



ABAC Adjudication Panel Determination No. 15/20

Product: Cheeky Monkey
Company: Cheeky Monkey Brewery
Date of decision: 25 February 2020
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 by Cheeky Money Brewery (“the Company”) and arises from a complaint received 5 February 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 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 the other codes as well as meeting the standards contained in the ABAC.
 4. For ease of public access, Ad Standards (AS) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by AS, 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 AS 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 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 February 2020. The Panel endeavours to make a decision within 30 business days of the receipt of a complaint and this complaint has been determined within that timeframe.
8. 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 post.

The Marketing Communications

9. An Instagram post including the following two images was seen by the complainant on 4 February 2020.



The Complaint

10. The complainant is concerned that:
- a person is shown drinking alcohol while sitting behind the wheel of a vehicle encouraging drink driving;
 - while one leg is bent up it isn't possible to see if the hand brake and engine are off;
 - #mondaymotivation implies they are trying to "motivate" this behaviour;
 - in the second photo the individual appears to be having fun;
 - they are promoting the use of the product while behind the wheel of a motor vehicle by the image and the caption "cans, four packs and cases available near you"; and
 - the ad is in poor taste as it was posted just after 4 children were killed in NSW by a drunk driver.

The ABAC Code

11. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (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

12. The Company responded to the complaint by email dated 14 February 2020. Advising that the Instagram and Facebook posts referred to in the complaint have been removed.

The Panel's View

13. In each Australian State and Territory, it is an offence to operate a motor vehicle whilst under the influence of alcohol. This legal requirement is reflected in Part 3 (d) of the ABAC which provides that an alcohol marketing communication must not show the consumption of alcohol before or during any activity that for safety reasons requires a high degree of alertness or physical coordination such as the control of a motor vehicle.
14. The Company has posted two images on its Instagram account which showed a man behind the wheel of a motor vehicle while consuming a can of Cheeky Monkey beer. The vehicle is not moving, and the man is sitting in a manner which suggests he is not going to immediately put the vehicle into motion. The complainant believes the posts are irresponsible and inconsistent with good alcohol marketing practice.
15. While 'drink driving' is an offence across Australia, the laws vary somewhat as to position of being over the legal blood alcohol limit while in a stationary vehicle. In some jurisdictions the offence arises from being 'in control' of a motor vehicle and this encompasses a parked vehicle if the intoxicated person for instance is in the vehicle with the car keys. In other jurisdictions the offence is slightly more forgiving in that it requires an attempt to put the vehicle in motion. This means an intoxicated person who is say asleep in a parked vehicle may not be committing offence.
16. The ABAC provision uses the term 'in control of a motor vehicle' which resembles the language used in the Queensland Traffic Act. Queensland has arguably the strictest of the Australian laws. While the legal background is of some interest, the Panel is to apply the Code standard as drafted informed by the spirit and intent of the ABAC scheme.
17. The Panel believes the posts are in breach of the Part 3 (d) standard. The posts:
 - are set in a motor vehicle;
 - with the only person in the vehicle sitting in the driver's seat and consuming the product; and
 - while the vehicle is not in motion, there is little doubt the man drinking the product would be regarded as 'in control' of the vehicle.
18. It is noted the Company did not mount any arguments as to why the posts do not breach the Code and removed the posts upon receiving the complaint.
19. The complaint is upheld.