



ABAC Adjudication Panel Determination No. 36/19

Product: Dirty Buch
Company: The Bucha of Byron
Media: Digital (Instagram)
Date of decision: 1 July 2019
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns digital marketing for Dirty Buch by The Bucha of Byron (“the Company”) and arises from a complaint received 29 May 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 other codes as well as meeting 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 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

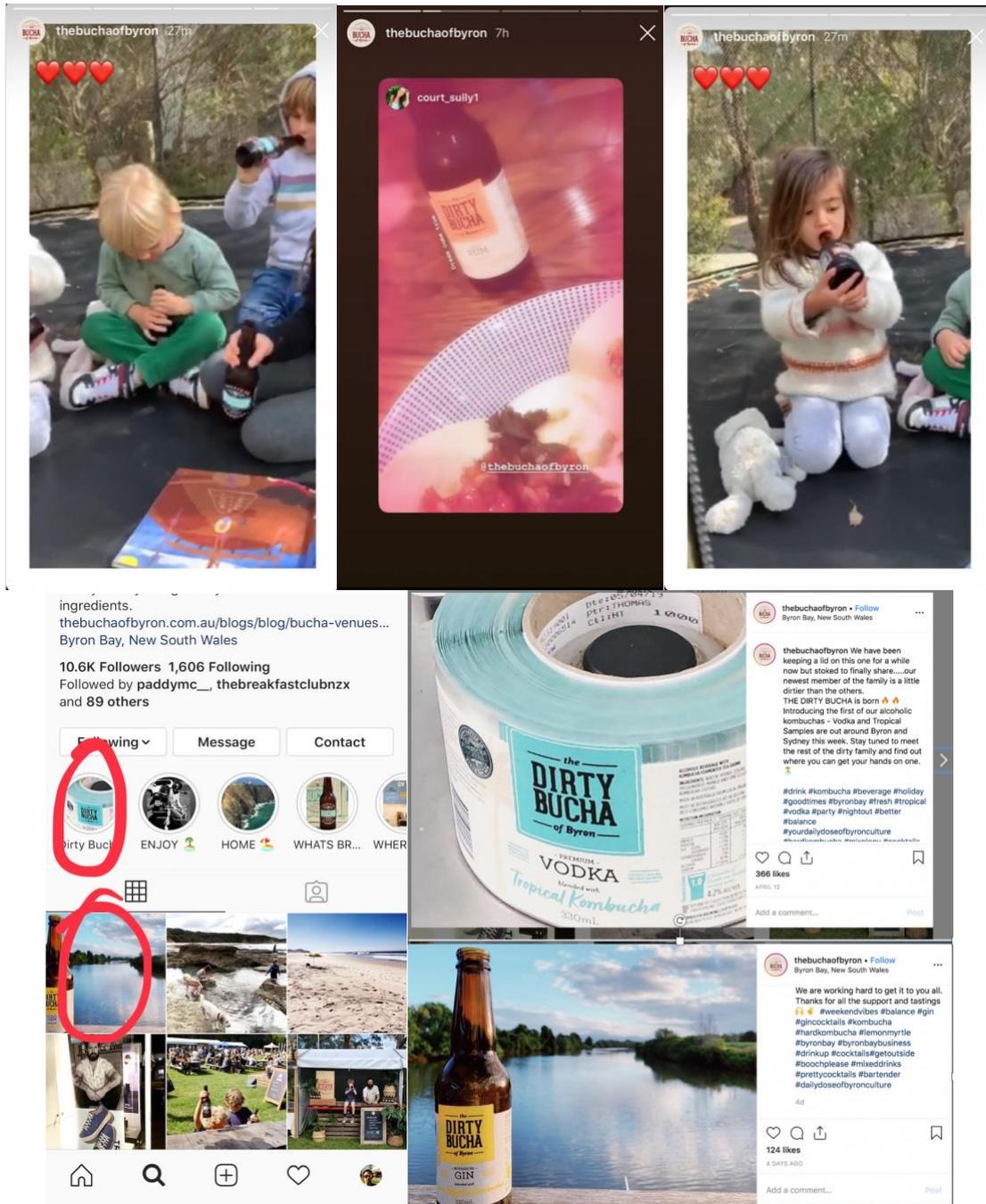
7. The complaint was received on 29 May 2019.
8. The Panel endeavour to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint has been determined within this timeframe.

