use this knowledge and understanding to create a unique customer experience. This is done with the aim of informing members about wine but in doing so the newsletter is promoting the Company brand. It is evident that the newsletter is a marketing communication and that alcohol use should be modelled in the newsletter consistently with the ABAC standards.
21. Further, while the meme is contained in a section of the newsletter under the heading - 'Joke of the Week!' - it cannot be reasonably regarded as separate and apart from the balance of the newsletter. Accordingly, the Panel believes the meme is part of an alcohol marketing communication.
22. The Company accepts that the humour in the meme relies on a change in mood occasioned by the inclusion of wine in the second scenario but argues this change is not 'significant' and hence does not breach the standard. The Panel believes that the Part 3 (c)(i) standard has been breached, noting that:
- the intended humour of the joke referred to in the complaint arises from the entirety of the meme, including the accompanying text, and not simply the rabbit's change in facial expression;

- the marginal change in the rabbit's facial expression, combined with the words "Me handling sugar-high kids vs me with wine handling sugar-high kids", delivers a message that drinking alcohol makes it easier to remain calm when handling a stressful situation, in this case, energetic, rowdy and excited children;
- the underlying humour of the joke is not achieved if, overall, a significant change in mood is not portrayed; and
- a reasonable person has a sense of humour and would not take the meme as the Company seriously advocating for alcohol to be used irresponsibly, but the humour does rely on an assumed shared common understanding that alcohol can be used to change mood and cope with stress and it is this implicit messaging about alcohol that is inconsistent with the ABAC standard.

23. The complaint is upheld.