



ABAC Adjudication Panel Determination No. 104-109/18

Product: Wilde Beer
Company: Tribe Breweries Pty Ltd
Media: Digital
Date of decision: 17 October 2018
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns Instagram posts featuring Wilde Beer which is owned by Tribe Breweries Pty Ltd (“the Company”) and arises from complaints received 6 September 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.
3. 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.
4. For ease of public access, the Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by 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 complaints raise concerns under the ABAC Code and accordingly are within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaints were received on 6 September 2018.
8. The Panel endeavour to determine complaints within 30 business days of receipt of the complaint. This complaint was considered within that 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 these marketing communications or their placement.

The Marketing Communication

10. The complaint relates to the posts included below that are by @cleocohen, @mitch.cox and @wilde_beer that show and reference Wilde beer.

The collage consists of six social media posts:

- Post 1 (Top Left):** User @cleocohen. Photo of a man and a woman eating inside a van. Caption: "Dinner nights inside - no need for chairs when there's enough room for a Mexican fiesta on the floor...". 11,420 likes.
- Post 2 (Top Right):** User @cleocohen. Photo of a woman lying on a bed in a van looking out at a beach. Caption: "Travelling new locations, learning new cultures and exploring different landscapes...". 8,377 likes.
- Post 3 (Middle Left):** User @mitch.cox. Photo of a woman lying on a bed in a van looking out at a beach. Caption: "Starting to plan our next van adventure, anyone selling in Europe?". 7,551 likes.
- Post 4 (Middle Right):** User @wilde_beer. Photo of a couple on a mountain peak with a circular logo overlay that says "APPROVED FOOD PRODUCT FODMAP FRIENDLY". Caption: "The only beer in the world to be certified!". 95 likes.
- Post 5 (Bottom Left):** User @wilde_beer. Photo of a couple sitting by a waterfall. Caption: "Take me away". 198 likes.
- Post 6 (Bottom Right):** User @wilde_beer. Photo of a couple sitting on a mountain peak. Caption: "Adventure finds those who seek it...". 67 likes.

The Complaints

11. The complainant objects to the marketing as the posts:

- depict an adult female and/or male who are under 25 years of age;

- are alcohol marketing by reason of the use of @wilde_beer in the captions and the visually prominent placement and/or consumption of bottles of Wilde beer;
- fail to use available age restriction controls to exclude minors from the audience; and
- are accessible to Instagram users including young people aged 13-17 years who would have directly received this post. It is highly likely that the social media influencers would have a high number and proportion of followers who are younger than 18 years. As a result, there is no basis for a reasonable expectation that the audience of these Posts would comprise at least 75% adults.

The ABAC Code

12. 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.

13. Part 4 of the ABAC Code provides that:

A breach of this Code that is reasonably unforeseeable by or outside the reasonable control of the Marketer or their agency will be classified as a 'no fault breach.'

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

Placement Rules means:

- (i) 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).
- (ii) 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.
- (iii) 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).

- (iv) 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

15. The Company responded to the complaint on 2 October 2018. The principal points made by the Company were:

- Tribe Breweries are the new owners of the Wilde Beer brand which is currently in transition from the original owners, Koala Beer. The complaint that has been lodged relates to social media activity executed by the previous owners so we are responding with limited knowledge of previous direction and execution on the brand.
- As far as Tribe has been able to identify the relationship that Wilde Beer had with Mitch Cox was based on the previous owners identifying Mitch as someone they believed embodied the brand through his lifestyle and personal brand. They engaged Mitch to take photography as part of his broader trip that he had already planned separately to Wilde being involved. As part of this trip Wilde Beer paid Mitch to take photography that Wilde would then be able to utilize on its own social media to help reinforce Wilde being a Gluten Free product with a positioning around the outdoors, natural and alternative lifestyles which plays to a 'gluten free lifestyle'. As such we understand that Wilde beer did not pay Mitch [or Cleo] to explicitly post these images as paid advertisements and they did so at their own behest as consumers and lovers of the brand.
- Unfortunately we cannot verify the exact age of either of Mitch [or Cleo as she wasn't engaged by Wilde directly] due to the previous owners engaging Mitch and due to employment confidentiality law we are not able to contact the previous marketing employees responsible. The complaint however does state an alleged age of 24 which taken as a minimum may well now be 25 however we cannot confirm this.
- We understand that Instagram does have an age restriction capability but this was not activated by the previous owners. We have now activated this on our Instagram site. The controls when activated prompt the user to verify they are over the age of 18. If they state no it blocks them from the

site. Therefore operating in a similar way to the gateways used by alcohol companies on their websites and other digital mediums.

- We are not able to provide any audience compositions for Mitch or Cleo's Instagram sites as these are not our sites. The complaint does however reference their site having 133,000 followers. The Wilde Instagram site has circa 11,000 followers and as stated did not previously have the age restriction enabled so we cannot verify the age of current followers. However we do know that since activating the age restriction that it has prompted existing followers who see / view any images posted to verify their age.
- While we cannot verify the age of Mitch and Cleo, the complaint states a reported age of 24. We do know they are in their twenties given the time frame they have been on social media.
- In summary:
 - as a result of being made aware of this complaint through Ad Standards [via an email sent to a administration email account], Tribe actioned the age restrictions on our Instagram site immediately.
 - Tribe then proactively reached out to ABAC to ensure we were addressing any potential issues which has allowed us to respond in this letter.
 - The time frame when these posts were made by Mitch & Cleo were between July and December 2017 , the earliest of which was more than 12 months ago, prior to Tribes ownership of the brand. The post on our website was made in July of this year during a transition period.
 - We believe these images are all in keeping with a tasteful and inoffensive portrayal of the brand and in no way seeks to market to minors or encourage the irresponsible consumption of alcohol. This is consistent with all images utilized.
 - While we cannot verify the exact age of the persons posting due to the change in ownership of the brand, nor can the complainant in their complaint.
 - It has now been more than 12 months since these posts and as far as Tribe Breweries has been able to ascertain the posts were not directly paid for or requested by Wilde Beer. The two people

in question are clearly over legal drinking age and are free to post and tag brands into their own social media.

