



ABAC Adjudication Panel Determination No. 18/20

Product: Carlton & United Breweries
Company: Pirate Life Double Acai & Passionfruit
Media: Digital (Instagram)
Date of decision: 25 March 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 Instagram marketing for Pirate Life Double Acai & Passionfruit (“the Company”) and arises from a complaint received 13 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 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

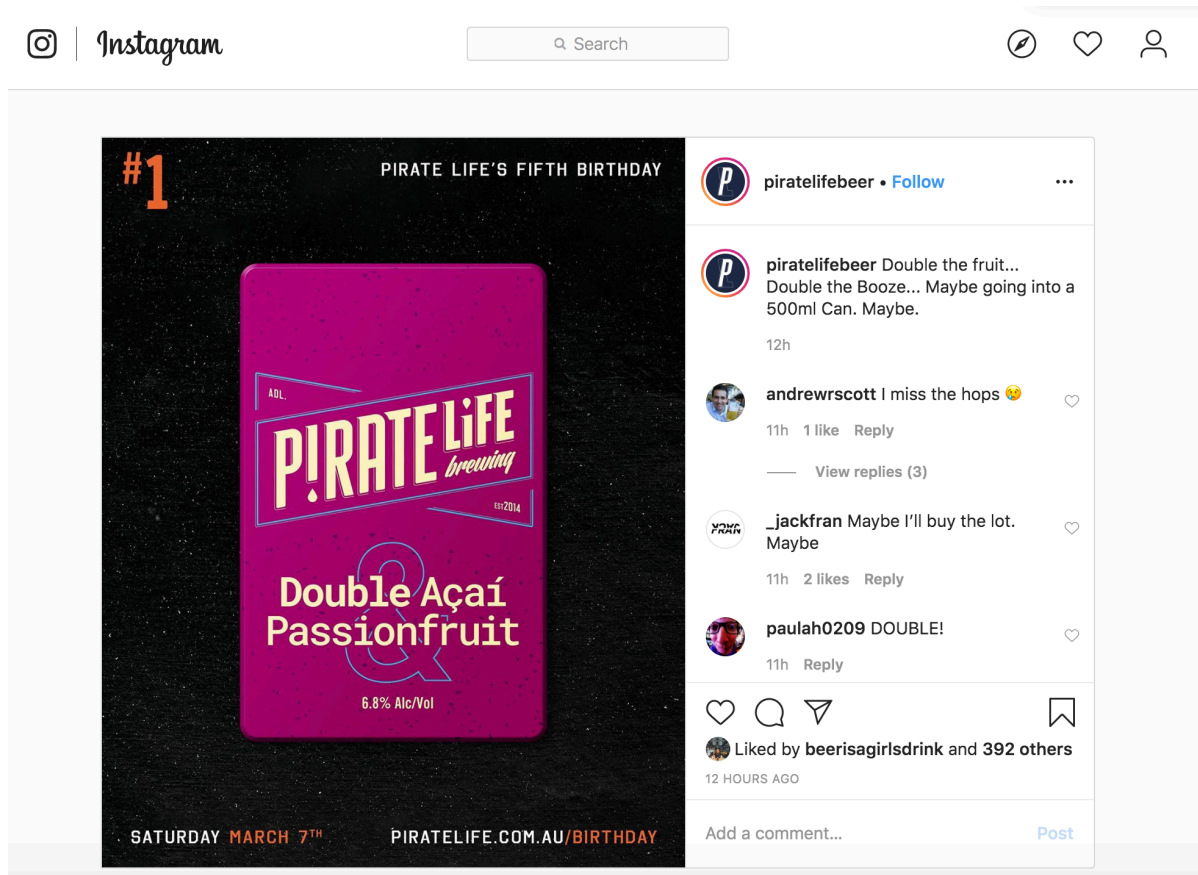
7. The complaint was received on 13 February 2020.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint 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 this marketing communication.

The Marketing Communication

10. The complaint relates to the following Instagram Post made 12 February 2020.



The Complaint

11. The complainant objects to the marketing as the post is promoting the beer based on its higher alcohol content by the phrase “double the booze”.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (a)(iv) encourage the choice of a particular Alcohol Beverage by emphasising its alcohol strength (unless emphasis is placed on the Alcohol Beverage’s low alcohol strength relative to the typical strength for similar beverages) or the intoxicating effect of alcohol

The Company’s Response

13. The Company responded to the complaint by letter dated 21 February 2020. The principal points made by the Company were:
- a) Following on from the release of Pirate Life Acai & Passionfruit Fruit Sour, Pirate Life Double Acai & Passionfruit is a limited release sour beer that the

Pirate Life team will be making available for purchase at their fifth birthday party being held at their brewery in Port Adelaide in early March 2020.

