ABAC Adjudication Panel Determination No. 86-7/20

Product: Small & Sour
Company: Colonial Brewing Co
Media: Digital (Instagram)
Date of decision: 8 July 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 the Small and Sour beers by Colonial Brewing Co ("the Company") and arises from complaints received 18 and 19 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 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 complaints raise concerns under the ABAC Code and accordingly are within the Panel's jurisdiction.

The Complaint Timeline

7. The complaints were received on 18 and 19 June 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 complaints were 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 complaints relate to the following two Instagram posts.

The Complaint

11. The complainant objects to the marketing as it shows or encourages drinking alcohol while participating in watersports which are high risk activities.

The ABAC Code

12. Part 3 of the ABAC Code provides that:

    (c) 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

13. The Company responded to the complaint by email dated 7 July 2020 stating:

- In relation to the post dated 19 November 2018, we agree with the complaint and will edit the commentary to not refer to water sports etc.

- In relation to the post dated 4 October 2018, the girl in the picture was drinking in a licensed area and was leaning against the pool wall which shows the actual water and trees behind her, her hair and body are not wet and she wasn't participating in water sports, rather drinking within the red line of the pool bar area in a resort in Townsville.

The Panel's View

14. Colonial Brewing commenced operations in 2004 in Western Australia's Margaret River district. In 2015 a second brewery was opened in Port Melbourne. The Company produces a range of beers including an IPA, Pale Ale and Draught and uses various social media channels to promote its range and brand. This determination follows two complaints about posts on the Company's Instagram account.

15. Neither post is recent having been made by the Company on 19 November 2018 and 4 October 2018. The November 2018 post shows a photograph of a can of product floating in a swimming pool with accompanying text which reads - 'When mixing watersports and beers (floating in a pool counts as a watersport), stay on the Smalls and keep an even keel - it's for your health'. A 'Smalls' is a low alcohol beer in the Company's range.

16. The October 2018 post shows a photograph of a woman immediately adjacent to a swimming pool consuming a beer. She is wearing sunglasses, a one piece swimming costume and is completely dry. The accompanying text reads - 'If you had to look at this while you were stuck behind a desk, on a train or just basically anywhere that's not here... we're sorry.'

17. The complainant contends both posts show or encourage alcohol use while participating in watersports which are high risk activities. The ABAC provides in Part

3(d) 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 co-ordination. Clearly swimming is an activity which is captured by the intent of this standard.

18. Assessment of the consistency of a marketing communication with a Code standard is based upon the probable understanding of the marketing item by a reasonable person. The 'reasonable person' test is borrowed from the common law system and means the life experiences, values and opinions held commonly by a majority of the community is the benchmark.

19. The Company does not mount an argument that the November 2018 post is consistent with the standard and has removed the post. The Panel believes the post does breach the standard as the image combined with the accompanying text raises a direct implication that it is acceptable to consume alcohol while swimming and floating in a swimming pool.

20. In relation to the October 2018 post the Company explains the photo was of a woman drinking in a licensed area adjacent to a swimming pool at a resort. It is pointed out that the woman is not swimming, nor in the swimming pool and her clothes and hair are dry. The Company therefore contends the post is consistent with the ABAC standard.

21. The Panel believes the decision on this post is more finely balanced. It can be accepted that the actual photograph is as the Company describes and that the woman is not in the swimming pool and is drinking within a licensed area at a resort which has a swimming pool. The picture as framed within the post however does not show the detail the Company has provided. Certainly, the woman's hair and the top half of her body are dry, but the way the picture is framed does not reveal her lower body and it's possible she could be actually standing in the pool. The Panel believes the more probable take out from the post is that it is showing alcohol consumption in breach of the Part 3(d) standard. The Panel noted:

    - a reasonable person accessing the Instagram account will not study the post in fine detail but will rather absorb an overall impression from a relatively quick view of the photograph and the accompanying text message;

    - the photograph depicts alcohol consumption of a woman either wading waist deep in a pool or positioned on the edge of a swimming pool;

    - the text message neither supports nor contradicts an impression that consumption is occurring in conjunction with the use of a swimming pool;

    - there are no visual cues to indicate the woman is not either currently or will shortly use the swimming pool e.g. she is not shown sitting on a deck chair or

socialising with other people who are clothed nor is she shown consuming alcohol while eating food;

- taken as whole, the most likely interpretation of the post is that alcohol consumption is occurring with the current use of a swimming pool, or that the pool might be used immediately after the consumption of alcohol.

22. It is noted that the posts are not recent. A quick review of the Company's Instagram account indicates that the Company posts regularly and hence it takes a little time and effort to now actually find the posts. It's not likely many contemporary followers and more occasional visitors to the Company's Instagram feed will come across the posts. That said, the posts are accessible and the ABAC standards are not time limited.

23. The complaints are upheld.