



ABAC Adjudication Panel Determination No 139/24

Product: Heineken
Company: Lion Beer Australia
Media: Instagram
Date of decision: 18 October 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 24 September 2024 about an Instagram advertisement for Heineken (“the product”). Lion (“the Company”) is the local distributor and manufacturer of Heineken in Australia.
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 places 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, and 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 24 September 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 before 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 item.

The Marketing

10. The complaint relates to an Instagram post:

[Heineken | The best part of summer wasn't the beer. #PhotoDump | Instagram](#)

The screenshot shows an Instagram post from the official Heineken account. The main image is a photograph of a person in a bikini and scuba gear underwater, holding a Heineken beer bottle. The person is smiling and looking towards the camera. The background is clear blue water with some bubbles. The Heineken logo and tagline 'For a Fresher World' are visible in the bottom right corner of the image. The post's caption reads: 'The best part of summer wasn't the beer. #PhotoDump'. There are three replies visible: one from 'johnrkb_' with 1 like, one from 'niklasrasenberg' with 1 like, and one from 'franeggg_'. The post is liked by 'rodrigochalpeno and others' 4 days ago. The Heineken logo is also visible in the top right corner of the post area.

Complaint

11. The complainant objects to the marketing as follows:

- *The advertisement goes against section 3, D – Alcohol Safety. The advertisement shows a woman holding a Heineken beer bottle while swimming. This can negatively influence and promote the message of partaking in water activities whilst consuming alcohol. Even small amounts of alcohol can affect behaviour and ability, increasing the risk of drowning. Alcohol can heighten the risk of drowning because it impairs judgement, increases risk-taking behaviour, reduces coordination, impairs reaction time and hypothermia.*
- *Data from the Royal Life Saving Society revealed that 2,760 men lost their lives due to drowning from July 2003 to June 2018. 49% of fatal drownings and 35% of non-fatal drownings are estimated to involve alcohol (Royal Life Saving Australia, 2024).*
- *Young people are susceptible to seeing this advertisement which promotes unsafe drinking practices as young people can access this advertisement. The Alcohol and Drug Foundation states that on social media alcohol consumption is normalised and often glamorised among adolescents and young adults. There is strong evidence that this is linked to increased alcohol consumption and alcohol-related problems (Alcohol and Drug Foundation, 2024). This advertisement promotes the unsafe message to those who access social media including but not limited to adolescents and young people, that water and alcohol are activities that coincide together.*
- *Alcohol and Drug Foundation, 2024, 'Alcohol Advertising, Social Media and Young People,*
https://cdn.adf.org.au/media/documents/Alcohol_advertising_young_people.pdf
- *Royal Life Saving Australia, 2024, 'Alcohol and water safety',*
<https://www.royallifesaving.com.au/stay-safe-active/risk-factors/alcohol-water-safety#:~:text=Alcohol%20and%20water%20don't,in%20urban%20and%20regional%20areas>

The ABAC Code

12. Part 2 of the ABAC Code provides that:

- (a) Parts 3 and 4 of the Code APPLY to all Alcohol Marketing Communications.

Alcohol Marketing Communication is defined as meaning a marketing communication for alcohol, in any media, generated by or within the reasonable control of an alcohol producer, distributor or retailer that has a discernible link to Australia.

13. Part 3 of the Code requires 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 machinery or swimming.

The Company Response

14. The Company responded to the complaint by letter emailed on 3 October 2024. Its primary comments were:

- Thank you for raising this complaint and providing the opportunity for us to respond to the concerns of the complainant. Lion reiterates its commitment to the ABAC Scheme and that it takes its obligations to responsibly promote its products seriously.
- The Advertisement was not approved by the Alcohol Advertising Pre-Vetting Service (AAPS).
- We submit that the Advertisement is not an “alcohol marketing communication” as it was not within Lion’s reasonable control, specifically
 - the Advertisement was posted on an Instagram account owned and managed by The Heineken Company NV (Heineken Global). Lion is the local distributor and manufacturer of Heineken in Australia and operates a separate Instagram account at this link: https://www.instagram.com/heineken_au/ (Heineken AU Account). The Heineken AU Account identifies that it’s intended for the Australian market by use of the “@heineken_au” handle and profile description “Heineken Australia”;
 - Heineken Global created the Advertisement;
 - Heineken is a global brand so the Heineken Global Instagram account is generally available online and not intended for a specific country; and
 - Lion has no control over the Heineken Global Instagram account or content posted, including the Advertisement.
- We submit that the Advertisement breaches Part 3(d) of the ABAC Code and confirm Lion wouldn’t have created or posted the Advertisement if it were within its control.

- We respectfully submit that any finding against Lion based on this Complaint should be a no-fault breach under Part 6 of the ABAC Code.
- As a responsible marketer, Lion has demonstrated a long-standing commitment to upholding both the letter and spirit of the ABAC and AANA Codes. Lion maintains strict internal and external processes to help ensure its compliance.

