



ABAC Adjudication Panel Final Determination No. 73-74/20

Product: Seshn Ale & Mid Haze Pale
Company: Shifty Lizard Brewing Co
Media: Packaging & Digital (Instagram)
Date of decision: 27 June 2020
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Richard Mattick

Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) concerns the packaging for Seshn Ale and Instagram posts promoting Seshn Ale and Mid Haze Pale by Shifty Lizard Brewing Co (“the Company”) and arises from a complaint received 2 June 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:

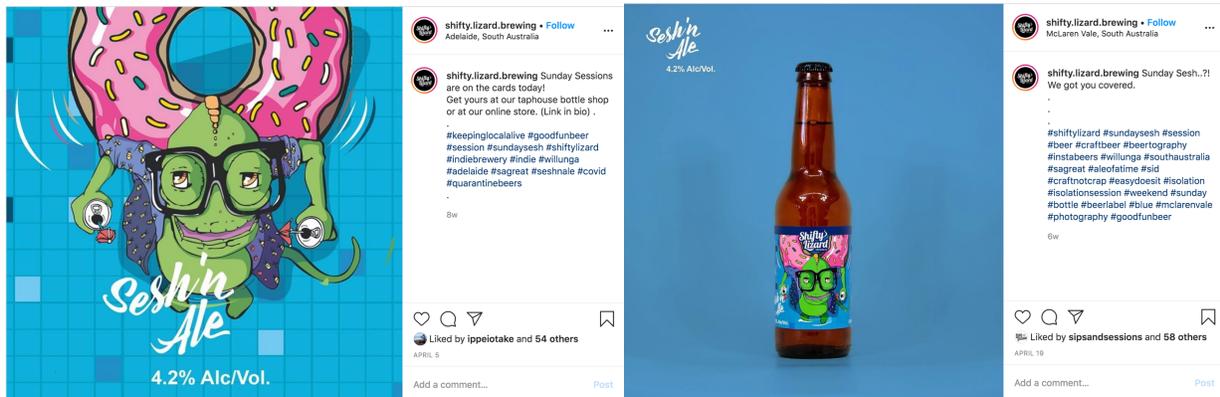
- AANA Code of Ethics – which provides a generic code of good marketing practice for most products and services, including alcohol;
 - ABAC Responsible Alcohol Marketing Code (“ABAC”) – which is an alcohol specific code of good marketing practice;
 - certain broadcast codes, notably the Commercial Television 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 2 June 2020.
8. Generally, the Panel endeavours to make a decision within 30 business days of the receipt of a complaint but this timeline is not applicable due to the two-part process involved in determinations concerning product names and packaging.
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 marketing communications.

Marketing Communication

10. Product packaging and Instagram posts promoting Seshn Ale



11. Instagram post promoting Mid Haze Pale..



The Complaint

12. The complainant is concerned about:

- product packaging and related Instagram posts promoting Seshn Ale showing the character drinking two beers at once while in a swimming pool which is inappropriate; and
- a repost of an image of a woman wading in the sea while holding an open bottle of Mid Haze Pale implies the woman has been drinking and swimming at the same time which is inappropriate for beer advertising.

The ABAC Code

13. 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

- (a)(ii) show (visibly, audibly or by direct implication) or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage;
- (d) A Marketing Communication must NOT 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

14. The Company responded to the complaint by email dated 5 June 2020. The principal points made by the Company were:
 - I believe that for the Sesh'n Ale packaging and Instagram posts this is very line ball. Our character is not seen floating but standing. All be it not really the point here. We don't believe that it is promoting excessive consumption but more a relaxed feel. However, as we see it this way, we can see how it could be taken the wrong way, and with this in light, we are re designing this image to take the cans out of his hands and will have new labels in circulation within 3-6 months.
 - We have deleted the post promoting Mid Haze Pale and will refrain from sharing any irresponsible posts from our consume rs in the future.

The Panel's View

15. Shifty Lizard is a small craft brewery based in Willunga in South Australia. Founded by Lee Stone and Danny Strapps the Company launched in 2017 and has steadily expanded its range of beers including a beer known as Shifty Lizard Sesh'n Ale. The Company uses social media channels including Facebook and Instagram to promote its products. This determination concerns the packaging (can design) of the Sesh'n Ale, an Instagram post for this product and an Instagram post for a second product - a Mid Haze Pale Ale.
16. On 12 June 2020 the Panel made a provisional determination that the product packaging was in breach of Part 3 (d) of the Code and consistent with the rules and procedures applying to decisions concerning product packaging, the Company was afforded an opportunity to seek a rehearing of the provisional determination by making further submissions. The Company has not sought a rehearing and the Panel has proceeded to make a final determination of the complaint.
17. The complaint in relation to the packaging of the Sesh'n ale is that it features a stylised lizard in a swimming pool holding two opened cans of beer. It is argued the image is inappropriate as it may encourage excessive alcohol consumption and swimming while consuming alcohol. The Instagram post is also argued to be promoting alcohol consumption while swimming. Both marketing items will be assessed in turn.

18. The Company generally uses a stylised lizard image on its products. On the Sesh'n ale the lizard is positioned in a swimming pool resting on a floatation device shaped to resemble a strawberry iced donut. The lizard is wearing an opened casual shirt and is holding in each hand an open can. Each can has a small cocktail umbrella resting in it.
19. The Company believes it is 'line ball' as to whether the packaging breaches the ABAC standards. It is pointed out that the lizard character is not floating in the pool but rather is standing in the pool water. It is argued the image is portraying a relaxed feel and is not promoting excessive alcohol consumption. The Company accepts, however, that the image might be 'taken the wrong way' and a new design will be introduced, and the current stock of the product run out.
20. In assessing if a marketing communication is consistent with a Code standard the Panel adopts the probable understanding of the marketing material by a reasonable person taking its content as a whole. This means that the life experiences, values and opinions common in a majority of the community is the benchmark. If a marketing communication can be understood in several ways, it is the most likely interpretation that is to be preferred.
21. The Panel believes that the packaging (and as a consequence the Instagram post featuring the packaging) does breach the Part 3(d) standard. While the image would be understood as portraying a relaxed, holiday like feel as argued by the Company, it does this by placing the lizard character in a swimming pool holding two cans that would be taken to be Sesh'n ales. The cans are shown as opened and it is directly implied that alcohol consumption has occurred either before or during using the pool. It is well accepted that swimming and using a swimming pool should not for safety reasons be combined with alcohol use. It is not considered that the packaging is encouraging excessive consumption. While the lizard is shown with two cans of what would be presumed to be the product, this level of consumption is not of itself excessive.
22. The second Instagram post shows a woman in swimwear with an open bottle of Mid Haze Pale Ale wading in the sea near a beach. The woman's body is wet which indicates she has been swimming. This post breaches the Part 3(d) standard as it clearly implies the consumption of alcohol during the activity of swimming.
23. Accordingly, the Panel makes a final determination that the product packaging and Instagram posts are in breach of Part 3(d) of the Code.