



ABAC Adjudication Panel Determination No. 21/19

Product: Vodka Soda &
Company: Ampersand Projects
Media: Digital (Instagram)
Date of decision: 23 April 2019
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns marketing for Vodka Soda & which is produced by Ampersand Projects (“the Company”) and arises from a complaint received 13 March 2019.
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 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 the other codes as well as meeting the standards contained in the ABAC.
 4. For ease of public access, Ad Standards (AS) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by AS, 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 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 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 March 2019.
8. 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 has been determined within this timeframe.
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 the marketing communication.

The Marketing Communication

10. The complaint refers to the Company sending alcohol beverages to Lily Bult and the following post, dated 12 March 2019 on the Instagram account @lilybult.



The Complaint

11. The complainant is concerned that:
 - The Company sent Lily Bult, aged 17, alcohol beverages;
 - Lily Bult is underage and promoting the alcohol beverage in an Instagram post; and
 - Lily Bult did not clearly state the post was an ad.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (a)(ii) show (visibly, audibly or by direct implication) or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage
 - (b)(i) have Strong or Evident Appeal to Minors
 - (b)(ii) depict a person who is or appears to be a Minor unless they are shown in an incidental role in a natural situation (for example a family socialising responsibly) and where there is no implication they will consume or serve alcohol;
 - (b)(iii) depict an Adult who is under 25 years of Age and appears to be an Adult unless:
 - they are not visually prominent;
 - 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. Definition in Part 6 of the ABAC provides:

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

Strong or Evident Appeal to Minors means:

- (i) likely to appeal strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
- (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by 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

14. The Company responded to the complaint by letter dated 22 March 2019. The principal points made by the Company were:
 - Ampersand Projects is committed to marketing alcohol responsibly and acting within ABAC guidelines. We do not condone irresponsible marketing practices, nor do we condone any marketing activity of alcohol to minors.
 - Since the launch of our product, we have ensured that all the available measures to exclude minors from exposure to our social pages and ads have been implemented:
 - Our social media pages are age gated at 18+ using Facebook and Instagram's security settings;
 - Our Instagram page also states in the bio that you "Must be 18+ to follow" to further re-iterate this; and
 - All our social media advertising is targeted at audiences that are aged 18 and over.

- Ms Bult coming into possession of our product was an unintentional incident. It is unfortunate that this has occurred, and we are very remorseful that our product was involved in the complaint.
- We have taken this matter very seriously and as outlined above we already have measures in place to ensure that our product is not marketed or provided to minors.
- We confirm that the material which was the subject of the complaint was deleted permanently on 12 March 2019 prior to receiving the complaint from ABAC.
- If a breach of the ABAC has occurred we submit that it was not reasonably foreseeable and outside of our control for the following reasons:
 - The subject of the complaint was a post made by an individual who was not acting on our behalf. Ampersand Projects has never had any business arrangement of any kind with Ms Bult.
 - We are advised that approximately 81% of Ms Bult's audience is over the age of 18; and
 - A reasonable person would believe that Ms Bult was over the age of 18 as the content of her Instagram account appears to be adult in nature and depicts a person living a lifestyle that should only be possible for someone overage. Ms Bult has posted numerous images of herself drinking alcohol and partying in nightclubs all around the world. This gives the reasonable impression that Ms Bult is over the age of 18 as she is frequently in adult and age-restricted environments.
- We have thoroughly reviewed the ABAC and AANA Codes and will take guidance from the best practice guidelines moving forward. We are aware of ABAC's pre-vetting service and will make use of this for any potential campaigns in the future.

The Panel's View

15. Lily Bult is a social media influencer who maintains accounts on the platforms of Instagram, Facebook and the streaming platform of YouTube. She has almost 63,000 followers on Instagram and 55,000 subscribers to her personal YouTube channel. Ms Bult's videos on YouTube deal with fashion, beauty and her lifestyle. While she is apparently originally from Sydney, Ms Bult has lived in the United Kingdom and her posts indicate she has travelled through Europe. She seems to be currently residing in Australia.

