



ABAC Adjudication Panel Determination No 157/24

Product: MXTology Cocktails
Company: MXTology Cocktails
Media: Digital – Facebook
Date of decision: 1 November 2024
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 13 October 2024 about social media marketing for MXTology Cocktails (‘the product’) by MXTology Cocktails (“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

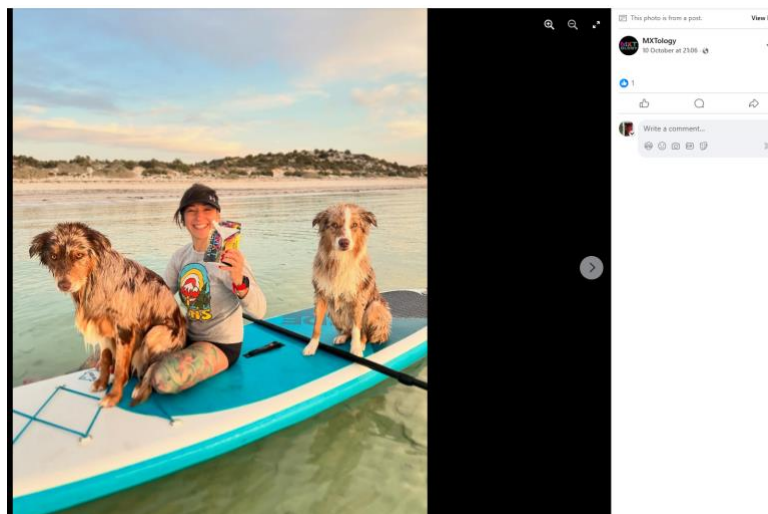
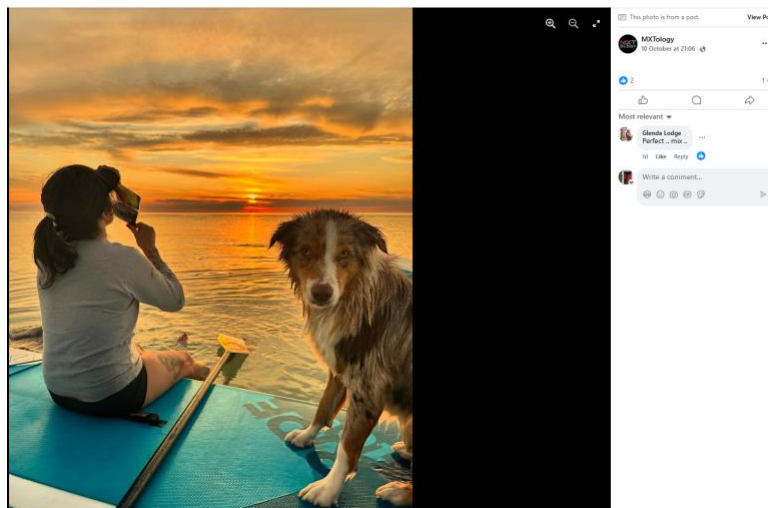
7. The complaint was received on 13 October 2024.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint and this determination was made within the target timeframe.

Pre-vetting Advice

9. A component of the ABAC Scheme is an advice service by which an alcohol marketer can obtain an independent opinion of a proposed alcohol marketing communication against the ABAC standards prior to public release. Pre-vetting advice is separate from the complaint process and does not bind the Panel but represents best practice on behalf of alcohol marketers. Pre-vetting advice was not obtained for the marketing.

The Marketing

10. The complaint relates to a Facebook post:



11. The complaint also refers to snowboarding and skiing social media posts, which have been considered previously in Determination 135/24 and therefore are not considered again as part of this determination.

Complaint

12. The complainant objects to the marketing as follows:
 - *They are constantly showing people drinking their drinks and doing dangerous activities like snow skiing and stand-up paddle boarding on the water.*

The ABAC Code

12. Part 3 of the Code provides that An Alcohol Marketing Communication must NOT:
 - (d) show (visibly, audibly or 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, such as the control of a motor vehicle, boat or machinery or swimming.

The Company Response

13. The Company responded to the complaint by letter emailed on 21 October 2024. Its primary comments were:
 - We want to clarify that MXTology does not promote drinking while actively paddle boarding. The image in question shows an individual sitting on a paddle board after enjoying their paddle boarding session, relaxing in knee-deep water. This is a key distinction, as we believe in enjoying our cocktails responsibly once the activity has been completed, not during.
 - Furthermore, the location of the image—taken in shallow water—emphasizes that this is a moment of relaxation, where the individual is stationary and in no danger of falling or being at risk of drowning. The safety of our customers is paramount, and we always promote the responsible enjoyment of our products in appropriate settings.
 - In conclusion, our intention with this image is to showcase a moment of rest and enjoyment after paddle boarding, not during the activity itself. We remain committed to promoting responsible and safe consumption of our cocktails in all settings.

