



ABAC Adjudication Panel Determination No 85/21

Product: Pirate Life Brewing's Point Nine
Company: AFL Pty Limited - DeVine Cellars
Media: Instagram
Date of decision: 21 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 Pirate Life Brewing's Point Nine ("the Product") by DeVine Cellars ("the Company"). It arises from a complaint received on 14 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

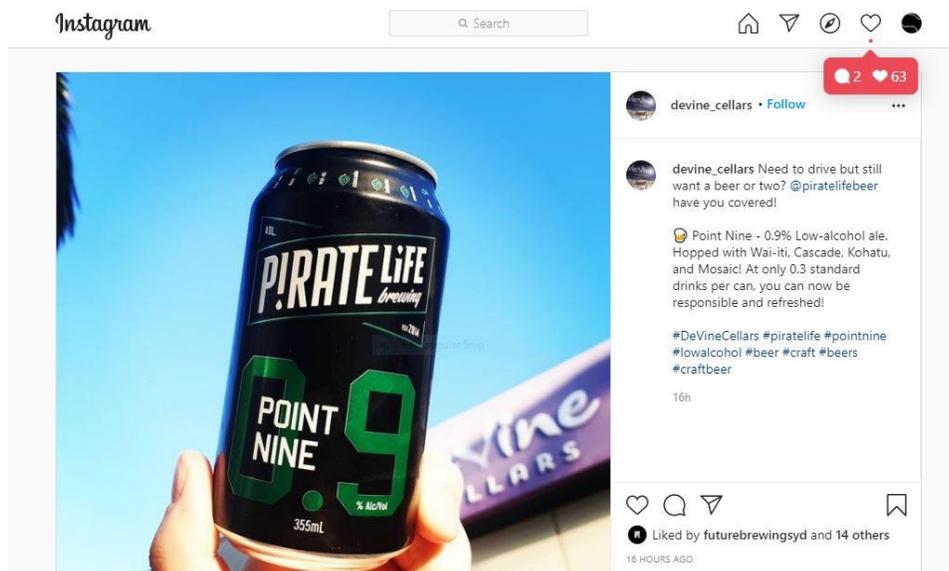
7. The complaint was received on 14 April 2021.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint 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 an Instagram post, as shown below:



The Complaint

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

The post suggests someone should drink beer and drive. This is inappropriate for an alcohol marketing communication.

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 letter emailed on 20 April 2021. The principal points made by the Company were:
- We did not apply for ABAC Pre-vetting for this communication. In the fast-moving craft beer segment, with today's new release being tomorrow's old news, the time taken in Pre-vetting by creating content, submitting, receiving feedback for (3 to 4 days later) and posting the content does not practically align with the requirement to publish the "news". The availability and receipt time of product often allows for little-to-no planning time before publishing of content is required.
 - Upon consideration, we acknowledge that there may be construed, by a few, an implication that DeVine Cellars have endorsed the consumption of an alcoholic beverage before an activity that requires a high degree of alertness (driving). This however, upon consideration of the tone of the message, held together with the extremely low alcoholic nature of the product in question and the general content of the communication as a whole, we would argue, lead to a probable understanding of restraint by the vast majority of consumers.
 - There is no question that the focus of the communication in question was on the very low strength of the product, falling under the purview of ABAC by only 0.4% Alc/Vol and being less than a third of the strength of a traditional "Mid-strength Beer Can" which, according to official advice from the Road Safety Commission WA could safely be consumed at the rate of one per hour before driving. We would argue that the extreme moderation (wording being "one or two" only) and being "responsible" was the prime driver of the communication, conveying a message of restraint to any reasonable consumer within the practical landscape in which we operate. We accept that, in concentrating on this facet of the communication, taken together with our common-sense approach to communication, referencing "driving" was an unintentional misstep which will not be repeated.

- It would seem that the guidelines do exhibit a conflict between Part 3 (a)(iv) and Part 3 (d) of the Code, where the term “Alcoholic Beverage” has no definition other than the ABAC defined “greater than 0.5% Alc/Vol”. This meaning that communication about a beverage such as this, with minimal per unit alcoholic effect, is considered to be on par with beverages which have five to forty-plus times more alcoholic content and the effects that go along with these, hardly an equal standard.
- At DeVine Cellars, we are more than cognizant and respectful of the Code, as can be seen in our other communications and have tried, at all times, to act in good faith, within the guidelines of the various codes of our industry, as referenced by the change to the text of this communication.

The Panel’s View

14. This determination relates to an Instagram post by an alcohol retailer promoting a low ABV 0.9% beer. The post features an image of the product, named Point Nine with the accompanying caption, ‘Need to drive but still want a beer or two? @piratelifebeer have you covered’.
15. The complainant contends the post suggests that someone should drink beer and drive, and this is inappropriate for an alcohol marketing communication. Part 3 (d) of the ABAC provides that alcohol marketing 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 co-ordination such as the control of a motor vehicle.
16. The Company concedes that the post might be understood by a few people as endorsing drink driving, but it is pointed out:
 - the overall intent of the post is to promote a very low alcohol content beer and would not be taken as encouraging drink driving;
 - the messaging is on restrained alcohol use 'within the practical landscape in which we operate'; and
 - there is conflict between Part 3 (a)(iv) and Part 3 (d) of the ABAC and a very low alcohol to content product is hardly the equivalent of a product with four to five times the alcohol content.
17. The Panel acknowledges the points being made by the Company. Part 3 (a)(iv) of the Code provides that marketing must not encourage the choice of an alcohol beverage by emphasising the product's alcohol strength unless emphasis is placed on the beverage's low strength relative to similar products. Clearly the post is emphasising the low alcohol content of the product. The issue arises because

the example given is consuming the product consistently with responsibly driving a car.

18. As the Company argues, the Part 3 (d) provision is quite black and white and doesn't consider the alcohol content of a product and the greater impact a more intoxicating product might have on impairing physical performance and mental abilities compared to a low alcohol/less intoxicating product. Rather the provision is clear cut and does not permit depictions of alcohol use before or during any activity requiring alertness or physical co-ordination. The strength of the beverage does not come into the equation.
19. While the drafting of the ABAC is not a matter for the Panel (the Panel simply applies the Code it is given), there are good policy reasons for keeping Part 3 (d) a black and white provision. Safety and alcohol use is a core policy consideration. A straightforward rule means both the alcohol industry and the community knows what is expected. And given the countless ways marketing creative material can be framed, it does not appear too much of a constraint on marketers to stay clear of showing or implying alcohol consumption before or during an inherently dangerous activity such as driving a motor vehicle.
20. The Panel accepts the post has an overarching message about the low alcohol content of the product. It does however make the point about this by referencing drinking the product and driving. This message is inconsistent with the Part 3 (d) standard.
21. The complaint is upheld.