



ABAC Adjudication Panel Determination No 243/21

Product: Desi Driver and Venue
Company: Big Shed Brewing Co
Media: Facebook
Date of decision: 22 November 2021
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns Facebook advertising by Big Shed Brewing Co. It arises from a complaint received on 12 October 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 meet 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

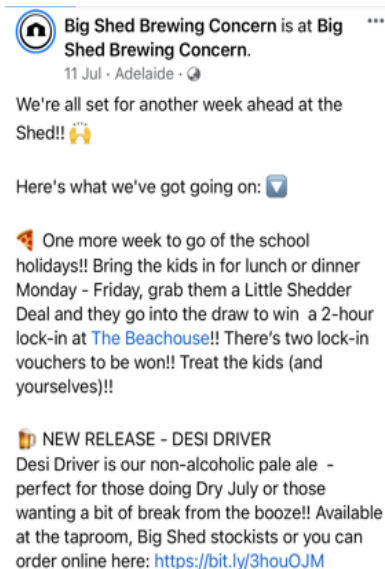
7. The complaint was received on 12 October 2021.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint was completed in this timeframe.

Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverage marketing features an 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 product packaging.

The Marketing Communication

10. The complaint relates to a Facebook post, screenshots of which are shown below:

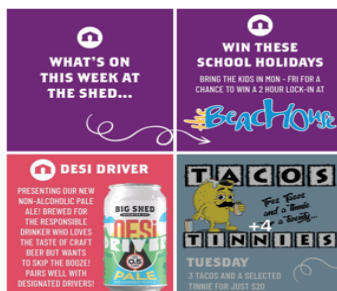


🍷 TUESDAY
Tinnies & Tacos is back Tuesday for another month with 3 tacos and a tinnie of Jetty Jumper, Royal Park Lager or F-Year for just \$20!!

? WEDNESDAY!!
[Quiz Meisters in SA](#) Trivia is back with Skip on Wednesday night!! We've had record breaking numbers for the last four weeks, so don't forget to book your team in!! <https://bit.ly/3yy9ual>

🕒 SATURDAY
Record Store Day (Drop 2) - we'll have [Underground Records](#) and [Crackle & Pop Records](#) in the house with all your RSD or just general vinyl needs!! Fantastic Wax ([Samantha](#)) will also be there flexing on the decks!! PLUS our kitchen crew will be serving up an amazing breakfast from 10am - keep an eye out for the menu early this week!

See you soon!!! 🍷





The Complaint

11. The complainant objects to the marketing as follows:

- *This post promotes a new beer release called Desi Driver and a promotion involving bringing kids into the venue to win a prize for the kids.*
- *Desi Driver - its packaging and advertising encourage drinkers to drink and drive. It is low alcohol but it's still an alcoholic beverage that is being associated with high-risk activity.*
- *The Beachouse promotion is advertising to parents to get kids to attend an 18+ venue. This is appealing to minors through their parents.*

The ABAC Code

12. Part 2 of the ABAC Code provides that:

The Code APPLIES to all Marketing Communications in Australia generated by or within the reasonable control of a Marketer, except as set out in Section 2(b). This includes, but is not limited to:

- brand advertising (including trade advertising)
- competitions
- digital communications (including in mobile and social media and user-generated content)
- Alcohol Beverage product names and packaging

- advertorials
- alcohol brand extensions to non-alcohol beverage products
- point of sale materials
- retailer advertising
- Marketing Collateral

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

- (b)(i) have Strong or Evident Appeal to Minors.
- (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.

14. Part 6 of the ABAC Code provides that:

Strong or Evident Appeal to Minors means:

- (i) likely to appeal to strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minors 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 confectionery or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

Alcohol Beverage means a beverage containing at least 0.5% alcohol by volume.

The Company's Response

15. The Company responded on 14 October 2021 by email. The principal comments made by the Company were:

- Thank you for bringing this to our attention and allowing us to respond. At Big Shed, we are firm believers in responsible promotion of alcohol so take these matters very seriously. I would also like it noted that as non-signatories to the ABAC code we have no requirement to respond but do so voluntarily as good corporate citizens. As such I have dropped everything to attend to this as a matter of urgency.
- The accusation made is a serious one in that we are accused of promoting our products to minors and that we are promoting the consumption of alcoholic beverages during high risk activity, in this case driving. It would be nice to be able to know who our accuser was so as to be able to answer these accusations directly. These accusations are no less serious than those handled in legal matters across the country and in those cases the accused are allowed that ability. Regardless I have conducted an investigation to respond to our anonymous accuser.
- Looking at the 2 parts to this complaint, firstly that Desi Driver packaging is encouraging drinkers to drink and drive and thus associated with a high risk activity.
- To begin with, drink driving isn't just high risk, it is illegal. The accusation is without base in any form. The product is non-alcoholic with less than .5% ABV. This is listed on the can and highlighted in the wording on the social media tile. There can be similar amounts of alcohol in fresh orange juice and even bread rolls.
- The beer is labelled as Desi Driver because it is a product for the person who is the 'designated driver'. As defined by the urban dictionary the desi driver is the person responsible for getting their friends home safely and as such in not consuming alcohol (<https://www.urbandictionary.com/define.php?term=Desi%20Driver>). Rather than promoting drink driving, it is promoting a responsible way to enjoy a beer with friends while maintaining your sobriety. The label is far removed from any we have done before. This is done so deliberately so as not to confuse the consumer in picking up the wrong can and also to ensure the product stands alone without promoting our alcoholic offerings.

