



ABAC Adjudication Panel Determination No. 51/19

Product: Birdees
Company: Katarzyna Group
Media: Digital (Facebook)
Date of decision: 13 August 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 the Facebook page for Birdees, a licensed venue that is part of the Katarzyna Group (“the Company”) and arises from a complaint received 12 July 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 12 July 2019.
8. The Panel endeavours 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 photos and memes on the Company’s Facebook account that do not promote responsible drinking. Examples follow.

Birdees

EVERY SUNDAY AT BIRDEES

SUNDAY SCHOOL

Like Follow Share Book Now Send Message

Birdees
July 10 at 1:30 PM · 🌐

Jägerbomb's FTW

At the bar

My brain:

Don't say it
Don't say it

Me- "8 Jagerbombs please."

918 3.8K Comments 185 Shares

Like Comment Share

Most Relevant +

Write a comment...

3.7 out of 5 - Based on the opinion of 867 people

Ask Birdees

"Is anyone available to chat?" Ask

"I have a question. Can you help?" Ask

Type a question...

Community

Invite your friends to like this Page

42,363 people like this

41,601 people follow this

69,402 check-ins

About

608 Ann St
Brisbane, Queensland, Australia 4006

Get Directions

(07) 3852 5000

Typically replies within a day

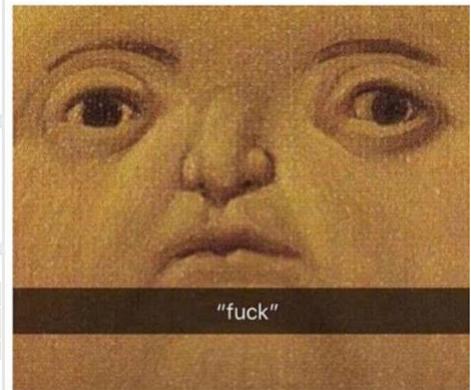
Send Message

www.birdees.com.au

Birdees
33 mins · 🌐

Y though?
#birdees

When you're on your 17th margarita and your friend says "don't you gotta work tomorrow?"



30 36 Comments 3 Share

Birdees added 94 new photos to the album: • Thursday 4th July 2019 • — at Birdees.

July 10 at 8:48 AM · 🌐

Bird is the word! Every Thursday at Birdees! 🐦🐦🐦

Brisbane's best student night is back at it again with

- 🎮 B-Pong, Hosted by Toddie Spitfire
- 🎵 Student vibes
- 🎁 Heaps of giveaways
- 🎧 Birdees' resident DJs keeping the bangers pumping 'til late!

Having a Birthday... Send us a DM for all our party packs!

• Thursday 4th July 2019 •

94 Photos

Birdees
July 2 at 12:30 PM · 🌐

Out of my way...
#birdees

Me headed towards another bad decision involving booze & boys



The Complaint

11. The complainant is concerned that the Company's Facebook page does not promote responsible drinking.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (a)(i) show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines
 - (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

The Company's Response

13. The Company responded to the complaint by email dated 26 July 2019 advising:
 - a) Birdees is not a signatory to the ABAC Code and as such is not required to comply with the Code. Birdees will therefore not accept the Panel's decision in relation to the complaint.
 - b) Birdees is committed to responsibly serving alcohol to our patrons at all times in compliance with the Liquor Act 1992. Birdees maintains a transparent working relationship with both the Office of Liquor and Gaming Regulation as well as the Queensland Police Services Liquor Unit.

- c) The social media posts in question are 'memes', which by definition are any image, video, piece of text, etc., that is typically humorous in nature, and are elements of a culture or system of behaviour passed from one individual to another by imitation or other non-genetic means. It is our belief that a reasonable person would take the posts as being 'not serious' and humorous in nature, and that a reasonable person would not adopt unsafe consumption of alcohol based on these posts. It is our belief that our target market that engages with these posts have a robust sense of humour and while some might find this attempted humour a little hackneyed, a reasonable person in our market (who have 'liked'/'followed' our page) wouldn't find the content of these posts offensive.
- d) We note your complaints with the wording 'showing' or 'referencing' of a 'customer' or 'person'. Again, these are not showing or referencing any person in particular. They are fictitious 'subjects' with the memes.
- e) Your reference of the post dated 10th July - 'showing a customer ordering 8 Jagerbombs' - this post does not 'show' any person, it is a text-base meme.
- f) Your reference of the post dated 10th July - referencing 'Beer Pong'. We don't promote 'Beer Pong'. We promote 'B-Pong' or 'Birdees Pong', which is a game played without the consumption of any alcohol.
- g) We refute that 'various photographs from events showing patrons that appear to be intoxicated'.
- h) Birdees will, however, continue to review its social media procedure and policy to all ensure all posts, even memes, can't be seen as encouraging excessive consumption or rapid consumption of alcohol.
- i) Each of the posts mentioned in the complaint have been deleted from our account.

