



## ABAC Adjudication Panel Determination No 73/21

**Product:** Evening Glass Off DIPA  
**Company:** Swell Brewing Co Pty Ltd  
**Media:** Instagram  
**Date of decision:** 6 May 2021  
**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 an Instagram post for Evening Glass Off DIPA (“the Product”) by Swell Brewing Co. Pty Ltd (“the Company”). It arises from a complaint received on 6 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

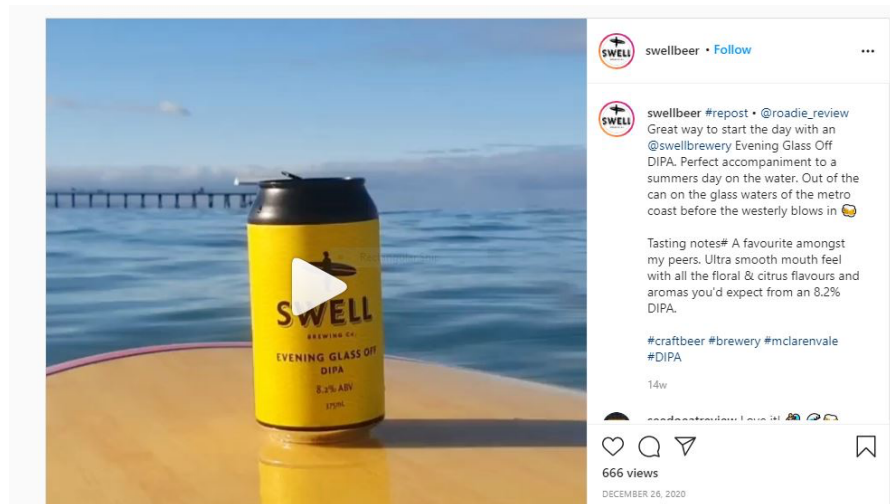
7. The complaint was received on 6 April 2021.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint 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 marketing.

## The Marketing

10. This determination relates to a video posted to Instagram showing a moving surfboard with an open can of the Product on it. A screenshot is shown below:



## The Complaint

11. The complainant has the following concerns about the marketing:

*This post demonstrates drinking alcohol during the high-risk behaviour of swimming.*

## The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:

- (d) 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 on 8 April 2021. The principal points made by the Company were:

- This is not one of our posts but in fact one of our customers that we have reposted.
- There are multiple reasons why this is an unwarranted complaint breaching section 3(d) of the code:
  - There is no evidence that anyone is actually drinking the beer.
  - There is no concrete evidence that the beer is actually open or that the can actually has any product in it.
  - This video could actually have been set up from a boat and then ALL props put back in the vessel after the photo shoot.
- We don't encourage drinking alcohol during high-risk behaviours.
- As a business that only sells to customers over 18, (that are considered adults in the eyes of the law) we can't be held accountable for what people do with our product after it leaves our control.

## The Panel's View

14. Swell Brewing Co is a craft brewery located in McLaren Vale, South Australia. This complaint relates to a post on the Swell Brewing Co Instagram account that is a repost originating from @roadie\_review.

15. The repost features a video of a surfboard moving in the ocean with a can of Swell Brewing Co Evening Glass Off DIPA balanced on the front of the board with the accompanying caption, 'Great way to start the day with an @swellbrewingco Evening Glass Off DIPA. Perfect accompaniment to a summers day on the water. Out of the can on the glass waters of the metro coast before the westerly blows in'.

16. The Company points out that this post was not created by them but rather by a customer, and they cannot be held accountable for what people do with their product after it leaves their control. The Panel does not dispute this point. However, the Company can control what it chooses to repost on its Instagram account. Content placed on a social media account of an alcohol marketer is the responsibility of the marketer irrespective that the content was created by a third party.
17. The relevant standard in Part 3(d) states that marketing communications 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, such as swimming. Using a surfboard (or swimming) in the ocean is self-evidently an activity that to be safely carried out requires a swimmer or surfer to be alert and physically co-ordinated. To show or directly imply alcohol consumption occurring while swimming or surfing will be in breach of the standard.
18. The Company argues the post does not breach the Part 3 (d) standard. It is contended:
  - actual consumption is not shown;
  - it is not clear the can is opened or contains product; and
  - the shot may not be from a surfer/swimmer but could be staged from a boat.
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 a majority 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. On balance, the Panel believes the post to be in breach of the ABAC standard. In reaching this conclusion, the Panel noted:
  - given there are no cues that the can was placed on the surfboard from a boat, the most likely interpretation is that the can was placed on the surfboard by a surfer with the shot showing the point of view of the surfer;
  - it is probable the can has been opened given its ring pull is visible in a raised position, and this creates a strong inference of consumption;
  - the accompanying text reinforces a direct implication of consumption in conjunction with surfing/swimming through the phrases -'Great way to start

the day with an @swellbrewingco Evening Glass Off DIPA' and 'Perfect accompaniment to a summers day on the water'; and

- while no one element alone is decisive, a reasonable person taking the content of the post as a whole would most probably understand the post as showing alcohol use while surfing/swimming.

21. The complaint is upheld.