The Panel's View

12. This determination arises in relation to a Facebook post for MXTology Cocktails. The post features two photographs of a woman sitting on a large paddle board while consuming the product. The concern expressed by the complainant is that the post encourages the consumption of alcohol before or while undertaking the risky activity of paddleboarding.

13. Part 3 (d) of the Code provides that an alcohol marketing communication must not show (visibly, audibly or 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.
14. The policy intent of the Part 3 (d) standard is that alcohol marketing should not model alcohol consumption before or in conjunction with activities that are inherently dangerous such as driving a motor vehicle. This is because alcohol impacts on a person's physical and mental capacities, reduces coordination and can contribute to a loss of inhibitions and the making of poor judgements.
15. It is important to note that the Code standard does not prohibit an alcohol brand being associated with a sport or activity such as paddle boarding or any other pursuit conducted on water. The point of the standard is that alcohol should not be consumed while undertaking the activities and marketing should not suggest that it is acceptable to use alcohol in this way. What this means for water based activities is that an item of marketing can:
 - show an alcohol product at a beach or adjacent to a swimming pool if it is clear that alcohol is not being consumed; or
 - show alcohol consumption but it is clearly established that the dangerous activity like swimming, surfing, scuba diving etc has finished and will not be recommenced
16. The benchmark applied when assessing if an ABAC standard has been satisfied is the 'reasonable person' test. This means the Panel puts itself in the shoes of a person who has the life experiences, opinions and values commonly held by most Australians and assesses how this reasonable person would probably understand the marketing communication.
17. So what would likely influence how a reasonable person would understand a marketing communication set at a beach as to whether a person depicted was going to consume alcohol and then enter the water to swim or go paddle boarding or windsurfing etc? Some factors might be:
 - how is the person dressed e.g. are they fully clothed or wearing swimming gear or are they wearing a floppy hat and sunglasses or swimming cap and goggles;
 - the positioning of the person i.e. is the person in the water, immediately adjacent to the water or some distance from the water;
 - whether the person is shown consuming the product (including, if not actually shown, but is directly implied);

- how is the alcohol product presented e.g. is it an open can or bottle or closed or does it seem the product has been already partially consumed; and
- the time of day of the scene depicted e.g. it is more likely the activity is completed if it is late afternoon as opposed to the morning.

18. In response to the complaint the Company advised that:

- MXTology does not promote drinking while actively paddle boarding. The image in question shows an individual sitting on a paddle board after enjoying their paddle boarding session, relaxing in knee-deep water. This is a key distinction, as we believe in enjoying our cocktails responsibly once the activity has been completed, not during;
- the location of the image—taken in shallow water—emphasizes that this is a moment of relaxation, where the individual is stationary and in no danger of falling or being at risk of drowning; and
- our intention is to showcase a moment of rest and enjoyment after paddle boarding, not during the activity itself.

19. The post has two photographs of a woman in sports gear sitting on a paddle board floating in the sea. The first image shows the woman with her back to camera drinking the product while facing a sunset. She is accompanied by a dog. The second image shows the woman with two dogs resting on the board holding the product and facing the camera. From the lighting, it is likely the photograph was taken in the mid to late afternoon.

20. The scenes depict calm water, and while it is not entirely clear, most likely the woman is relatively close to the shore and in shallow water. It appears the dogs have been in the water but the woman's clothing is dry. Both photographs are staged for the camera and are not an 'action' shot.

21. On balance the Panel believes that the Part 3 (d) standard has been breached. In reaching this conclusion the Panel had regard to:

- paddleboarding is an activity that, for safety reasons, requires a high degree of alertness or physical coordination;
- alcohol consumption is depicted (image 1) or directly implied (image 2)
- both photographs are set with the paddle board and the woman in the water with a paddle, suggesting at a minimum further use of the board is required to return to the shore;
- the time of day is suggestive that paddleboarding has either ended or would shortly end; and

- a reasonable person would probably conclude that the marketing is suggesting alcohol consumption with the use of a paddle board is acceptable.
22. With relatively minor changes it would have been possible for the Company to have positioned the product at the beach and associated the product with the activity of paddleboarding in a manner that does not offend the Code standard. Some advice from the ABAC pre-vetting service would assist the Company for the future to develop instructions to its creative team to meet the standards.
23. The complaint is upheld.