



ABAC Adjudication Panel Determination No 104/22

Products: Wine and gin
Company: Tamburlaine Organic Wines
Media: Facebook
Date of decision: 16 December 2022
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”) arises from a complaint received on 16 November 2022 and concerns social media marketing via Facebook by Tamburlaine Organic Wines (“the Company”).
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 the 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 16 November 2022.

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 sought for the marketing.

The Marketing Communication

10. The complaint relates to three different Facebook posts:

Post 1



Post 2 – 10 Photos

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Members SPECIALS
WAREHOUSE MANAGER SPECIAL
POINT TO GO RANGE
WAS \$360
\$180
- STRAIGHT DOZENS 50% OFF -

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DON'T FORGET THE PUDDING!
-STICKERS ARE INCLUDED IN THE MIX & MATCH BOTTLES!
1 DOZEN = 40% OFF
2 DOZEN = 45% OFF
3+ DOZEN = 50% OFF

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New HERDING CATS
-EXCLUSIVE TAMBURLAINE ORGANIC WINE-
CHRISTMAS SPECIAL

12 BOTTLES	24 BOTTLES	36 BOTTLES
\$80	\$160	\$240
\$64	\$120	\$168
40% OFF	45% OFF	50% OFF

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Members SPECIALS
MIX & MATCH
UP TO 50% OFF MIXED DOZENS*
1 DOZEN = 40% off
2 DOZEN = 45% off
3 DOZEN = 50% off

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A gift from us...

SECRET SANTA
PURCHASE CASES OF 5 WINE AND GET A FREE GIN! *
OR
PURCHASE CASES OF 4 WINE AND GET A FREE STICKY! *

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HOLIDAY GIVEAWAY
EVERY PURCHASE PUTS YOU INTO THE DRAW TO WIN A HOLIDAY AT ONE OF OUR PREMIUM CELLAR DOOR STAYS IN THE HUNTER VALLEY OF MILLTHORPE NEAR ORANGE

ONE TO BE WON EVERY TWO WEEKS!*

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Christmas Holiday SPECIALS
MEMBERS AND FRIENDS
UP TO 50% OFF
- FREE SHIPPING ON DOZENS

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Members SPECIALS
WAREHOUSE MANAGER SPECIAL
WINE LOVERS RANGE
WAS \$260
\$144
- STRAIGHT DOZENS 50% OFF -

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Members SPECIALS
WAREHOUSE MANAGER SPECIAL
BULL IN A CHINA SHOP
WAS \$260
\$144
- STRAIGHT DOZENS 50% OFF -

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#TamburlaineOrganicWines #OrgancWine #VeganFriendly #AustralianOrganicWine #AustralianWine

Members SPECIALS
WAREHOUSE MANAGER SPECIAL
MARK DAVIDSON RANGE
WAS \$260
\$108
- STRAIGHT DOZENS 50% OFF -

6 1 share 128 views

Post 3



The Complaint

11. The complainant objects to the marketing as follows:
 - *Flippant regard to drinking in moderation. And cute promotions that my grandchildren thought were kids' ads.*
 - *This company should know better and should not be running sales promotions for alcohol on Facebook.*

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;
 - (b)(i) have Strong or Evident Appeal to Minors.

