



ABAC Adjudication Panel Determination No 86/21

Product: Baby Brain Beer
Company: Smiling Samoyed Brewery
Media: Instagram
Date of decision: 26 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 Baby Brain Beer (“the Product”) by Smiling Samoyed Brewery (“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 that includes an image of a smiling baby in a stroller, a woman's hand holding a glass of beer and the caption "Alvin was very excited to be at NOLA for their 1st birthday AND the first pour of our new beer, Baby Brain! Alvin keeping Mum and Dad awake most of the night as a newborn was the cause/inspiration for this one!"

The Complaint

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

Babies don't belong in alcohol advertising. This is displaying a minor in an inappropriate setting.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (b)(ii) depict a person who is or appears to be a Minor unless they are shown in an incidental role in a natural situation (for example, a family socialising responsibly) and where there is no implication they will consume or serve alcohol.

The Company's Response

13. The Company responded to the complaint by letter emailed on 22 April 2021 but requested that their response remain confidential.

The Panel's View

Introduction

14. Husband and wife team Simon Dunstone and Kate Henning founded Smiling Samoyed Brewery in 2012 in the small South Australian town of Myponga on the Fleurieu Peninsula south of Adelaide. The facility combines a brewery, taproom, and function areas. The Company has been successful with its range of beers winning prizes at the Royal Adelaide Show and its facilities are at the centre of the tourism industry in the district. The Company employs social media to promote its products, activities, and news. This determination flows from a complaint received about a Company Instagram post made on 24 November 2016.
15. The post consists of a photograph of Mr Dunstone's and Ms Henning's then three-month-old son Alvin sitting in a pram and a woman's hand holding a glass of beer next to Alvin. The accompanying text references the first anniversary (birthday) of the Adelaide bar NOLA and that the Company's 'Baby Brain' Pale Ale was having its first pour at the bar. (A feature of NOLA is that it rotates craft beers from different producers at various times). The text goes on to explain that Alvin was excited to be at NOLA and the cause/inspiration for the beer was newborn Alvin keeping his parents up at night.
16. The complainant contends that babies don't belong in alcohol advertising and a minor is being displayed in an inappropriate setting. The ABAC has a core standard of good practice that alcohol marketing communications should not have strong or evident appeal to minors. One element of this standard (Part 3 (b) (ii)) is that minors should not be depicted in alcohol marketing unless they are shown:
 - in an incidental role;
 - in a natural situation; and
 - where there is no implication they will consume or serve alcohol.
17. The Company has provided a detailed response to the complaint at two levels namely:
 - firstly, at a jurisdictional/procedural level where a range of arguments are mounted as to why the ABAC Scheme has no application to the Company and its Instagram post and why the Panel should offer no view about the complaint and the consistency of the post to the ABAC standard; and
 - secondly, at a substantive level as to why the post is not in breach of any ABAC standard.

18. The Company is not a signatory to the ABAC Scheme and has not made any prior commitment to market consistently with the ABAC standards nor to comply with the outcome of the public complaints process. In this respect the position of the Company is like many smaller alcohol producers. The Company contends that given it is not an ABAC member or signatory, the Panel should not form a view on the consistency of its Instagram post with the ABAC standard and should refer the complaint to the appropriate legal authority i.e. the Liquor and Gambling Commissioner pursuant to the powers contained in the Liquor Licensing Act 1997 (SA).
19. Since its commencement in 1998 the ABAC public complaints process has received, and the Panel has considered complaints about the advertising of alcohol entities which are not members or signatories to the Scheme. Almost universally the alcohol entities involved have cooperated with the Panel process (as has occurred in the current case) and accepted the views reached by the Panel. This occurs not because of strict legal obligation but because of an acceptance of the social and corporate responsibilities that come with being a participant in the alcohol industry. Alcohol is not just another product. Its misuse can cause great individual and community harm. Public policy identifies that alcohol marketing should occur consistently with the objective of minimising the risk of harm.
20. The ABAC standards reflect basic good practice when it comes to alcohol marketing messaging. Similar standards are in effect also contained in Australian liquor licensing requirements and are found internationally. The core standards are:
 - alcohol marketing should model moderate and responsible alcohol use;
 - marketing should be directed towards adults and not have strong appeal to minors;
 - the effects of alcohol should be shown responsibly; and
 - alcohol use should not be shown before or during an activity which is inherently dangerous.
21. The Company might accept the Panel's view on the complaint or might not. This is a matter for the Company. On the very rare occasion that an alcohol company respondent has not acted on a Panel determination which concluded that a marketing communication be removed or modified due to inconsistency with an ABAC provision, the matter has been referred to the relevant liquor licensing authority for consideration against their alcohol promotion requirements. This is in accordance with the cooperative relationship between the ABAC Scheme and government regulators.

The Marketing Communication

22. The Company maintains an Instagram account entitled 'Smiling Samoyed Brewery' with a description of 'Independent award winning craft brewery with delicious craft beers'. A brief review of the account shows a mix of posts relating to the operations of the brewery and products and posts which are more personal in nature. The Company contended that the post complained about was not 'alcohol advertising' and was about letting the community know about a proud moment while raising an important dialogue about parenthood. While this is a fair comment by the Company, the post does feature a picture of the product, its name, and its availability at the NOLA bar. The Instagram account and the post does fall within the scope of a marketing communication for ABAC purposes.
23. The post shows a photograph of an infant next to an adult's hand holding a glass of the product. The accompanying text provides context to the images. The issue in terms of consistency with the Part 3 (b) (ii) standard is whether the infant is shown in an incidental role, in a natural situation and where there is no implication they will consume or serve alcohol. The Company submits the provision has not been breached arguing the post explains the impact that being sleep deprived new parents had on 'Baby Brain' Pale Ale coming into being. In this context, it is contended the image of baby Alvin was a necessary but incidental part of the story of the post which centred on the NOLA event and the launch of 'Baby Brain' Ale.
24. Clearly an infant would not be taken as consuming or serving alcohol. While the framing of the photograph showing the child's parent (not just a hand) would have been preferable in showing the natural situation of the family at the venue, the accompanying text to the photograph sufficiently establishes the child is with his parents and is incidental to the event being depicted. The Panel believes the post does not breach the standard.
25. In dismissing the complaint, the Panel notes the post complained about was created in 2016. There is likely to be only very limited public benefit in considering marketing communications which are quite unlikely to be seen and hence of any impact on much of the community. The Panel requests that given the huge number of social media alcohol communications made each year, consideration be given to the benefits and costs of there currently being no cut off in age of social media posts against which complaints can be made and whether there should be an amendment to the Scheme to limit the time within which a complaint can be made about a social media post.
26. The complaint is dismissed.