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 sought for these marketing communications.

The Marketing Communication

10. The complaint refers to promotion of Dirty Bucha on The Bucha of Byron Instagram account and the following screenshots were identified by the complainant.



The Complaint

11. The complainant is concerned that the promotion of Dirty Bucha on the Company's Instagram account has strong or evident appeal to minors by:

- Promoting a new alcoholic range of products that has similar packaging to and alongside their established non-alcoholic products, thereby targeting 16-17 year olds transitioning to adulthood;
- their bio does not reference alcoholic kombucha; and
- including images of children consuming non-alcoholic products alongside images of adult men and women 'getting tipsy' with the alcoholic product

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (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)(iv) be directed at Minors through a breach of any of the Placement Rules.

13. Definition in Part 6 of the ABAC provides:

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.

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.

The Company's Response

14. The Company responded to the complaint on 12 & 25 June 2019. The principal points made by the Company were:
- (a) We take such matters very seriously and as beverage industry professionals are very conscious of how we represent our brand and our responsibilities. Whilst we understand the nature of the concerns raised by this parent and have immediately taken some steps to address them, we strongly disagree and challenge that we have specifically targeted minors, in particular their specific reference to targeting 16 to 17 year olds who are transitioning to adulthood.
 - (b) For context, the Bucha of Byron is our non-alcoholic kombucha company. In the past weeks we have launched the Dirty Bucha which is our new range of premixed spirits with kombucha. In the early launch and trial stages for the Dirty Bucha which we are currently in, we have made a proportionately minimal number of posts to advise our audience that an alcohol version is being released.
 - (c) The kids referred to in the complaint are our own children. This is not an advertising ploy it is our children playing on a trampoline together drinking our kombucha. Please note that the complainant neglected to refer to the large disclaimer on that same Instagram story clearly stating 'this is not alcoholic' (The following was posted "Disclaimer" our little gang are drinking our original range of Buchas – not dirty) Also an important point is the time frame between when the children were featured vs when news of the Dirty Bucha being released was (The post in question was posted at 6:31pm on May 11. Earlier that day we re-posted a consumer generated story at 1130am of someone drinking Dirty Bucha. It was 7 hours later (ie 6:31pm where we posted the story in question with our children on the trampoline).
 - (d) The Instagram stories that have been posted were all advising our customers that there is now an alcoholic version that we are making. This has been the sole intention of the posts. For example, the post in the picture in this image states 'introducing the first of our alcoholic kombuchas'. Further, we have addressed their concerns by amending the bio to make reference to this also.



- (e) The complainant's concern that we are targeting 16 and 17 year olds that are transitioning to adulthood is completely unfounded. There is no use of teenagers in any post, story or communication at all. Our target audience for the Dirty Bucha are health conscious adults in their 30's.
- (f) At this early stage of developing the brand we have not yet created content for the Dirty Bucha, aside from communicating the fact that it has been launched and to show some people taste testing the product. We will in due course seek AAPS approval for future Dirty Bucha content.
- (g) When developing the designs for the Dirty Bucha we were very conscious of separating the branding and look from our non-alcoholic Bucha of Byron range. Note the Bucha of Byron logo is entirely different and does not appear anywhere on the Dirty Bucha packaging. The Dirty Bucha features a different logo, different label shape, has a white background to further differentiate from our non-alcoholic range and very clearly and explicitly calls out the spirit contained within. So, we would argue the Dirty Bucha brand shares more similarities with other RTD alcohol beverages on the market that were our design reference points, than it does with the non-alcoholic range.
- (h) In this initial launch phase, we acknowledge we have made posts on our non-alcoholic Instagram account regarding the Dirty Bucha, however this has been as a communication to our loyal adult drinkers to advise them that there is now a new alcoholic version available. As we start to produce volumes of Dirty Bucha that allow us to move beyond trial and properly go to market, we will separate the Instagram accounts. To that point, we have already done so and will continue to progress down this direction.
- (i) The bio has now been amended to advise of the alcohol product also. This was excluded initially as mentioned previously because the posts were intended to advise of a new product being released.
- (j) There are no images of children ever alongside images of adults getting tipsy. First, the children depicted in the image had a clear disclaimer they are drinking non-alcoholic drinks. Second, there are no examples we can find depicting adults 'getting tipsy'. It is not the case as it is at odds with what the Dirty Bucha intended brand will stand for when we release it in future – it is about moderation and a better alcohol alternative (lower ABV at 4.2% than other RTDs, 1 standard drink per bottle to allow for moderation

