



## **ABAC Adjudication Panel Determination No. 29-30/18**

**Product:** 5 Seeds Cider  
**Company:** Lion  
**Media:** Digital  
**Complainant:** Ms Jackson, Cancer Council Victoria  
**Date of decision:** 9 April 2018  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Debra Richards  
Professor Louisa Jorm

### **Introduction**

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns Instagram posts featuring 5 Seeds Cider (“the Company”) and arises from two complaints received 20 February 2018.
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 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”) – 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 – which places restrictions on the location of alcohol advertisements on outdoor sites such as billboards.
2. The codes go either to the issue of the placement of alcohol marketing, the content of alcohol 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.
  3. For ease of public access, the Ad Standards (AS) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the AS, a copy of the complaint is supplied to the Chief Adjudicator of the ABAC.
  4. The complaint is independently assessed by the Chief Adjudicator and AS 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.
  5. The complaints raise concerns under the ABAC Code and accordingly are within the Panel’s jurisdiction.

## **The Complaint Timeline**

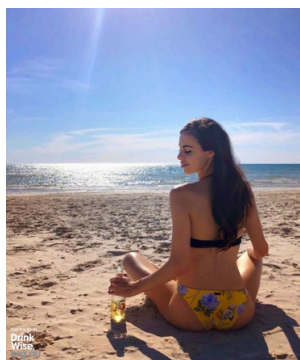
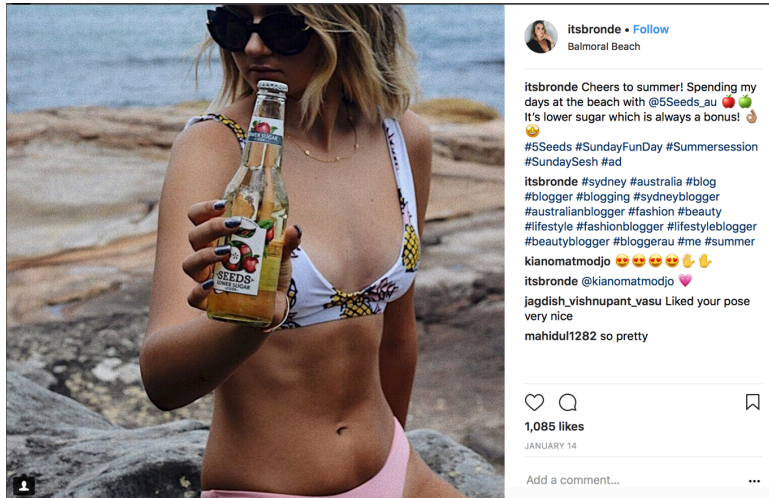
3. The complaints were received on 20 February 2018.
4. The Panel endeavour to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint was unable to be completed in this timeframe due to a delay in obtaining advice from Instagram and in relation to its age restriction controls.

## **Pre-vetting Clearance**

5. 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 these marketing communications.

## The Marketing Communications

6. The complaint relates to posts by @itsbronde and @mcdhannah that feature 5 Seeds Cider and regrams of those posts by @5seeds\_au. A screenshot of each post complained about is included following.



## The Complaints

7. The complainant objects to the marketing as the posts appear to result from a commercial arrangement with Lion to promote 5 seeds cider and fail to use available Instagram age restriction controls. In addition they feature women who are under the age of 25.

## The ABAC Code

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

(b)(iii) depict an Adult who is under 25 years of age and appears to be an Adult unless:

- they are not visually prominent or
- they are not a paid model or actor and are shown in a Marketing Communication that has been placed within an Age Restricted environment.

(b)(iv) be directed at Minors through a breach of any of the Placement Rules.

9. Part 6 of the ABAC Code includes definitions including:

**Placement Rules** means:

- (ii) A Marketing Communication must comply with codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Alcohol Guidelines).
- (iii) If a media platform on which a Marketing Communication appears has age restriction controls available, the Marketer must utilise those age restriction controls to exclude Minors from the audience
- (iv) If a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, a Marketing Communication may only be placed where the audience is reasonably expected to comprise at least 75% Adults (based on reliable, up to date audience composition data, if such data is available)
- (v) A Marketing Communication must not be placed with programs or content primarily aimed at Minors

A **Minor** means a person who is under 18 years of age and therefore not legally permitted to purchase an alcohol beverage in Australia.

