



ABAC Adjudication Panel Determination No 23/21

Product: Daily Lager
Company: Romsey Brewing Co
Media: Instagram
Date of decision: 22 February 2021
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns Instagram advertising for Daily Lager (“the Product”) by Romsey Brewing Co (“the Company”). It arises from a complaint received on 18 February 2021.
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:
 - 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;
 - 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 18 February 2021.
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 the advertising.

The Marketing

10. The marketing referred to in the complaint is a video appearing on the Company's Instagram page (as a story). The entire video is approximately 15 seconds long. It shows a person in a non-urban environment, standing next to a car, who takes an initial sip from what appears to be a 330ml bottle of Daily Lager, and then proceeds to consume the entire contents of the bottle within about five seconds. The words "The moment when Victoria's lockdown ends" are shown at the bottom of the video.



The Complaint

11. The complainant is concerned about the advertising as they believe it promotes binge drinking.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (a)(i) show or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines.

The Company's Response

13. The Company responded to the complaint by letter emailed on 19 February 2021. Its principal comments were:
 - I wish to reiterate our stance on responsible drinking and the safe consumption of alcohol.
 - Daily Lager as a brand and Romsey Brewing Co as an entity, has always placed the safety of its consumers and the compliance of all regulatory boards at the forefront of its operation.
 - We strongly disagree with and dispute the complaint made against our post and wish to provide the following statement:
 - Firstly, categorising the post in question as 'Marketing' is incorrect. We live in an era of social media whereas posting frequently is seen as 'normal', assuming each of these posts is linked to an underlying marketing agenda is false and not to be considered.
 - Daily Lager's social media is primarily used for community engagement, the ongoing support of our local region and the wellbeing of its followers.
 - The post in question was a stunt performed by a local influencer, this was not a paid advertisement or production nor was it planned or staged by Daily Lager in any way. The post shows the individual consuming a beverage at a pace in which they deem to be comfortable based on individuality and preference.
 - It is safe to assume the stunt performed in a larrikin like manner by a semi-professional can only be considered comedic in nature and in no way serious by viewers. Assuming this promotes quick

consumption of alcohol or unsafe practices is beyond reason or justification.

- Daily Lager, without prejudice supports and encourages all ways of life, hobbies, and social orientations. Daily Lager are strong ambassadors for mental health, supporting community members through tough times and promoting their passions and hobbies. Daily Lager does not deem it necessary to put the mental health of its followers at risk through unnecessary sanctions when expressing their individuality in a safe and semi-professional environment.
- Daily Lager encourages further communication with the ABAC, including an investigation into the origin of the complaint. Daily Lager also welcomes a discussion on ways to better uphold its already exemplary reputation.

The Panel's View

Background and Context

14. The small Macedon Ranges town of Romsey is the home of a new craft brewer, Romsey Brewing. In October 2020, the Company's founders Shannon Wright and Benjamin Holmes released their first batch of Daily Lager which is being brewed under arrangement by Holgates Brewhouse in nearby Woodend. The Company has plans to establish a brewhouse in Romsey which will no doubt be well received by the local community given the town's only hotel closed in 2017.
15. As a small business establishing itself in the shadow of the COVID-19 pandemic, the Company at this point has both a limited distribution of its product and a small marketing presence reliant heavily on social media platforms. It is a post accessed by the complainant on the Company's Instagram account which is the subject of this determination. The post is a third-party video of a man who skolls a bottle of Daily Lager. Accompanying the video is text which reads - 'The moment when Victoria's lockdown ends'. The issue raised by the complaint is whether the post is promoting binge drinking.
16. Part 3 (a)(i) of the ABAC provides that an alcohol marketing communication must not show or encourage the excessive or rapid consumption of an alcohol beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines. The Company refutes that the standard has been breached arguing:
 - the single post cannot be categorised as 'marketing' i.e. linked to an underlying marketing agenda;

- the Company uses social media for community engagement and the post was a 'stunt' performed by a social media influencer;
- the influencer was not paid, and his video was not planned or produced by the Company;
- the individual was drinking at a pace at which they were comfortable;
- a reasonable viewer would understand the post was a stunt, and would be taken humorously and not seriously advocating quick consumption or unsafe drinking practices; and
- the motives and genuine intent of the complainant are questioned.

