



ABAC Adjudication Panel Determination No. 105/20

Product: Hawkers Pale Ale
Company: Hawkers Beer
Media: Digital (Instagram)
Date of decision: 4 August 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 by Hawkers Beer (“the Company”) and arises from a complaint received 23 July 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 23 July 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.



The Complaint

11. The complainant objects to the marketing as showing beer floating in a pool sends the wrong message regarding drinking in a safe space. It is not safe to drink beer in a pool.

The ABAC Code

12. Part 3 of the ABAC Code provides that:
- (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

13. The Company responded to the complaint by email dated 26 July 2020 stating:
- I would normally let things go, but I feel given our company's history of social responsibility and given the extent to which we have gone on all our branding, website, communication, and marketing to enforce responsible consumption of alcohol, I really need to address this.
 - There is nowhere that suggests doing any activity and drinking, safe or otherwise. This is a picture of a can of beer in the fountain (which is super shallow) at a house where our photographer was. This was not a pool. There

was no one near the beer. There was no suggestion of any activity. This was in fact an artistic photo studying light and pattern. Now, would a reasonable person see this and think I want to have a beer, get drunk, and jump in a pool? I feel confident the answer would be no.

- In relation to the caption under the photograph "'A Melbourne spring essential, our Pale Ale is perfectly sessionable, generously hopped, and enjoyable anytime, anywhere". I do not think that encourages people to enjoy beer in an irresponsible fashion either. Anyone visiting our website is stopped by an age gate (they need to confirm they are of legal age before entering) and they will clearly see our statement "Hawkers Beer supports the responsible service of alcohol." in the footer of every page.
- None of our products have funny names nor have we ever used silly child like graphics on any of our products. We have adopted the pregnancy warning from day one and before it was mandatory. This complaint is in our opinion a trolling attempt to waste our and your time. I hope the panel dismisses this so we can all move forward in our lives.

The Panel's View

14. Hawkens Beer is a Melbourne based independent brewer. While the Company only commenced operations in 2015, its extensive range of regular and limited release beers has established the Company as a major presence in the Australian craft beer sector. The Company employs various social media channels to promote its range and brand. One channel used is Instagram and this determination concerns an Instagram post made on 28 October 2019.
15. The post shows a photograph of a can of Hawkens Pale Ale floating in what appears to be a swimming pool but which the Company advises is actually a shallow fountain. The photo is accompanied by a short text message which reads- 'A Melbourne spring essential, our Pale Ale is perfectly sessionable, generously hopped, and enjoyable anytime, anywhere.'
16. The complainant believed the post sent 'a wrong message regarding drinking in a safe space'. It is stated that it's not safe to drink beer in a pool. The Company responds by pointing to its strong commitment and practices to good standards in alcohol marketing. In relation to the post it is argued:
 - alcohol use is not shown, nor is any activity, 'safe or otherwise';
 - the photo is taken in a shallow fountain and displays an artistic study of light and pattern on the water;
 - a reasonable person will not take a message about drinking and swimming, from either the photo or the text message.
17. Part 3 (d) of the Code provides that an alcohol marketing communication must not show (including by direct implication) the consumption of alcohol before or during any activity that for safety reasons requires a high degree of alertness or physical coordination such as swimming. Assessment as to whether marketing material is inconsistent with the standard is based upon the probable understanding of the marketing by a reasonable person. If several interpretations of the marketing

message are possible, it is the most probable, as opposed to a possible but less likely interpretation, which is to be preferred.

18. It is not unusual for alcohol marketers to place alcohol products within settings that show water in some way e.g. a scene near a beach or a function at a home which has a swimming pool. The Code doesn't preclude a body of water ever being shown in alcohol marketing, but it does say that the marketing cannot show or directly imply that alcohol consumption is acceptable before or during a person swimming or engaging in some other like activity e.g. surfing. It is acceptable to show a person having a drink if they are a passenger on a ship, or fishing from a boat in calm waters, but it is not appropriate to show a person in control of a boat drinking just as it is clearly inappropriate to show someone drinking and driving a motor vehicle.
19. Since 2014 the Panel has made some 13 separate decisions which consider the Part 3(d) standard in relation to various scenes and depictions of alcohol with water in some way. Clearly each case has been decided on its own merits, but some general guidance can be drawn from these past decisions, namely:
 - the standard requires that alcohol consumption be shown, either directly or by necessary implication, and simply showing an alcohol product near or even in water will not be a breach if alcohol consumption cannot be reasonably taken to have occurred or that it will occur in the immediate future;
 - placing a person with a bottle or can of alcohol actually in the sea or in a swimming pool will be a strong indicator that consumption may well occur even if the alcohol container is shown as unopened; and
 - a marketing communication must be assessed as a whole, so a picture of an alcohol product in or near water without any person present could still be in breach of the standard if accompanying text would be understood as saying the product can be consumed while engaging in swimming or related activity.
20. In the present case, a can of the product is shown floating in water. The Company advises that the water is in a shallow fountain and not a pool which could be used for swimming. While this may be correct, it is not apparent from the photograph as cropped in the Instagram post that the can is not in a swimming pool and a reasonable person would assume the can was floating in a pool. That said, no one is seen with the can and no alcohol consumption is shown in the photograph.
21. The photograph is then contextualised by the accompanying text. The text would be most likely understood as promoting the beer as a good choice for consumption in conjunction with spring-time activities. While it is possible to interpret the text with the picture as implying the product could be consumed with swimming, this is not the most probable message a reasonable person will take from the post. It seems quite unlikely a reasonable person would take the post as a whole as encouraging the unsafe practice of drinking while swimming.
22. The complaint is dismissed.