- Wilde Beer made a post on its site in July 2018, which given we are not able to verify the age of those in the post we are happy to remove this specific post should ABAC deem it appropriate
- Moving forward we will put in place a tighter control of images posted and ensure anyone engaged in the brand will be over the age of 25.

The Panel's View

16. This determination concerns a series of social media posts on the platform Instagram dating from July 2017 to July 2018. The posts promote or reference the product Wilde Beer and appeared on the Company's Instagram account and the accounts of Mitch Cox and Cleo Codrington. Mr Cox and Ms Codrington are social media influencers (SMI).
17. The Company advised that it had recently acquired the Wilde Beer brand and that the posts of the SMI occurred prior to its ownership of the brand. Further a July 2018 post on its Instagram account occurred during the transition period between the previous and current owners. For the purposes of this determination nothing turns on the change of corporate ownership except it provides context as to why the information supplied by the Company about its relationship with the SMI is not complete.
18. The complaint is centred upon the age of the SMI. The age of persons used in alcohol marketing is relevant because of the ABAC requirement found in Part 3(b) of the Code that alcohol marketing must not have strong or evident appeal to minors. One mechanism employed by the Code to seek to have marketing not strongly appeal to minors is to have a requirement that adults appearing in marketing must be at least 25 years of age.
19. In addition to the content standard, the ABAC seeks through its placement rules to direct marketing toward adults and away from audiences comprised of minors. The rules do this by stipulating varying requirements on the use of different media platforms. For digital media, such as Instagram, placement rule (ii) provides that available age restriction controls to exclude under 18 year olds from accessing marketing communications must be utilised.
20. The complaint argues that both the content standard and the placement rule have been breached because the SMI were both aged under 25. Further, it argues that the Company account and the SMI accounts failed to utilise age restriction controls. The complaint also raises that the likely audience of the posts would include over 25% minors and that this breaches another ABAC placement rule.
21. The Company makes a number of points in response to the complaint, namely:

- It accepts that its corporate Instagram account had not applied available age restriction controls and now these controls have been activated.
 - The relationship with the SMI was to produce content for the Company's own use and did not specify that the SMI were to post about the product on their Instagram accounts.
 - It does not hold information on the age of the SMI.
22. The complainant has raised concerns about Mr Cox and Ms Codrington referencing alcohol products in two other complaints made at the same time as the complaint about Wilde Beer. As a result of information received in relation to the other complaints dealt with in Determinations 85-103/18 & 110/18 respectively the Panel is aware that the SMI were both aged under 25. This means that the Instagram posts on the Company account have breached Part 3(b)(iii) of the Code.
23. The position with the posts of the SMI on their personal Instagram accounts is not as straightforward. Instagram is a massive global media platform which in June 2018 reported that it had over 1 billion active monthly users. It is reasonable to speculate that of these 1 billion users of the platform that hundreds of thousands if not millions of references would be made about alcohol as a product.
24. Naturally the ABAC does not purport to impose obligations on every reference made to alcohol on Instagram or indeed over various media more generally. To fall within the remit of the ABAC Scheme a reference to alcohol as a product must be:
- related to an Australian alcohol entity e.g. an alcohol producer or retailer; and
 - a marketing communication for ABAC purposes, which means the marketing item must have been generated by or under the reasonable control of an alcohol marketer.
25. So, can the Instagram posts of the SMI be regarded as marketing communications for ABAC purposes? While the Company explains that it does not have a complete record of the relationship between its former owner and the SMI it is clear a relationship did exist and that it did involve the production of content for use by the Company. It did not apparently involve a requirement that the SMI post about the product on their personal Instagram accounts.
26. In Determination no 85-103/18 a description of SMI marketing is detailed. While not repeating that analysis in full it can be noted:
- The Company engaged with Mr Cox and Ms Codrington because their lifestyle and personal brands as displayed on their social media channels was attractive to the Company.

- There was a commercial relationship of some kind between the SMI and the Company.
 - The nature of SMI marketing is that while it is not required that the SMI reference the Company product it was quite probable that a reference would occur and this would be entirely consistent with the Company's overall marketing strategy involving SMI.
 - Taken as a whole it is reasonable to conclude that the references to the product on the SMI Instagram accounts were generated by the Company's engagement with the SMI so as to bring the posts within the ambit of a marketing communication for ABAC purposes.
27. Advice from Instagram is that both Mr Cox and Ms Codrington hold business accounts. This means that both are able to apply age restriction controls to the accounts as a whole or to individual posts which reference alcohol products. It seems that at the time of the posts neither SMI had applied the available age restriction controls.
 28. Drawing all of this together the Panel concludes that the ABAC has been breached by the Company Instagram posts featuring persons under the age of 25 and by this account not applying age restriction controls. Further the SMI personal accounts have also breached the Code by featuring persons under the age of 25 and the accounts not utilising age restriction controls.
 29. Because placement rule (ii) has been breached it is not necessary to examine if placement rule (iii) has been breached given that this rule applies when age restriction controls are not available. As explained above the controls were available for both the company account and the SMI accounts in this case.
 30. Accordingly the complaint is upheld.