The Company's Response

13. The Company responded to the complaint by email on 6 December 2022. The principal comments made by the Company were:
- The alcohol marketing communications referred to in the complaint did not receive Alcohol Advertising Pre-vetting Service Approval for their content and/or placement as we believed that this was not a mandatory prerequisite for Facebook posts.
 - I reject the complaint that Post 1 has strong or evident appeal to minors simply because there is a picture of a puppy and some strawberries. Yes, the puppy is cute, but as our Facebook page is for a winery, our posts are clearly meant for adults – I'm not sure why the Complainant was showing their grandchildren Facebook posts from a winery page in the first place – were they deliberately looking to be outraged?
 - Our range of gin is called Herding Cats (a name derived from our common saying that running a business is like herding cats...) To have a puppy saying "After a long day of herding cats" we thought was catchy...FOR ADULTS. There is no way that children would look at that and be encouraged to drink gin. Also ... strawberries??? Wines are advertised all the time with fruit that depicts the character of the wine...and children consume EVERY fruit – they also eat cheese which is commonly found on winery Facebook posts alongside wine...Does this mean we can never show fruit alongside wine?
 - In relation to Post 2, I am not sure what the complaint was about these posts. Please let me know what the problem is with these so we can either answer a complaint or adjust our posts in the future.
 - We concede that Post 3 is not appropriate according to RSA and Licensee regulations and as soon as I saw the post it was removed. We have since had discussions with our Social Media team about appropriate and responsible marketing towards adults and a breach like this will not happen again. All future posts will have a note at the bottom encouraging people to drink responsibly.

The Panel's View

14. According to its website, Tamburlaine Organic Wines is one of Australia's largest producers of organic wines, with vineyards in the Hunter Valley and Orange regions of New South Wales. In addition to producing a number of different types of wines, it also offers a range of gins under the 'Herding Cats' brand name. The Company employs social media as one of its marketing channels and it is three posts made to the Company's Facebook page that have drawn this complaint.
15. The complainant is concerned that the marketing has '*flippant regard to drinking in moderation. And cute promotions that my grandchildren thought were kids' ads.*'
16. These concerns raise two issues under the Code, being that an alcohol marketing communication must not:
 - 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 – Part 3 (a)(i); and
 - have strong or evident appeal to minors – Part 3 (b)(i).
17. While the complainant did not match the individual posts to the specific concerns, it is reasonable to assume that Post 1 featuring the puppy relates to the concern about appeal to children whereas Posts 2 and 3 relate to excessive consumption and making fun of drinking in moderation.
18. The benchmark applied when assessing if an ABAC standard has been satisfied is the 'reasonable person' test. This means the Panel puts itself in the shoes of a person who has the life experiences, opinions and values commonly held by most Australians, and assesses how this reasonable person would probably understand the marketing communication.

Post 1

19. Post 1 shows a picture of a puppy and strawberries alongside a drink presumably mixed with gin. The words 'After a long day of herding cats' are superimposed on the picture and the post is headed 'It's hard work but someone has to do it'.
20. The Company argues that Post 1 does not have strong or evident appeal to minors. It is contended:

- that as a winery, their marketing is intended to appeal to adults and should not have been shared with children;
- while the puppy is a cute image, the post as a whole would not appeal to minors;
- the resting puppy is juxtaposed against the brand name 'Herding Cats' and would not encourage minors to drink gin; and
- fruit is often consumed with alcohol such as wine and it is not unreasonable to place the strawberries with a picture of a drink made with the product.

21. Part 3 (b)(i) of the Code and provides that an alcohol ad must not have strong or evident appeal to minors. This might be breached if the ad:

- specifically targets minors;
- has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; or
- uses imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to minors.

22. The Panel has considered the factors that might give rise to a strong or evident appeal to minors on previous occasions. While each marketing communication must always be assessed individually, some characteristics within marketing material which may make it strongly appealing to minors include:

- the use of bright, playful, and contrasting colours;
- aspirational themes that appeal to minors wishing to feel older or fit into an older group;
- illusion of a smooth transition from non-alcoholic to alcoholic beverages;
- creation of a relatable environment by use of images and surroundings commonly frequented by minors;
- depiction of activities or products typically undertaken or used by minors;
- language and methods of expression used more by minors than adults;

