



ABAC Adjudication Panel Determination No 258/21

Product: Alcohol Delivery
Company: DRNKS Pty Ltd
Media: Email
Date of decision: 8 December
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 email marketing for alcohol delivery services by DRNKS Pty Ltd (“the Company”). It arises from a complaint received on 5 November 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:
 - 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;

- 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

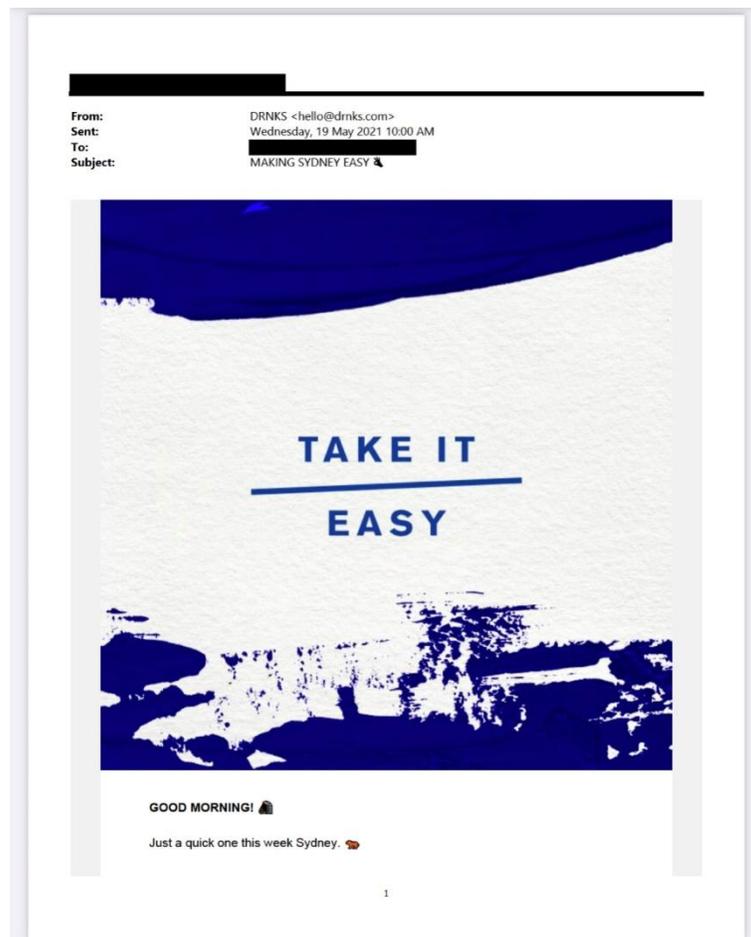
7. The complaint was received on 5 November 2021.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint was completed in this timeframe.

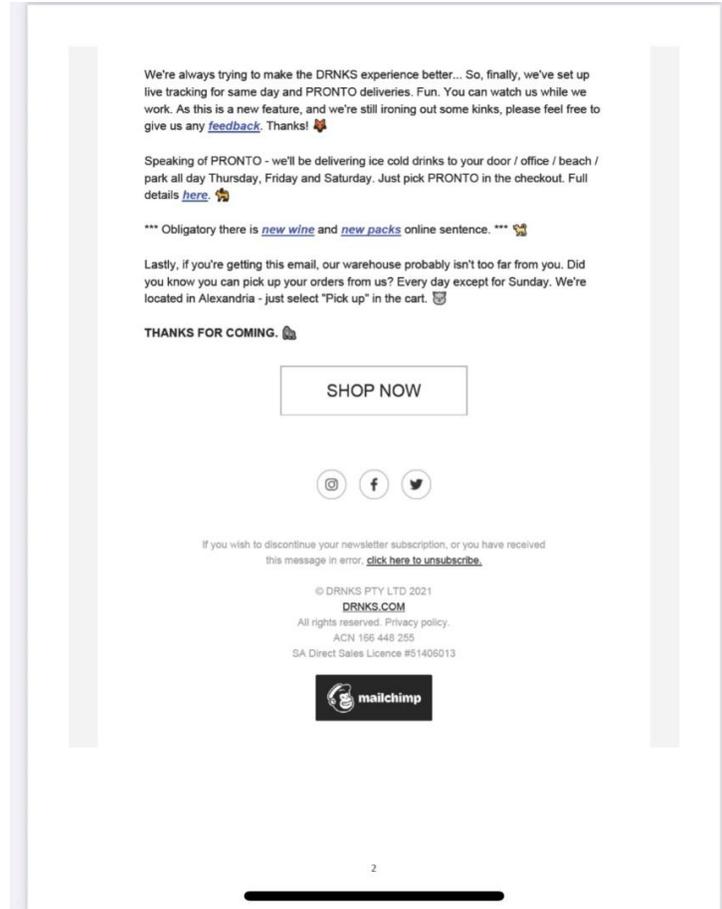
Pre-vetting Clearance

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 Instagram post.