and control, lower sugar). Please clarify or provide examples of any possible references to 'getting tipsy' as we strongly contest this.

- (k) We don't believe that the Bucha of Byron Instagram account breaches the ABAC placement rules as:
- a. Dirty Bucha was not to be an ongoing marketing campaign on the Bucha of Byron account, in the initial trial stages of the Dirty Bucha being produced there were around 5 official posts and between 3-5 stories to alert existing Bucha drinkers that there is now an adults version of the Bucha being produced with spirits. The intention has always been that the Dirty Bucha would have a standalone account.
 - b. The Bucha of Byron account is not age gated as the posts pertaining to the Dirty Bucha were very limited and only alerting people to the fact there is now an alcoholic version available. The Dirty Bucha account that will be used ongoing for marketing of the Dirty Bucha is age gated.
 - c. The primary audience and target for the Bucha of Byron is adults. The Bucha, even though non-alcoholic, is distributed in primarily licensed venues as that has been the target since the start of the business. This is the point of difference for the Bucha against competitors who are ranged more in supermarket environments, the Bucha is more in bars. This is evidenced by the fact that our largest distributor sells only to licensed premises and more than 80% of our stockists hold liquor licenses and therefore the product itself is not readily available for purchase by minors. In terms of audience composition for our Instagram account this is 1% of total audience (below 18 Years of age).
 - d. We strongly dispute that any alcohol advertising has had content primarily aimed at minors. The only posts made pertaining to the Dirty Bucha were communications advising that the product had been launched and where it was available to purchase in the trial stages. These were aimed solely at our adult audience with no reference or inference whatsoever that minors should try it. The product is only available in a very limited number of licensed premises. Even aside from the Dirty Bucha, the non-alcoholic Bucha of Byron is in no way directly marketed to minors. Our target is adults in late 20's to early 30's and our stockists are primarily licensed venues. The image referred to of children on a trampoline is one post of our children playing together on the first weekend catch up that the founders' children could all meet together - they were drinking a non-alcoholic Bucha with a very clear notification stating that this was not alcohol (Post was labelled with "DISCLAIMER: our little gang are drinking our original range of buchas - not dirty). There is no content primarily targeting children, the only use of children on the entire account has been images of our own children as we are a small family based business. This had nothing whatsoever to do with alcohol and in fact for the month in question out of 60 posts there were only 2 with children (ie aforementioned posts with founders children). The majority of the content is lifestyle based and showcases the Byron Bay area where the product is produced any the things that people in this area do. Primarily things adults do.
- (l) Thank you for bringing the complaint to our attention and we have now immediately made the following changes:

- a. We have since ensured that on all of our stories that feature Dirty Bucha there is a clear message reinforcing it is for 18+ only.
- b. We will now also make reasonable endeavours to ensure posts featuring Dirty Bucha are made in the evening (post 6pm) rather than during the day.
- c. We've also established a stand-alone Dirty Bucha Instagram page where we will promote the majority of our Dirty Bucha information. However, we will from time to time need to promote new flavours, new venues, new production of our Dirty Bucha on our Original page. In this event we will ensure all posts are clearly labelled and disclaimers made.
- d. Further steps to be taken in future:
 - i. developing a standalone Dirty Bucha Instagram account; and
 - ii. applying for AAPS approval for future Dirty Bucha campaigns.