- At under .5% ABV one would need to consume 20 cans in the 1st hour to reach the 2 standard drinks defined to reach the 0.05 driving limit and then drink 10 cans per hour after that to maintain it. The 20 cans would need to be consumed at a rate of 1 every 3 minutes and have a total volume of 7.5L. The human stomach has a capacity of between 2-4L. Liquid leaves the human stomach at a rate of anywhere from 10 minutes (water) up to 60 minutes when dealing with complex things such as broth (<https://health.clevelandclinic.org/how-long-does-it-take-to-digest-food/>). Assuming a person had nothing in their stomach they would still not be able to physically hold and process enough Desi Driver to be over the legal limit.
- To the second accusation that we are appealing to minors through their parents is ridiculous. Licensed venues across the country run various specials, set up kid-friendly areas/playgrounds and kid-specific events. This isn't done to promote alcohol to minors, but to highlight to parents that these spaces are kid-friendly and we are no different. Our venue is designed to cater for the entire family and that is what is being promoted in this case. The promotion itself was run through school holidays when kids are at home or out with the family. It was designed to attract a lunchtime diner mid-week which is usually quiet in our venue.
- Specifically, your questions have been copied below with answers following:

Q1: Did the alcohol marketing communication referred to in the complaint receive Alcohol Advertising Pre-vetting Service Approval for its content and/or placement?

A1: No we did not receive any pre-vetting for this or any advertising. Likewise, we do not seek pre-vetting approval for label design. The pre-vetting purpose while offering some comfort in having these things looked over offers no material protection from spurious complaints. Pre-vetted material can still be complained against and that complaint can be upheld. Only once the complaint is upheld and we work with ABAC to correct any infraction are we protected against future complaints. As such pre-vetting is a waste of time/money and we are better placed to wait until a complaint is upheld.

Q2: Is Desi Driver a brand extension to a non-alcohol beverage product within the scope of Part 2(a) of the ABAC?

A2: While I am not 100% clear on what is being implied here, Desi Driver is a non-alcoholic beer made by us. While it has out masthead branding, beyond that it has a completely different look and feel.

Q3: Does the marketing communication breach Part 3 (b)(i) of the Code by having Strong or Evident Appeal to Minors? In particular, does running a competition to encourage parents to bring their children to a brewhouse make alcohol appealing to minors?

A3: No it does not. Our advertising is no different to any licensed venue creating special offers for kids as a way to encourage parents to choose us for their family meal. By this reasoning, any one pub putting in a kids play area and advertising that fact would be in breach. Any 'kids eat free' specials would be in breach. The fact is we are not simply a 'brewhouse' as you put it. Rather we are a licensed hospitality venue that caters for all family members. As the parents of young children, the accusation that we would promote alcohol to kids is frankly abhorrent and offensive.

Q4: Does the marketing communication breach Part 3 (d) of the Code by showing (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?
In particular:

- a. Does the marketing clearly identify the product as non-alcoholic?
- b. Is there any potential for confusion with an alcoholic product within the Company's range?
- c. Would a reasonable person think the marketing is promoting alcohol use inconsistently with ABAC standards?

A4: The words 'non-alcoholic' appear both in the text alongside the can art and on the bottom of the can. It also states that it is less than .5% alcohol.

Desi Driver has a completely different look to every other product in our range, both core and limited.

A reasonable person would not have taken the time to complain, let alone believe this is inconsistent with ABAC standards.

- In closing, I would like to know if ABAC offers pre-vetting for complaints? I mean, are complaints looked at by ABAC 1st to determine whether or not there is a case to answer or are they simply accepted and passed on to businesses to address. As a small business, we have limited resources and dealing with these spurious complaints from anonymous people is frankly a waste of time.
- I look forward to having this complaint dismissed.

