



ABAC Adjudication Panel Determination No 54/21

Product: Gose-ade
Company: Mash Brewing Company
Media: Instagram
Date of decision: 12 May 2021
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns an Instagram post for Gose-ade (“the Product”) by Mash Brewing Company (“the Company”). It arises from a complaint received on 1 April 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:
 - (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 1 April 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 post.

The Marketing

10. This determination relates to the following Instagram post:



The Complaint

11. The complainant has the following concerns about the marketing:
 - *This branding mimics Gatorade a drink often drunk by minors. This could lead to confusion for minors.*
 - *The post also makes claims about refreshing yourself and electrolytes for your body which are verging on making health claims from the beer.*

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (b)(i) have Strong or Evident Appeal to Minors.
 - (c)(iv) suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation.
13. Part 6 of the ABAC Code provides that:

Strong or Evident Appeal to Minors means:

- (i) likely to appeal strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
- (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

The Company's Response

14. The Company responded to the complaint by email on 9 April 2021. The principal points made by the Company were:

ABAC Alcohol Advertising Pre-vetting Service

- The Gose-Ade was a small batch, independent brew that was not widely distributed through National chains therefore did not go through the Pre-Vetting approval process.

Responsibility toward Minors

- The Product was not meant to resemble Gatorade. Gatorade is not an alcoholic beverage; it is a sports drink. Gose-Ade ("The Product") is an alcoholic brewed beverage with grape flavour and electrolytes added. We had no intention nor believe it to target minors. Gatorade is advertised for athletes and/or active people with no favouritism towards minors.

- Orange on the can label is a contrasting colour that works well with the purple background colour.
- Purple is widely considered to be associated with the “Grape” flavour, of which the product is flavoured and coloured like, inspiring a label of the same colour.
- Phonetically, it is a play on words. “Gose” is a type of beer product. There are clear markings of the ABV of 2.9% at the side of the label on the can. There is a listing of “Malt, hops, yeast and water...” on the side of the label, these ingredients are synonymous with beer. The Mash Brewing brand logo at the top of the can label is also evident. The term “Brewing” is often associated with Breweries, who make beer, not soft drinks.

Therapeutic benefit

- There is no suggestion nor claim of therapeutic benefit from the Product, claiming otherwise is speculation. Gatorade stipulates on its packaging what it does or attempts to do. The Product does not.
- Beer is widely considered and advertised to be a thirst-quenching product with no indication of health benefits. This is not exclusive to alcoholic beverages, however. “Thirst Destroyer” is playing on this, with the Product having a lower ABV of 2.9%, thirst being eliminated from its refreshment factor, being able to drink multiple cans with the emphasis on quenching of thirst over alcohol content.
- There is no suggestion of health benefits from the Product. The “Following words” is a description of the product itself. “Gose” – beer product, “sea salt” - an ingredient/salt (sodium is considered to help with retention of fluid, aiding hydration but this is not exclusively its purpose and is not claimed anywhere on the label) “dose of grape” - the flavour of the Product. “Refresh thyself” - the Product itself is refreshing, not claiming that it is curing any other ailment than thirst/feeling of refreshment.

The Panel’s View

15. Mash Brewing is a Western Australian based craft brewer which has been operating since 2006. The Company produces a wide range of beers including a 'Gose' which is a style of beer originating in Goslar Germany. The Company advises that its Gose-ade is a small batch product which due to its style of brewing and ingredients including grape, is purple in colour. The complaint goes to an Instagram post for the product and raises two concerns, namely:

- that the branding displayed in the post mimics the sports drink Gatorade and as a result could lead to confusion for minors; and

- the post makes claims about the product being refreshing and containing electrolytes which suggest a health benefit.
16. The complaint brings into play two ABAC standards. Firstly Part 3 (b)(i) provides that an alcohol marketing communication must not have strong or evident appeal to minors. One way in which this standard might be breached is if the marketing uses imagery, designs or motifs that are likely to appeal strongly to minors or that create confusion with a soft drink. Secondly, Part 3 (c)(iv) provides that alcohol marketing must not suggest that the consumption of an alcohol beverage offers any therapeutic benefit. The consistency with each of these standards will be examined in turn.