The Panel's View

15. This determination relates to a complaint received about a post made to an Instagram account for Heineken. The post shows a woman snorkelling holding an opened bottle of Heineken with the accompanying text - 'The best part of summer wasn't the beer.' The complainant believes the post breaches the ABAC standard in Part 3 (d).
16. Heineken is a global alcohol brand founded and based in the Netherlands. In Australia, the brand is produced and sold under license by Lion. The post was made to Instagram, a global social media platform. The threshold issue for assessment is whether the Instagram account on which the post was made is within the jurisdiction of the ABAC Scheme.
17. While some alcohol brands and social media platforms operate globally, the ABAC scheme is limited in its reach to marketing which is linked to Australia. This is reflected in the Code which describes its application to a 'marketing communication for alcohol, in any media, generated by, for, or within the reasonable control of an alcohol producer, distributor or retailer, that has a discernible and direct link to Australia'.
18. This means the Scheme and the remit of the Panel do not extend to every alcohol marketing item that can be accessed in Australia over a global digital platform. To fall within the ambit of the Scheme the marketing item must have a discernible and direct link to Australia such as:
 - the Instagram account is under the control of an Australian alcohol marketer; or
 - if the Instagram account is under the control of an international entity there is a discernible and direct link to Australia so there is an Australian entity to which the ABAC obligations can attach ie an Australian entity with reasonable control over the marketing communication
19. The Company contends that:
 - the post is not an alcohol marketing communication for ABAC purposes as it was not within Lion's reasonable control;

- the post was on an Instagram account owned and managed by The Heineken Company NV (Heineken Global);
 - Heineken Global created the post;
 - the Company maintains a separate Instagram account for the brand in Australia;
 - Heineken is a global brand so the Heineken Global Instagram account is not intended for a specific country; and
 - Lion has no control over the Heineken Global Instagram account or the content that is posted on the global account.
20. A review of the Instagram account on which the post was made shows that it is generic with no specific Australian content as such, and it appears to be directed toward an overseas audience. For instance, it refers to Heineken's sponsorship of the UEFA Champions League, and it refers to 'football' when showing images that are European and don't reflect football as the term is most commonly used in Australia.
21. Further, the post complained about references summer as having just passed, which supports that the post presupposes its audience is in the Northern Hemisphere. There is nothing on the account to suggest that it was contributed to by Lion Australia and the comments to posts by followers do not readily indicate the account is being engaged with by Australian consumers.
22. The Panel believes that the post is not a marketing communication within the jurisdiction of the ABAC Scheme. It is evident that the post was created outside Australia and is on a social media account that is directed to an apparently European audience. While Heineken is a product freely available in Australia and is marketed in Australia by Lion, the Instagram marketing of the product in Australia for the Australian consumer is via a separate account. Lion Australia does not have the requisite control to bring the global Heineken account within the scope of the ABAC Scheme.
23. On 26 September 2024, two days after the complaint was received the Rules and Procedures applying to the ABAC Scheme were revised. One of the changes authorised the Panel Chief Adjudicator to not refer a complaint to the Panel if the complaint raises issues that are more appropriate to refer to an alternate complaints adjudication forum.
24. The new rule recognises that alcohol marketing operates in a shared regulatory environment and that a complaint might raise an issue that notionally falls under the ABAC but also raises an issue under another regulatory regime. Mostly this rule will be utilised when an item of marketing is better dealt with by a State/Territory Liquor Licensing Authority as while a notional ABAC standard

is raised, the core issue is about the responsible service of alcohol under the domain of the government regulator e.g. a concern about the conduct and promotion of a happy hour style event.

25. The rule also recognises that sometimes an item of marketing accessed online in Australia and complained about to the ABAC Scheme is more properly within the domain of the regulatory regime of another country. This is a case of that nature, with a post created in the Netherlands, for a European market best considered by the alcohol regulatory regime applying in Europe.
26. Drawing this together:
 - Heineken as a physical product is brewed and sold in Australia by Lion Australia;
 - Lion markets Heineken in Australia including via Instagram;
 - the post complained about was not on the Heineken Australia Instagram account but on a separate Instagram account held by the Dutch brewer Heineken N.V.;
 - it is evident that the Heineken N.V. Instagram account is directed towards a European audience and there appears to be little engagement on this account by Australian consumers;
 - Lion did not create the post nor does it have control over the Heineken N.V. Instagram account;
 - while the Heineken N.V. Instagram account can be accessed in Australia given the global nature of the internet and social media, there is not a sufficient nexus between the Heineken N.V. Instagram account and Australia to bring the account and the post within the ambit of the ABAC Scheme; and
 - rather the more appropriate regulatory regime for the post is that applying to alcohol marketing in the Netherlands and Europe.
27. Accordingly, the Panel does not have jurisdiction to determine the complaint against the ABAC standards and the complaint must be dismissed for this reason.