## **The Company's Response**

10. The Company responded to the complaint by letter dated 13 March 2018. The principal points made by the Company were:
  - a) In reference to complaint 29, Lion can confirm that the social media influencer who appears in this post, Hannah McDonald (@mcdhannah) is 25 years old. Hannah was paid \$264 to post the advert on her Instagram page, where approximately 83% of her social media followers are over 18.
  - b) In reference to complaint 30, the social media influencer who appears in this post, Karolina Ezerskyte (@itsbronde) is 23 years old. Karolina was paid \$165 to create this post on the basis that 89% of her followers are over 18. The content shared on Karolina's Instagram account is high-end in nature, with a strong focus on lifestyle that appeals to a mature audience.
  - c) The 5 Seeds Instagram account uses an age-gate to ensure all marketing communications are strictly shared with users aged 18 or over, and the 5 Seeds audience demographic is 100% adults.
- a) Nevertheless, as the social influencer, Karolina Ezerskyte is currently under 25, 5 Seeds have removed this post from their Instagram page, Karolina has removed the post from her Instagram page and Lion has reiterated its guidelines to our social media moderators to ensure no similar post is repeated.

## **The Panel's View**

11. The two complaints concern the inclusion within the Instagram feeds of two young women promoting the Company's product. It is accepted by the Company that the two women involved were engaged as social influencers to promote the 5 Seeds Cider product and hence the otherwise private Instagram posts are marketing communications for ABAC purposes.
12. There are two issues to be considered as raised in the complaints, namely:
  - a) Are the two women aged 25 years or over as required by section 3(b)(iii) of the ABAC content standards; and
  - b) Have the Code Placement Rules been complied with.
13. The question of the age of persons featured in alcohol marketing is one of fact. It is permitted to depict an adult who is 25 years old or older and not permitted to depict a person aged 24 years or younger. The complaint contended both women appeared to be under the age of 25.
14. The Company has advised that Ms McDonald is aged 25 and Ms Ezerskyte is aged 23. Accordingly, the section 3(b)(iii) requirement has not been satisfied in the case of Ms Ezerskyte.

15. The ABAC Placement Rules require that alcohol marketing via digital platforms such as Instagram meet certain requirements, namely:
  - a) The use of age restrictions if such controls are available; and
  - b) If age restriction controls are not available, then a marketing communication may only be placed where the audience is reasonably expected to comprise at least 75% adults.
16. The operation of Instagram's age restriction controls and alcohol marketing by social influencers was recently fully canvassed by the Panel in Determination 12/18, dated 14 March 2018. In short, the position is:
  - a) Instagram does have age restriction controls but these controls are differential depending on the nature of the Instagram account holder;
  - b) A 'business' account such as a branded alcohol company's account have available age restriction options which enable the Company to exclude under 18 year old users of Instagram from accessing Company posts; and
  - c) A 'private' account owner such as Ms McDonald and Ms Ezerskyte do not have the option of selecting an age restriction control.
17. The Panel's Executive Officer has had further discussions with Instagram's Australian representatives in conjunction with this determination. These discussions have confirmed once again that private account holders cannot elect to apply age restriction controls.
18. Placement Rule 2 requires that 'available' age restriction controls be utilised. While it is somewhat incongruous that the age controls are an option for business accounts, but not private accounts, this is how Instagram operates. Accordingly, Placement Rule 2 is not applicable.
19. This means that the 75% adult audience benchmark contained in Placement Rule 3 is applicable. The Company has advised that the age make up of the followers of the two influencers is 83% adult for Ms McDonald and 89% for Ms Ezerskyte. Public data on the followers of Instagram is not made available, although overall the site has predominantly adult users well in excess of the 75% adult threshold.
20. Pulling this together means:
  - a) The complaint in relation to Ms Ezerskyte is upheld in relation to her being under the age of 25;
  - b) The complaints in relation to Ms McDonald and the requirements of the Placement Rules for both account holders are dismissed; and
  - c) The Company cannot place on its Instagram feed posts from Ms Ezerskyte because she is under the age of 25.
21. Accordingly the complaints are upheld in part.