Strong or evident appeal to minors

17. The complainant's contention is that the depiction of the product in the Instagram post could be confused with Gatorade. Gatorade is a so-called sports drink which aims to replenish the carbohydrates, water and electrolytes which can be lost through high intensity physical activity. The branding for Gatorade has evolved over time and variations are used on different Gatorade products. However, a constant has been the use of a stylised lightning bolt and some products feature the brand name positioned at an angle and with a font akin to that employed by the Company with Gose-ade. Some Gatorade products use the strapline 'Thirst Quencher' whereas the post uses a strapline 'Thirst Destroyer'.
18. The Company states that the Gose-ade branding used in the post was not meant to resemble Gatorade. In any event, it is argued the post would not have strong appeal to minors as:
- the design and colour scheme used draws attention to the grape flavour of the product;
 - Gatorade is advertised towards athletes and/or active people and not particularly towards minors; and
 - the post has several cues which identify the product as being an alcohol beverage and a type of beer.
19. In assessing if an alcohol marketing communication is consistent with a Code standard the Panel is to adopt the probable understanding of the marketing material by a reasonable person taking its content as a whole. This means that the life experience, values, and opinions common in most of the community is to be the benchmark. If the message to be derived from the marketing item can be understood in several ways, then it is the most probable interpretation which is to be preferred over a possible but less likely interpretation.

20. The Panel has considered the 'strong or evident appeal' standard in numerous past determinations. Further, in 2020 the ABAC Scheme commissioned Youth Insight (the research arm of Student Edge) to advise on themes, designs and imagery which youths aged 13 to 17 find strongly appealing and unappealing in marketing. Based on these two sources, some characteristics within a marketing communication which may make it strongly appealing to minors include but are not limited to:
- the use of bright, playful, and contrasting colours;
 - aspirational themes that appeal to minors wishing to feel older or fit into an older group;
 - illusion of a smooth transition from non-alcoholic to alcoholic beverages;
 - creation of a relatable environment by use of images and surroundings commonly frequented by minors;
 - depiction of activities or products typically undertaken or used by minors;
 - language and methods of expression used more by minors than adults;
 - inclusion of popular personalities of evident appeal to minors at the time of the marketing (personalities popular to the youth of previous generations will generally not have strong appeal to minors);
 - style of humour relating to the stage of life of a minor (as opposed to humour more appealing to adults); and
 - use of a music genre and artists featuring in youth culture.
21. It should be noted that only some of these characteristics are likely to be present in a particular marketing communication, and that the presence of one or even more of the characteristics does not necessarily mean that the marketing item will have strong or evident appeal to minors. Each case must be assessed on its own merits and it is the overall impact of the marketing communication rather than an individual element which shapes how a reasonable person will understand the item.
22. The post does adopt a branding for Gose-ade which is a play on the brand elements for Gatorade. The image in the post (as opposed to the accompanying text) really does not clearly identify what the product is. 'Gose' would only be recognised by dedicated craft beer drinkers and would not otherwise be understood as necessarily referring to a beverage. The reference to 'Thirst - Destroyer' is a cue that the product might be a beverage, but it is the resemblance to Gatorade branding which might lead a reasonable consumer to guess that the

post relates to a drink. The accompanying text establishes the image is relating to a type of beer.

23. On balance, the Panel does not believe the post breaches the Part 3 (b) (i) standard. The Panel noted:
- while the image suggests Gatorade, Gatorade is not considered a product with a particular appeal to minors beyond its general appeal to adults;
 - the accompanying text sufficiently grounds the post as referring to a type of beer to mitigate potential confusion with a soft drink; and
 - taken as whole the post would not be considered by a reasonable person as targeting minors nor having appeal to minors beyond a general appeal to adults.
24. It should be noted, the Panel is assessing the Instagram post inclusive of the text message and is not making a ruling on the appeal to minors of the branding if employed on different types of packaging. Best practice would see the Company seek pre-vetting approval for its use of the brand name and design features on product packaging.

Therapeutic benefit

25. The complainant refers to the post making claims about 'refreshing yourself' and the presence of electrolytes, and questions whether the post is making health benefit claims. The Company refutes that any suggestion of therapeutic benefit is made, and that the emphasis is on the refreshing quality of the beer. To make a claim that an alcohol beverage is refreshing or 'thirst destroying' does not suggest the consumption of the product provides a positive health benefit. Nor is it a breach to factually state the ingredients of a product. It is a breach of the standard to claim that the ingredients or the way the product is brewed leads to an improved health outcome.
26. The part of the post which comes closest to offending the standard are the words 'electrolytes for your body' which might be implied as meaning 'to benefit your body'. However, the Panel does not believe that the most probable understanding is that a positive claim of benefit is being made. Accordingly, no breach of the Part 3 (c) (iv) standard has occurred.
27. The complaint is dismissed.