The Marketing

10. The complaint concerns an email sent on 19 May 2021, as follows:





The Complaint

11. The complainant objects to the marketing communication as follows:
 - *The part of the advertisement that is an issue is this sentence:*
'Speaking of PRONTO - we'll be delivering ice cold drinks to your door / office / beach / park all day Thursday, Friday and Saturday'.
 - *According to 114K of the NSW Liquor Act 2007, "A person must not, as part of a same day delivery, supply liquor in a public place within - (a) an alcohol-free zone". Most of the major beaches in Sydney are alcohol free zones (see Randwick City Council and Waverley Council webpages).*
 - *This advertisement could also be considered in breach of Part 3(d) of the ABAC Code which states that a marketing communication must not: '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...swimming.'*

- *DRNKs is specifically promoting the delivery of 'ice cold drinks' as part of a fast delivery service, presumably for immediate consumption - this is a dangerous combination at a beach.*

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (a)(ii) show (visibly, audibly or by direct implication) or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage.
 - (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 by email on 8 November 2021. Its principal comments were:
 - We pride ourselves on our responsible supply of alcohol.
 - The newsletter was only ever hosted on Mailchimp and has now been deleted entirely.
 - The only suburbs this service is offered are Paddington, Surry Hills, Darlinghurst, Centennial Park, Alexandria, Beaconsfield, Erskineville, Eveleigh, Redfern, Waterloo and Zetland. There are no beaches in these suburbs.
 - My understanding is the legislation you refer to (S114K of the NSW Liquor Act 2007) was implemented from the 1st of July 2021. This newsletter was sent out prior to that.
 - In the 6th paragraph here, you can see when the laws were introduced regarding parks:

<https://www.liquorandgaming.nsw.gov.au/resources/alcohol-delivery-laws>
 - All our delivery drivers completed the Responsible Supply of Alcohol Training (RSAT) when the course became available in July - we take this

matter seriously and while I agree with the point ABAC are making about the use of the word beach, we would never, and have never, delivered same day alcohol to a park or the beach. I understand the particular sentence in the newsletter could lead someone to believe that we would, so as mentioned I have deleted it immediately.

- Additionally, the Pronto service has not provided cold drinks for over five months now - all alcohol is room temperature.
- Lastly, we specialise in rare and boutique organic wines and our products are lower in alcohol than average and priced much higher than average. We do not condone or encourage excessive consumption of alcohol. In fact one of our slogans is literally “drink less, drink better”.

The Panel’s View

14. DRNKS commenced operations in 2014 as an online alcohol retailer focusing upon organic wines. Since that time the Company has expanded operations and now provides an Australia wide online alcohol sales platform as well as same day delivery to selected Sydney suburbs. “DRNKS Pronto” is the 30-minute delivery service and it is an email marketing DRNKS Pronto, sent on 19 May 2021, that has drawn the complaint.
15. The email advises that the Company now provides tracking for same day and DRNKS Pronto deliveries. In part the email states - “we’ll be delivering ice cold drinks to your door / office / beach / park all day Thursday, Friday and Saturday”. The complainant takes issue with this statement on two grounds. Firstly, it is submitted that the delivery of alcohol to a beach is unlawful pursuant to the provisions of the Liquor Act 2007 (NSW). Secondly it is argued that the statement can be understood as encouraging alcohol consumption prior to swimming.

ABAC and same day alcohol delivery regulation

16. The first concern requires an examination of the interplay between the ABAC Scheme and regulation of same-day alcohol delivery in New South Wales. As mentioned in paragraph 2 above, alcohol as a product and the sale, service and marketing of alcohol falls within a shared regulatory space. Primary responsibility for the regulation of the sale and service of alcohol including same-day home delivery of alcohol rests with State and Territory governments.
17. In late 2020, the Liquor Act 2007 was amended by the Liquor Amendment (24-hour Economy) Act. In part the amending legislation inserted into the Liquor Act new provisions regulating same-day alcohol deliveries. As stated by the Company in its response to the complaint, these new provisions came into operation on 1 July 2021.

