



ABAC Adjudication Panel Determination No 30/22

Product: Beer
Company: 40/20 Beer Company Pty Limited
Media: Instagram
Date of decision: 17 May 2022
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Jeanne Strachan

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns a post shown on the Instagram pages of both the 40/20 Beer Company (“the Company”) and Country South Steelers PRLFC. It arises from a complaint received on 23 April 2022.
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 complaints were received on 23 April 2022.
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 advertising.

The Marketing

10. The complaint concerns the following image on the Instagram pages of both the Company and Country South Steelers PRLFC:



The Complaints

11. The complainant is concerned about the advertising as follows:
 - *This post demonstrates drinking alcohol during the high-risk behaviour of swimming.*

The ABAC Code

12. Part 2 of the ABAC provides that:
 - (a) The Code APPLIES to all Marketing Communications in Australia generated by or within the reasonable control of a Marketer...
 - (b) The Code does NOT apply to:
...
(v) Sponsorship.
13. 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.
14. Part 6 of the ABAC Code provides that a:

Marketer means a producer, distributor or retailer of Alcohol Beverages.

Sponsorship means any agreement or part of an agreement involving payment or other consideration in lieu of payment by a Marketer to support a sporting or cultural property, event or activity, in return for which the sponsored party agrees to be associated with or promote the sponsor's Alcohol Beverage or outlet. Sponsorship also includes naming rights of events or teams and the inclusion of a brand name and/or logo at an event venue or on uniforms of participants (excluding branded merchandise).

The Company's Response

15. The Company responded to the complaint by phone on 5 May 2022. Its principal comments were:

- Country South Steelers ‘tagged’ the Company in a post they made to their Instagram page, meaning that the post showed in the ‘tagged’ tab of the Company’s Instagram account.
- The Company was not involved with making the post, and did not have prior knowledge of it being made.
- On receipt of the complaint, the Company immediately ‘untagged’ itself from the post, and contacted Country South Steelers, who removed the post from their Instagram page.

The Panel’s View

Introduction

16. 40/20 Beer is an Australian made and owned craft brewer based in Manly New South Wales. The Company is not a signatory to the ABAC scheme and is not contractually bound to meet Code standards or abide by Panel determinations. That said, the Company accepts that alcohol marketing should occur consistently with community standards of good marketing practice and has cooperated with the complaint process.
17. The complaint relates to an Instagram post created by the Country South Steelers PRLFC, a Police Rugby League team based in the southern region of NSW. The post was made to the football team’s Instagram account and showed a man standing in a swimming pool resting a can of the Company’s beer between his bicep and forearm. The can appears to be open.
18. From examination of the team's Instagram account, it appears that the Company is one of the team’s sponsors. The terms of the sponsorship relationship are not relevant to this determination, but it likely explains why the Company’s product is shown in the post. In making the post, the creator ‘tagged’ the Company. This means the image in the post also appeared within the ‘tagged post’ section of the Company’s Instagram account.
19. It was the post within the tagged post section of the Company’s Instagram account which drew the complainant’s attention. The complainant believes the post is irresponsible as it demonstrates alcohol drinking during the high risk activity of swimming. There are two issues raised by the complaint for consideration, namely is the Company responsible for a post which it did not create but came to appear on its social media account and secondly, is the post inconsistent with ABAC standards.

ABAC and tagged posts

20. Not all references to alcohol products on social media fall within the remit of the ABAC Scheme. In fact, the vast majority of private posts mentioning alcohol are not touched by ABAC obligations. To fall within the Scheme the social media post must be generated by or within the reasonable control of an alcohol marketer.
21. In this case the Company did not create the post and it seems that the Company had no prior knowledge that the post would be made by the football club. While it is possible that the sponsorship arrangement between the Company and the club might have some provision about how the club references the Company's products and brand, for current purposes it is assumed that the Company had no 'reasonable control' over the club's Instagram account. This means the issue is the Company's responsibility for tagged posts that appear on the Company's Instagram account.
22. Instagram enables account holders to tag another Instagram account holder when making a post. The consequence of this is that the tagged post appears in a section of the second account holder's account. While this occurs without requiring the prior approval of the second account holder, this account holder has options to remove the tagged post.
23. In this way, the tagged post is akin to user generated comments that can be commonly made on social media posts across platforms. The Panel has previously decided that user generated comments appearing on the account of an alcohol company become the responsibility of the company. It is noted this is also the position adopted by the Federal Court on the responsibility of social media account holders more generally.
24. Drawing this together, the Panel believes that the Company has reasonable control over posts appearing on its Instagram account, including those created by third parties that have tagged the Company. This means the post appearing on the Company's account does fall within the ambit of the ABAC standards.

Alcohol and Safety

25. Part 3 (d) of the Code provides that an alcohol marketing communication (which includes social media posts) 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 coordination. Swimming is self-evidently an activity that should not be undertaken while consuming alcohol.
26. The post shows a man, wearing swimwear and standing in a swimming pool, balancing an opened can of beer on his arm. While the image does not show the man actually drinking the beer, the reasonable implication is that alcohol

consumption is occurring, during the use of the pool. As such the post is inconsistent with the ABAC standard.

Conclusion

27. The Panel finds that the Company has breached the Part 3 (d) standard by permitting the post to appear on its Instagram account. It is acknowledged that the Company did not itself create the post and upon receiving the complaint it removed the post from its account and contacted the football club to request that it also remove the post.
28. There are no precise rules as to the moderation responsibilities of alcohol companies and social media accounts. For instance, it would not be reasonable to expect tagged posts that offend the ABAC standards to be removed within say a few hours or even a day or two of the post being made (a 'no-fault breach' might be suitable in such cases). On the other hand, a company should be keeping a regular eye on its own social media accounts and inappropriate user generated comments or tagged posts should not remain for weeks.