The Panel's View

16. Big Shed Brewing is an Adelaide craft beer producer that commenced commercial operations in 2013 and launched a tasting bar and kitchen in 2014. This complaint relates to a Facebook post by Big Shed Brewing that includes promotions for a new non-alcoholic beer and also a competition that gives patrons that bring their children into the venue during school holidays an opportunity to win tickets to the Beachhouse, a family entertainment complex.
17. The complaint raises two ABAC standards in relation to the Facebook post:
 - Does the Facebook post have strong or evident appeal to minors by encouraging adults to bring their children to the venue for a chance to win tickets to The Beachhouse- Part 3 (b)(i)?
 - Does the Facebook post encourage alcohol consumption prior to driving, through its promotion of a non-alcoholic Pale Ale, Desi-Driver- Part 3 (d)?

Strong or Evident Appeal to Minors

18. The first issue arises from the complainant's concern that the promotion is encouraging parents to bring children into an 18+ venue to enter a competition to win a family entertainment prize.
19. In South Australia, licensed venues are regulated under the Liquor Licensing Act 1997 (SA). The Act is supported by the General Code of Practice which contains provisions required to be followed by licensees to minimise harm in the service of alcohol. Section 8 of the General Code goes to practices relating to minors. A licensee must take steps to prevent a minor from consuming or being supplied with alcohol on licensed premises and prevent a minor from unlawfully entering any area that is out of bounds to minors.
20. The Act therefore expressly envisages that minors will attend licensed premises such as the Company's venue. It would be assumed that a minor would be in attendance with a responsible adult, but the obligation on licensees goes to safe practices concerning minors, not the prohibition of minors from licensed premises.
21. The interplay between the South Australian liquor licensing regime and the ABAC Scheme sees the government regulator primarily concerned with the responsible service and promotion of alcohol within licensed premises whereas the ABAC Scheme is concerned with how alcohol is marketed to the wider community beyond the confines of a licensed premise. The Facebook post touches on both regimes in as much as it is directed towards activities within the Company's venue through a marketing communication to the wider community.

22. The Facebook post is not inconsistent with the ABAC standard. The Panel noted:
- the ABAC Scheme needs to be understood as operating consistently with formal government regulation of alcohol and South Australian liquor licensing expressly permits minors to attend licensed premises;
 - the post is clearly targeted to adults by positioning the venue as a child-friendly dining option; and
 - a reasonable person would not understand the post as encouraging underage drinking or otherwise as being strongly appealing to minors.

Encourage Drink Driving

23. The second issue relates to the promotion of a new non-alcoholic Pale Ale, named, Desi-Driver. The complainant is concerned that the product's packaging and advertising encourage consumers to drink and drive. Further, it is argued that although the product may be low alcohol, it's still an alcoholic beverage that is being associated with a high risk activity.
24. The ABAC applies to the marketing of alcohol beverages. 'Alcohol Beverage' is defined as meaning a beverage containing at least 0.5% alcohol by volume. The product contains less than 0.5% alcohol and therefore is not an alcohol beverage. Marketing for the product is captured by the ABAC only if this marketing, including the product branding and packaging, can be considered to be a 'brand extension' of the Company's alcohol beverage range.
25. To be a brand extension, the branding of the non-alcoholic product needs to adopt core branding attributes of the recognised alcohol beverage range. While each case needs to be assessed on its own facts, some factors indicating that non-alcohol product marketing is a brand extension include the use of the alcohol company name and alcohol descriptors such as beer or ale.
26. On balance, the Panel believes the Desi Driver product can be considered a brand extension, particularly given the reasonably prominent use of the Big Shed Brewing Co name on the front of the can. Further, the Facebook post combines mention of the Desi Driver product with other information about the product being a 'break' from consuming alcohol.
27. When considering the consistency of brand extension marketing with Code standards the Panel applies a common-sense and 'spirit and intent' approach. The test might be expressed as follows - would a reasonable person understand that the brand extension marketing communication is promoting alcohol use inconsistently with ABAC standards.
28. The intent of the ad is clear – driving is an activity that cannot be combined with alcohol consumption, but which can be done consistently with consuming Desi

Driver. A reasonable person would not understand that drink driving is being encouraged by the Facebook post. In fact, the opposite message is far more likely to be taken from the marketing.

29. It is noted that the Company is not a signatory to the ABAC Scheme and hence has not formally committed to meeting the ABAC standards in its marketing. The Company, however, has co-operated with the complaints process and accepts the obligations that come with operating responsibly in the alcohol market. The Company questions whether there should be a threshold test on the merits of complaints before a marketer is put to the time and inconvenience of having to respond to a complaint.
30. The Panel acknowledges the point being made. Responding to complaints does require time and sometimes expense by a respondent alcohol company and not all complaints are equally strong in the arguments advanced. That said, alcohol is not just another product. The misuse of alcohol causes both individual and community harm. Given this, the community is entitled to robust avenues - be it through liquor licensing regimes or industry-based schemes such as ABAC - to have concerns about the responsible service and marketing of alcohol examined and considered.
31. The complaint is dismissed.