



ABAC Adjudication Panel Determination No 35/23

Product: MSC Bortails
Company: Basic Brands/Mandatory Spirit Co
Media: Instagram and Facebook
Date of decision: 29 March 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Louisa Jorm
Ms Jeanne Strachan

Introduction

1. This determination by the ABAC Adjudication Panel ("the Panel") arises from a complaint received on 27 February 2023 and concerns Instagram and Facebook marketing for MSC Bortails ("the Product") by Basic Brands ("the Company").
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 the 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 27 February 2023.

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

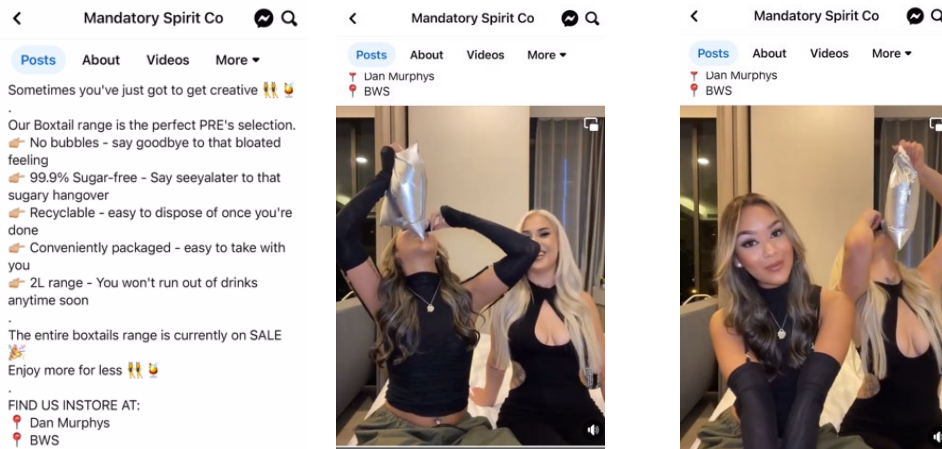
9. The quasi-regulatory system for alcohol beverage marketing features an independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for the marketing.

The Marketing Communication

10. The complaint relates to a post made to the Company's Instagram and Facebook pages, a summary of which is provided below:

Woman 1 (W1):	<p>Okay. We have something exciting to try. It is a boxed cocktail (holds up MSC Martini two litre cask) and it brings me back to my days of drinking out of one of these bags (holds up a goon bag).</p> <p>Because we don't have any glasses in this Airbnb, we literally have mugs that have passion on it, and I don't know, I feel like drinking out of the bag is just more fun.</p>
Woman 2 (W2):	<p>A bit more...umm...like a blast from the past.</p>
W1:	<p>Yeah. Alright. And we accidentally froze this because we were meant to drink this yesterday but...ahh..we just decided to eat food from the 7-11 instead of going out.</p> <p>But anyway, first impressions.</p> <p>(Drinks from goon bag).</p> <p>That's so good.</p>
W2:	<p>Is it?</p>
W1:	<p>It's really nice.</p> <p>(Hands goon bag to W2)</p>

W2:	(Drinks from goon bag)
W1:	We're in Bangkok and we're having fun. We're going to go out clubbing.
W2:	Whoo!
W1:	Do you like it?
W2:	Yeah. Yeah.
W1:	It's really good.
W2:	It's really yummy.



The Complaint

11. The complainant objects to the marketing as follows:

- *The online video is sponsored content of two models/influencers/social media personalities consuming an alcoholic product from Mandatory Spirit Co. They then proceed to drink alcohol directly from the flagon style container stating that drinking alcohol this way is a 'bit more fun'.*
- *We believe these advertisements are in breach of Standard 3(a) of the ABAC Responsible Marketing Code whereby a marketing communication and product must NOT:*

show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines (ABAC Standard 3(a) Responsible and Moderate Portrayal of Alcohol Beverages).

- *The video presents a glamorised portrayal of consuming alcohol to excess. The video encourages people to consume the product in an inappropriate and excessive manner. The video uses models/influencers to show their product and are promoting this to social media followers of the brand and their products.*

The ABAC Code

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

- (a)(i) show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines.

The Company's Response

13. The Company was forwarded the complaint on 28 February 2023, and responded within two hours to advise that they had removed the post.