17. It is noted that the Company is not a signatory to the ABAC Scheme and therefore it has not bound itself to the ABAC standards nor to comply with the Panel's determination. That said, the Company is committed to responsible marketing practices, values its reputation, and has fully responded to the complaint. Given the Company has raised some threshold issues about the ABAC and its application in this case, it is useful to deal briefly with those matters before turning to the substance of the consistency of the post with the Part 3 (a) standard.

Is a single third-party generated social media post a 'marketing communication' for ABAC purposes?

18. The ABAC does not purport to regulate every reference to alcohol use to be found on social media platforms. To fall within the ambit of the ABAC Scheme a reference to alcohol beverages must meet the following criteria:

- it must be a 'marketing communication' (see below)
- generated by or under the reasonable control of
- an Australian alcohol beverage producer, distributor, or retailer.

19. A marketing communication is broadly defined in the Code and captures traditional paid advertising carried on television or radio or published in a magazine etc as well as digital marketing items. Posts on an alcohol company's own social media accounts - Facebook, Instagram and the like - fall within the definition of a marketing communication. The Company contends that the post in this case can't be considered 'marketing' as:

- it is a one-off video and not part of a predetermined strategic promotional campaign by the Company; and

- it was not created by the Company, but a third party 'social influencer' and beyond it being linked to the Company's Instagram account, the Company had no role in it.
20. It is now well accepted both under the ABAC for alcohol marketing and Australian Consumer Law more generally, that an advertiser is responsible for third party created material which is posted to social media accounts controlled by the advertiser. (See the Federal Court decision in ACCC v Allergy Pathways Pty Ltd 2011 FCA 74.) In short, posts on an alcohol marketer's social media accounts need to meet ABAC standards whether the posts are created directly by the alcohol company or created by third parties. A post on the third party's private social media account will generally not fall within the ambit of the ABAC unless the alcohol marketer took action to generate the post, or some arrangement is in place whereby the alcohol company has reasonable control over the post.
21. Also, a 'marketing communication' for ABAC purposes is not confined to executions as part of a structured marketing campaign as suggested by the Company. A single one-off social media post is as much required to meet responsible alcohol marketing standards as is a major television or digital brand campaign. Finally, it should be noted that the ABAC in common with complaint-based regulatory schemes more generally, does not apply a 'proper motivation' test to screen complaints. Such a test would be impractical to apply, and, in any event, it is the question of whether the marketing is meeting community standards which is critical, not the origin story of the complaint.

Is the video consistent with the ABAC standard?

22. The assessment of the consistency of a marketing communication with an ABAC standard is from the standpoint of the probable understanding of the marketing by a reasonable person taking the content of the marketing as a whole. The 'reasonable person' is a legal construct which means the life experiences, values, and opinions found commonly in most of the community is the benchmark. A person who has a different understanding is not 'unreasonable' but possibly their interpretation would not be shared by the majority of the community.
23. The Company argues the video would not be understood as promoting quick or unsafe alcohol consumption but would be seen as a humorous 'stunt'. Further, it is submitted that the individual drinking was comfortable at the pace of consumption shown. The Panel accepts that the video is referencing a celebration at the end of Victoria's pandemic restrictions and would be seen as light-hearted in that context. After all, it was the Victorian Premier who referenced 'not going on the beers' as part of responsible social distancing practices during second wave restrictions in that State and this expression has now morphed into popular culture e.g., a song referencing 'go on the beers' in the Triple j's hottest 100 for 2020.

24. The Panel, however, does believe the video is in breach of the Part 3 (a)(i) standard. In reaching this conclusion the Panel had regard to:
- the video does show a bottle of the product being skolloed which a reasonable person would equate with rapid consumption;
 - that the individual shown drinking might be able to comfortably consume the beer at that pace, does not detract that a reasonable person would take skolloing an entire bottle of beer as rapid consumption; and
 - even assuming the video was seen as humorous and not modelling usual drinking patterns, the humour derives from an assumed common expectation that it is acceptable to mark a milestone (e.g., the end of lockdown) with the rapid consumption of alcohol. It is this assumed acceptable use of alcohol that is inconsistent with the ABAC standard.
25. It is acknowledged that the Company is a very new addition to the Australian alcohol market. It is noted that basic good practice has been adopted by the Company such as applying age gating to its website and referencing DrinkWise resources on the website. It is evident the Company understands the importance of a social license and intends to market its products in accordance with community standards of good practice. To this end, the Company might avail itself of the various support and guidance materials on the ABAC website and use the pre-vetting service when planning significant branding or marketing activities.
26. The complaint is upheld.