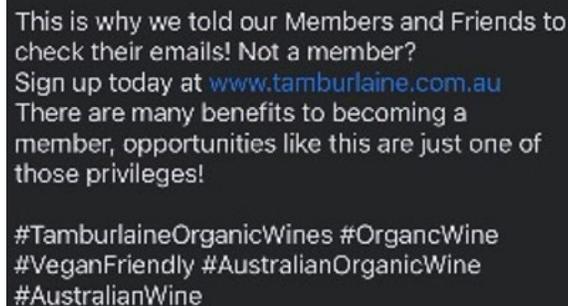
- inclusion of popular personalities of evident appeal to minors at the time of the marketing (personalities popular to the youth of previous generations will generally not have strong current appeal to minors);
 - style of humour relating to the stage of life of a minor (as opposed to humour more probably appealing to adults); and
 - use of a music genre and artists featuring in youth culture.
23. It should be noted that only some of these characteristics are likely to be present in a specific marketing communication and the presence of one or even more of the characteristics does not necessarily mean that the marketing item will have strong or evident appeal to minors. It is the overall impact of the marketing communication rather than an individual element that shapes how a reasonable person will understand the item.
24. The use of animals in alcohol marketing will have some potential to be attention grabbing to minors and care needs to be taken by marketers. This does not mean animals or characters derived from animals cannot be used, but it does mean the overall impact of the marketing item must be mature and not strongly appeal to minors.
25. On balance, the Panel believes the post does not breach the Part 3 (b) standard. In reaching this conclusion the Panel noted:
- the principal image of the post is the puppy alongside the drink and strawberries;
 - the puppy will draw the attention of minors however the overall image and lighting is mature rather than bright and eye-catching;
 - the strapline - After a hard day of herding cats - will resonate more strongly with adults than minors; and
 - taken as a whole, the appeal to minors is incidental rather than strong and evident.

Post 2

26. Post 2 includes 10 different images promoting member discounts and cheaper pricing for the purchase of multiple bottles of product. Other promotional options are included such as free shipping and the chance to enter the draw for free accommodation. The images contain the Company's logo and name, pictures of the product or accommodation and written information about discount pricing etc.

The posts have a Christmas theme, with some showing festive decorations and headings such as 'Don't Forget the Pudding!', 'Christmas Special', 'Secret Santa' and 'Christmas Holiday'.

27. The following text accompanies Post 2:



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#VeganFriendly #AustralianOrganicWine
#AustralianWine

28. Taken together, the theme of the posts is to encourage the purchase of multiple bottles of the Company's products by way of discount pricing or other rewards as opposed to purchasing a single bottle or a lesser quantity. The question is whether the messaging in the posts can be taken to encourage excessive alcohol consumption in breach of Part 3 (a)(i) of the ABAC.
29. The ABAC standard draws a distinction between the encouragement of the purchase of alcohol and the encouragement of the consumption of alcohol. By its nature, alcohol, particularly spirits and wine, has a long shelf life and it is not uncommon to purchase alcohol in multiples eg a carton of beer or a case of wine.
30. This does not mean that alcohol purchased in multiples will then be consumed immediately or irresponsibly. For instance:
- the product can be stored and then consumed moderately over a period of time;
 - the product might be consumed by numerous people and not a single person in a binge fashion; and
 - the product might be purchased for a party or a social occasion like a large family Christmas lunch or dinner.
31. Clearly different considerations apply if alcohol is purchased for immediate consumption such as in a bar. Here promotions such as 'happy hours' run a risk of encouraging excessive or rapid consumption due to the purchased product having to be consumed immediately after purchase. This is not the case with alcohol ordered online and home delivered.

32. The posts do not suggest a pattern of consumption. A discount is not offered for consuming the product in a short time frame. The Panel does not believe these posts breach the Code standard.

Post 3

33. Post 3 shows red wine being poured into a wine glass. The post is headed 'Moderation who?' and the words 'Who is this "moderation" everyone tells me to drink with?' are superimposed on the image, along with the Company's name and logo.
34. The Company concedes that Post 3 is not appropriate according to RSA and Licensee regulations and that it has been removed. Internal training has been conducted to minimise the risk of this type of breach recurring.
35. The Panel believes that Post 3 encourages the excessive consumption of alcohol by making fun of drinking in moderation. It therefore breaches the Part 3 (a)(i) standard.

Conclusion

36. The complaint is upheld in relation to a breach of Part 3 (a)(i) by Post 3 and dismissed in relation to Posts 1 and 2.