b) We reject the assertion made by the complainant that the image or accompanying text in the Instagram post encourages the choice of the Pirate Life Double Acai & Passionfruit based on its alcohol strength. The Instagram post depicts the tap badge for Pirate Life Double Acai & Passionfruit, with the accompanying text 'Double the fruit... Double the Booze... Maybe going into a 500ml Can. Maybe.' Whilst this post articulates that the alcohol by volume ('ABV') for the product is twice that of the Acai & Passionfruit Fruit Sour, these references do not breach Part 3(a)(iv) of the Code, as they do not encourage the choice of this particular product based on the ABV and play an informative role in distinguishing the product from the regular Acai & Passionfruit Fruit Sour, in a manner consistent with Pirate Life's relaxed, colloquial brand voice.

c) As outlined in the ABAC Guidance Notes for this section:

'There are two elements to this part of the standard:

- emphasis of alcohol strength*
- in a way that encourages a consumer to choose the product.'*

'Emphasis of alcohol strength'

The image itself has many prominent elements that do not refer to the ABV, including:

- the Pirate Life logo;
- multiple references to Pirate Life's fifth birthday celebration; and
- the reference to acai and passionfruit.

All references to the higher alcohol strength of this product, refer to the fact that the strength of this product is twice that of the standard Acai & Passionfruit Fruit Sour. The Guidance Notes for this section specifically note that alcohol strength 'may' be communicated in marketing communications, but that the strength must not be a 'dominant' part of the communication. In this instance the strength is articulated in the text of the copy, and referred to in name on the tap badge but taking into account the various visual cues presented in this Instagram post, overall the strength of the product is not the dominant part of the communication.

'Encourages a consumer to choose the product'

The Instagram post in this instance articulates that Pirate Life Double Acai & Passionfruit is twice the strength of its counterpart, however there is no call to action in the post encouraging the choice of this beverage over any others because of its alcohol strength, and consequently it does not satisfy the second element of Part 3(a)(iv).

It is important to distinguish this new product from the Acai & Passionfruit Fruit Sour and to inform consumers of its higher alcohol content so they can make an informed choice. This product is a higher alcohol strength version of a product that is already in market and the references to 'double' in this marketing communication are therefore an informational tool to distinguish the

product from its lower ABV counterpart, without in any way heralding it as the preferred choice.

- d) CUB is committed to ensuring our promotional and marketing material, and that of our associated entities such as Pirate Life, does not promote or encourage any irresponsible consumption of alcohol. Our goal is for consumers to enjoy our products responsibly and in moderation. Accordingly, we have taken all reasonable precautions both in the naming and marketing of Double Acai & Passionfruit to ensure that while the ABV information is clear enough to ensure that consumers are informed, it is in no way emphasised and does not encourage the choice of this particular beverage.

The Panel's View

14. This determination deals with Part 3 (a) (iv) of the ABAC which provides that a marketing communication must not encourage the choice of a particular alcohol beverage by emphasising its alcohol strength or the intoxicating effect of alcohol. The complainant contends that an Instagram post from the Company breaches this standard. The Company counters that its post was to announce a new product and did no more than properly distinguish the product's characteristics from an existing product.
15. The policy intent of the ABAC standard is that a product's relatively higher alcoholic strength compared to another product should not be used as a selling point. This does not mean the strength of a product cannot be referenced in a marketing communication. On the contrary, the alcohol strength of a product is an important factor for an informed consumer to note in making an appropriate choice. The issue therefore is whether a marketing communication is providing information about the strength of a product which is permitted or is using the strength as a selling point to choose the product which is not permitted.
16. Some considerations in assessing if a marketing communication is consistent with the standard include:
- the highlighting of the strength by enlarged font so as to give prominence to the product's strength beyond providing factual information;
 - use of bold colours relative to other words or features to emphasise strength;
 - overly prominent positioning of the strength of the product in proportion to other messaging;
 - repetition in messaging of the strength; or
 - use of straplines, slogans, imagery or other creative techniques which promote the strength of the product as a key distinguishing feature of the product vis a vis other product of a similar kind.
17. These considerations are not exhaustive and each case is to be assessed on its own merits taking the content of the marketing item as a whole. In the current case the most prominent feature of the Instagram post is a depiction of the tap badge of the 'Double Acai Passionfruit' beer. This image is accompanied by a short text message which reads- Double the fruit... Double the Booze... Maybe going into a 500ml Can. Maybe.

18. There is a small measure of advertising puffery with the text message as the alcohol strength of the pre-existing Acai & Passionfruit beer is 3.8% and the 'Double' product's strength is 6.8% which is not quite double the strength of the original product. That aside, the Panel does not believe the post is in breach of the ABAC standard. In reaching this conclusion the Panel noted:
- the dominant message a viewer will take from the post is the name of the product via the depiction of the tap badge;
 - the text message is subordinate to the tap badge image in terms of probable impact on a viewer;
 - the text message would be taken as a reference to the 'Double' component of the product name and relates to the characteristics of the product regarding fruit and alcohol strength;
 - the 'double booze' part of the text would be understood within the context of the post as a whole and does not give undue emphasis to the strength of the product vis a vis overall messaging.
19. The complaint is dismissed.