The Panel's View

- 15. The Bucha of Byron is the brand name of a type of kombucha drink produced in Byron Bay and available for retail purchase, generally in licensed premises, along the eastern seaboard and Canberra. Kombucha is a fermented sweetened black or green tea. The nature of the fermentation process means kombucha is slightly alcoholic, but the original range of Bucha of Byron products have not been an alcoholic beverage.
- 16. Recently the Company has expanded its market offerings to include an alcoholic version of kombucha which has been branded Dirty Buch. This product combines kombucha with pre mixed spirits. It is the initial social media promotion of this new alcohol beverage which has drawn the concern of the complainant.
- 17. It seems the complainant has been a customer of the Company's non-alcoholic products and has followed the Company's Instagram account. The complainant's children have also followed the account and its inclusion of references to the Dirty Buch product on Instagram which it is argued is inappropriate.
- 18. In part the complainant appears concerned that the Company has developed the Dirty Buch product at all and is worried the new alcoholic product could now be a pathway to transitioning 16 and 17 year olds who have used the previous kombucha to alcohol use. The Company strongly refutes this, but in any event the ABAC does not regulate which products should or should not be on the market but provides standards as to how alcohol products must be marketed. A core ABAC standard is that alcohol marketing must not have strong appeal to under 18 year olds.
- 19. The complainant's argument, in essence, is that there is no clear delineation between references to Dirty Buch and non-alcoholic kombucha on the Instagram account and that small children are shown consuming a drink with a reference to the Dirty Buch in the accompanying information with the photo. It is said it is unclear what product the children might be drinking and that adults are shown 'getting tipsy' on the Dirty Buch. The nature of this complaint raises both the ABAC content standards and the Placement Rules.

20. The Company's response is essentially that it is in transition in establishing new branding for Dirty Buch and a dedicated Instagram account for the alcohol products separate from the non-alcoholic kombucha range. It argues the initial mentions of Dirty Buch was to inform its customers of the new product and that there are no images or references that can be interpreted as adults 'getting tipsy'. It says it is clearly stated the children shown are drinking the original non-alcoholic kombucha.
21. Part 3(b)(i) of the Code requires that an alcohol marketing communication not have strong or evident appeal to minors. Part 3(b)(ii) provides that a minor is not to appear in an alcohol marketing communication unless shown in an incidental role and where there is no implication they will consume or serve alcohol.
22. The Panel accepts the complainant is genuinely concerned but it is not considered that the content of the Instagram posts breach the content standard relating to strong appeal to minors. There is no implication that children shown on the trampoline in the Instagram images are consuming alcohol and the post makes clear the children are not drinking alcohol. More generally, the Panel does not believe the references to the alcoholic product are done in a way which can be fairly said to be strongly appealing to minors.
23. The complaint also raises the ABAC Placement Rules which have the aim of directing alcohol marketing away from audiences consisting of minors to the extent possible. As a digital platform, Instagram has a technical capability to restrict the potential audience of an account to over 18 year olds, although being able to utilise this facility is not straightforward as the Panel has discussed in previous determinations. The core issue to be assessed is whether the Company sought to use available age restrictions controls when adding the posts about Dirty Buch to its Instagram account.
24. It is clear from the Company's response that it did not seek to apply available age restriction controls to its account. As pointed out, the Company viewed the posts as a transitional measure to announce its new alcoholic product and prior to creating a dedicated Instagram account for Dirty Buch which it is stated will be age restricted. The additional information given by the Company contends that very few under 18 year olds would have viewed the Dirty Buch posts.
25. The Panel acknowledges that the posts were in the nature of transitional statements, but Placement Rule (ii) has been breached as the Dirty Buch posts are an alcoholic beverage marketing communication and the Rule requires that age restriction controls be applied if available and no attempt was apparently made to use the age restriction controls available on Instagram. This might be seen as a minor breach, but it is a breach nonetheless.
26. It is appropriate that the Company creates a separate and distinct branding for its new alcohol product and that its marketing uses separate channels such as an alcohol only Instagram account. It is noted that the Company will be seeking pre vetting approval for its marketing items. Its alcohol social media accounts will need to apply available age restriction controls to exclude under 18 year olds from accessing the accounts. Further, any reference to its alcohol products on its non-alcohol social media channels will likely mean these channels will also have to meet the ABAC Placement Rules, including the application of age restriction controls. Pre vetting advice should be taken on this point.
27. Accordingly, the complaint is dismissed in relation to the ABAC content standard and upheld in relation to Placement Rule (ii).