18. The complainant referred to Section 114K of the Liquor Act. This was one of the new provisions added to the Act in 2020 and provides that a person must not, as part of a same day delivery, supply liquor in a public place within:
 - an alcohol free zone;
 - an alcohol prohibited area; and
 - a restricted alcohol area.
19. The legislative foundation for 'alcohol free zone' and 'alcohol prohibited area' is to be found in the Local Government Act. In basic terms, a NSW Local Authority is given the power to designate particular areas as alcohol free zones - typically a public road, car park or footpath or as an alcohol prohibited area - typically a park or beach. (a 'restricted alcohol area' is not designated by a Local Council but by the State Government).
20. The practical effect of section 114K of the Liquor Act is to link the new regulatory regime on same day alcohol deliveries to the long-standing designations of certain areas as alcohol free zones or alcohol prohibited areas. An alcohol retailer cannot lawfully deliver alcohol to a customer in one of the zones or areas (noting that alcohol can be delivered to a private or commercial property located within a zone or area).
21. Responsibility for the Liquor Act rests with Liquor and Gaming NSW, a State Government body. The enforcement of the alcohol-free zones or alcohol prohibited areas rests with the relevant Local Authority. The ABAC is an industry based regulatory scheme for the responsible marketing of alcohol beverages and self-evidently has no direct role in regulating same day alcohol delivery services nor enforcing local alcohol exclusion zones and areas.
22. This means if an alcohol retailer acted contrary to the provisions of section 114K and delivered alcohol to customers physically located in an alcohol exclusion zone or area, then this is a matter for enforcement action by Liquor and Gaming. It is also noted that an alcohol retailer acting in this way would be in breach of the Online Alcohol Sale and Delivery Code of Conduct produced by Retail Drinks Australia. Retail Drinks Australia is the peak industry body for the retailers of packaged alcohol products. Clause 4.1.10 of the Online Code prohibits any alcohol deliveries in designated Dry Zones as prescribed in current State and Territory liquor regulations. The Online Code also includes a complaints process.
23. The complainant points to the Company's email marketing as indicating that the Company will make same day alcohol deliveries to beaches in Sydney. It is contended most major beaches are alcohol free zones. For its part the Company refutes that it operated unlawfully pointing out:

- its Sydney same day deliveries do not go to suburbs with beaches;
 - it meets it's legal requirements;
 - and in any event the email was sent in May 2021 prior to the new NSW government regime on same day deliveries coming into effect on 1 July 2021.
24. Part 3 (a)(ii) of the ABAC provides that an alcohol marketing communication must not show or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an alcohol beverage. Assessment of the consistency of a marketing communication with a Code standard is from the viewpoint of a reasonable person taking the content of the marketing item as a whole. This means if a marketing communication can be understood in several ways, it is the most probable interpretation which is to be preferred over a possible but less likely interpretation.
25. Alcohol marketing that advocated that a person use alcohol in a criminal or unlawful way would be a breach of the Part 3 (a) standard. The sentence in the email referenced by the complainant (as conceded by the Company) does not employ the most precise language, but the Panel does not believe the email breaches the standard. In reaching this conclusion the Panel noted:
- the provisions making it unlawful to deliver alcohol to an alcohol free zone or area had not come into effect when the email was sent;
 - there is a fair amount of nuance in how local government designations of alcohol exclusion areas actually operate. For instance:
 - some restrictions are not outright but go to times of day;
 - Randwick City Council (given by the complainant as an example of alcohol restrictions) has website advice that "alcohol and glass is prohibited on all Randwick City beaches (all sand areas and rock platforms), but you can drink alcohol in a number of beachside parks during daylight hours";
 - 'beach' could readily be understood to include areas adjacent to the sand such as foreshores and grassed areas where alcohol consumption is more often permitted; and
 - taken as a whole the messaging in the email is primarily about the new tracking system for orders and would not be reasonably understood as a call for customers to act unlawfully or engage in anti-social behaviours.

Alcohol and Safety

26. The complaint raises a concern that the advertisement promotes drinking and swimming activities. This brings into play Part 3 (d) of the Code, which requires that a marketing communication must not show (including by direct implication) the consumption of an alcohol beverage before or while swimming (or for that matter, undertaking any other activity that, for safety reasons, requires a high degree of alertness or physical coordination).
27. Promoting an alcohol product using beach or ocean scenes is not prohibited by ABAC standards, but the standard contained in Part 3 (d) does impose some reasonably straightforward obligations when there are beach or ocean depictions of alcohol products namely:
 - do not show or imply that alcohol is being consumed during the use of the water e.g., swimming or wading in the ocean; and
 - do not create a scene where it can be reasonably implied that a person will consume alcohol and then go into the ocean.
28. For example, a person can be shown drinking alcohol on a beach or the foreshore if it is clear the person is not going to go into the water. This might be because the person is fully clothed, or the time of day establishes that any swimming would have finished for the day.
29. The Panel does not believe the email marketing breaches the Part 3 (d) standard, noting that:
 - there is nothing in the email suggestive that swimming might be contemplated;
 - simply mentioning 'beach' does not raise a reasonable implication that swimming is to occur;
 - it is not inconsistent with the ABAC standard to associate alcohol products with outdoor settings such as a beach or park; and
 - it is a very long bow to draw from the description of 'ice cold drinks' a sequence of actions involving alcohol consumption and subsequent swimming when no words or images in the marketing point to swimming occurring.
30. The complaint is dismissed.