16. The Company forwarded Ms Bult a gift pack which consisted of two cans of their vodka and soda product, some branded straws and a fresh lime. The accompanying note with the pack read 'Hey Lil, A couple on us for you to enjoy! Cheers VS&'. The Company states it had no business arrangement with Ms Bult, but it is clear from the dynamics of influencer marketing that it was the Company's hope and reasonable expectation that Ms Bult would post about their product. This indeed happened and it was Ms Bult's Instagram post featuring a picture of the gift pack which has drawn the complaint.
17. The complainant contends that Ms Bult was 17 years old when supplied the gift pack and the Instagram post occurred. This is seen as inappropriate and also the complainant believes the post was not identified as an advertisement. For its part the Company states that Ms Bult came into possession of the gift pack as a result of an 'unintentional incident'. Essentially this arose because the Company was under the mistaken believe that Ms Bult was over the age of 18.
18. The Panel has considered social media influencer marketing by alcohol companies in previous determinations. In brief:
 - Influencers are a potentially powerful means to give credibility and authenticity to a brand due to the standing of the influencer with their followers.
 - An alcohol marketer might engage with an influencer to promote or reference a brand through a direct commercial relationship and in such a case the relevant post is a marketing communication for ABAC purposes.
 - In other instances the relationship between the influencer and the alcohol marketer may be indirect and the test is whether it can be said the marketer had either a reasonable measure of control over the influencers' posts or the marketer can be said to have 'generated' the post which references the alcohol brand or product. This requires a case by case assessment of the factual circumstances as to how the post came about.
 - If an influencer post is an ABAC marketing communication then all of the ABAC standards and the Placement Rules apply to the post and the alcohol marketer will be responsible to see the ABAC requirements are satisfied.
19. In this case the Company supplied the gift pack of the product to Ms Bult. It did so in the hope that Ms Bult would promote or reference its product over one or more of her social media channels. A review of Ms Bult's Instagram posts reveals that she receives and promotes a number of beauty products and lines of clothing. It is a reasonable conclusion that the Company's gift pack would result in Ms Bult posting about the product and that the post was hence generated by the Company so as to bring it with the scope of the ABAC Scheme.
20. The principal concern raised by the complaint is that the Company has embarked on a course of action which has resulted in its product being associated and endorsed by someone under the lawful age to consume alcohol. Given that Ms Bult

chronicles much of her life via social media channels, it is not difficult to ascertain her date of birth through a cursory internet search. It is apparent that she was born on 31 March 2001 and was 17 years old when gifted the product by the Company and when the Instagram post occurred.

21. The Company points to the Instagram account of Ms Bult to argue that she is portraying a lifestyle which would indicate she was at least 18 years old. Certainly some of her posts appear to show scenes with alcohol products and also venues which a minor would not lawfully be able to access e.g. licensed premises such as a night club. And it can be accepted that Ms Bult does appear to be an adult in many if not all of her photographs. That said, she was a minor and the Company has a fundamental responsibility to market its products to not strongly appeal to minors and not to involve minors in its marketing activities. Clearly the Company has failed in this responsibility.
22. In terms of ABAC standards the Panel believes the following provisions have been breached:
 - section 3 (a) (ii)- encouraging irresponsible behaviour by the post showing that the product was supplied to a minor in an apparent breach of liquor licensing laws and with the implication that the product would be consumed by a minor through the phrase ' A couple on us for you to enjoy!'
 - section 3 (b) (i)- the post has a strong appeal to minors by implying that the product is suitable to be consumed by a minor
 - section 3 (b) (ii)- by generating a post on the Instagram account of a minor and hence depicting an alcohol product with associated pictures and images of a minor
23. The Company advised that it has applied age gating controls on its own social media accounts. The post however appeared on Ms Bult's Instagram account. It is not entirely clear what steps the Company took, if any, to have available age restriction controls applied to the post and as pointed out recently in Determination 16/19 the position with Instagram on practically activating age restrictions is not straightforward. It is noted that the Company has taken steps to have the post removed and it does not appear the post remains on Ms Bult's account. Given the breach findings already made it is not necessary to make a definite ruling on the Placement Rules.
24. Social media influencers are a growing avenue for alcohol marketers to promote their brands. The Company has failed to undertake basic due diligence in engaging with Ms Bult as an influencer. The Company states it has learned from this case and will improve its processes. It clearly needs to.
25. The Complaint is upheld.