The Panel's View

14. In this case, the Panel is assessing a video posted on the Company's social media accounts (Facebook and Instagram) and the consistency of the video and accompanying text with the standard contained in Part 3 (a). This standard provides that a marketing communication must not show (including by direct implication) or encourage the excessive or rapid consumption of an alcohol beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines.
15. The video is of two young adult women who drink directly from the 'goon bag' of the Company's two litre carton pre-mixed vodka product. The complainant believes the video is irresponsible alcohol marketing and contends it:
- presents a glamorous portrayal of consuming alcohol to excess; and
 - encourages people to consume the product in an inappropriate and excessive manner.
16. The Company responded to the complaint by quickly removing the social media posts and chose to not mount any argument as to whether the post was consistent or otherwise with the Part 3 (a)(i) standard. While the Panel will always consider the arguments of a respondent company to a complaint, under the rules applying to the complaints process, the Panel is obliged to form its own view on the issues raised by a complainant irrespective of whether the alcohol marketer puts forward arguments or not.

17. The baseline for the operation of the standards of good marketing practice contained in the ABAC is the 'reasonable person' test as provided in Part 5 of the Code. This provision goes to the interpretation of the Code and states that compliance of a marketing communication with the Code is to be assessed in terms of the probable understanding of the marketing communication by a reasonable person to whom the material is likely to be communicated and taking its content as a whole.
18. Essentially the question the Panel is to answer is how a reasonable person would most probably understand the post given the complainant's concerns ie is the post (the video and the accompanying text) showing or encouraging excessive or rapid alcohol consumption or the misuse of alcohol.
19. The concept of the reasonable person is borrowed from the Australian common law system and it is an attempt to ground the assessment of ABAC requirements with prevailing community standards. This means a reasonable person has life experiences, values and attitudes found in common with most people in the Australian community.
20. In regard to marketing, generally speaking a reasonable person will pay some attention to a marketing communication but won't consider the material as a matter of great importance. Obviously, some marketing will be more successful at gaining and keeping attention than other marketing examples, but as a guide the Panel assumes:
 - the content and messaging would be absorbed to some extent but it will be the major themes and the most prominent visual cues that will be more influential than finer details; and
 - with a social media post, the visual aspects such as a photograph or video will be more influential than accompanying text.
21. Sometimes it is possible to interpret a marketing communication in several ways. A consequence of the reasonable person test is that the most likely interpretation is to be preferred over a possible but less likely interpretation. This doesn't mean that a person taking a different interpretation of the marketing item is 'unreasonable' but possibly their understanding of the marketing would not be shared by most people in the community.
22. Context is always critical in assessing a marketing communication. For instance, an action taken in one context might be probably understood as irresponsible but when shown in another context would not be viewed as poor behaviour. For example, a scene showing alcohol consumption near a swimming pool might or might not imply alcohol use prior to swimming depending on whether the person drinking is wearing swimming togs or is fully clothed, the time of day the scene is placed and the background activity.

23. In the current case, the marketing communication is a social media post. The most important element of the post is the video of the two women. In this video the prime take outs are:
- two women wearing evening dresses are shown drinking the Company's product directly from a goon bag. Both women take a single mouthful of the product;
 - the dialogue between the women establishes:
 - they are in an Airbnb apartment in Bangkok and they will be going clubbing;
 - they drink directly from the bag as there are no glasses in the apartment (although the dialogue notes there are mugs) and drinking this way is 'more fun';
 - drinking from a goon bag is something they have done in their past; and
 - they both enjoy the product.
24. The accompanying text is mostly a series of product attributes with a claim the product is the perfect 'PRE's selection'. This reference would be most likely understood as relating to the practice of consuming alcohol prior to going out. This is referred to as pre-loading.
25. The consumption of alcohol from a goon bag directly into the mouth does raise an implication of less controlled or measured consumption compared to drinking from a glass or cup and certainly could in a given context be probably understood as showing or encouraging excessive or rapid consumption. However, it is possible the action could be depicted within a context where excessive or rapid consumption would not be the most likely interpretation.
26. On balance the Panel does believe the post is in breach of the Part 3 (a)(i) standard. In reaching this conclusion the Panel noted:
- consumption directly into the mouth from a goon bag raises an implication of rapid consumption as clearly the product cannot be sipped as from a glass or cup and must be taken by the mouthful;
 - the video provides a context as to why the product is being consumed directly from the bag, namely there being no glasses - however this reason is diminished by the acknowledgement that there are mugs in the apartment and the reminiscence of past behaviour of drinking from a bag being 'more fun';

- while the video does not show excessive consumption with each woman having a single mouthful of the product the reasonable implication is that further consumption will occur by reference to 'PRE's selection' in the text; and
- taken as a whole a reasonable person would probably understand that combined the various elements of the post does encourage excessive consumption or misuse of alcohol to pre-load.

27. The complaint is upheld.