The Panel's View

Introduction and Background

- 14. Birdees is a well-known and longstanding nightclub in Fortitude Valley adjacent to the Brisbane CBD. This determination concerns the promotion of the nightclub via posts on its Facebook page.
- 15. The regulation of the use and marketing of alcohol in Australia falls within a shared regulatory space with primary responsibility for the regulation of licensed premises such as nightclubs resting with State or Territory liquor licensing authorities. In Queensland, the licensing regime is founded in the Liquor Act 1992, supporting regulations and guidelines on various matters issued under the authority of the Act.
- 16. The ABAC Scheme operates independently to but cooperatively with the liquor licensing regimes. The Scheme is quasi regulatory in nature in that compliance with the standards for good marketing practice contained within the ABAC are voluntarily assumed by alcohol industry participants. Contractual commitment to the standards arises from either membership of the peak industry associations which sponsor and

fund the Scheme or by a company becoming a direct signatory to the Scheme. Birdees is not a signatory to the ABAC Scheme and has stated in its response to the complaint that it will not accept the Panel's decision.

17. It should be noted that there are significant commonalities between the standards contained in the ABAC and the requirements contained in Queensland's liquor licensing regime. For instance, Section 142ZZ(2) of the Liquor Act describes prohibited practices and promotions for a licensee. This includes the encouragement of irresponsible consumption of liquor. Examples of how this regulatory obligation might be breached are detailed in Guideline 60 issued by the Commissioner for Liquor and Gaming and include:
 - a promotion using emotive descriptions that are likely to encourage irresponsible consumption
 - a promotion involving a person enthusiastically talking up excessive consumption of alcoholic beverages or promoting intoxication
18. The ABAC in Part 3 (a) provides for a similar constraint on alcohol marketers with a requirement that a marketing communication must not show or encourage excessive or rapid consumption of an alcohol beverage. A marketing communication includes the promotion of an alcohol retailer such as a nightclub through the use of digital platforms such as social media i.e. Facebook, Instagram and other like platforms.
19. The focus of the liquor licensing regime is the conduct of licensees in operating licensed premises, while the ABAC is not so much concerned with activities within licensed premises e.g. compliance with responsible service of alcohol requirements, but with how the licensee portrays alcohol use in its marketing. In short and in general terms, liquor licensing is about what happens within premises and the ABAC is about the licensee's projection of alcohol use to the outside community.
20. Overwhelmingly non-ABAC signatories will nonetheless cooperate with the Panel when a complaint is received and abide with Panel decisions. Largely this is because the ABAC standards reflect community expectations as to how a responsible alcohol marketer will behave and this will be accepted by a marketer even without ABAC membership. In the rare case where a marketer seeks to ignore a Panel decision, the matter is referred to the relevant liquor licensing authority for consideration and enforcement. For instance, Determination 33/18 where the Panel made a decision which was not initially acted upon by the marketer and subsequent enforcement action on the same marketing material was taken by the Victorian Commission for Gambling and Liquor Regulation.
21. In this case, the Company has cooperated with the complaint process, stated its commitment to working with Queensland authorities and said it would review its social media posts. While the Company has said it will not accept a Panel decision, it seems likely in practice it will do so.

Do the Facebook posts meet the ABAC standard?

22. The complaint concerns a series of posts made by the Company on its Facebook page. It is argued that the posts do not promote responsible drinking. The Company contends the posts are 'memes' which a reasonable person would understand are humorous and would not be taken as seriously advocating excessive consumption or unsafe drinking practices. Further it is pointed out that Birdees does not conduct 'beer pong' games at the club but rather a game which doesn't involve alcohol consumption. It is refuted that any photos posted show intoxicated patrons.
23. In assessing whether a standard has been breached, the Panel is to adopt the standpoint of the probable understanding of the marketing communication by a reasonable person. The notion of a 'reasonable person' is drawn from the common law system and means that the life experiences, values and opinions shared by a majority of the community is to be the benchmark.
24. The Panel accepts that the posts are intended to be humorous and a reasonable person shares the Australian robust sense of humour. It would not be taken that the posts are directly advocating drunkenness or excessive consumption.
25. That said, the 'shared' experience which the humour in the posts draws upon is that of engaging in excessive alcohol consumption or taking unwise decisions influenced by alcohol use. It is this assumption that it is common and as a result implicitly acceptable to consume to excess that makes a number of the posts in breach of the Part 3 (a) standard.
26. The Panel finds the following recent posts in breach of the Code:
 - 10 July at 1-30pm on ordering 8 Jagerbombs
 - 14 July post referencing consumption of 17 margaritas
 - 2 July at 12-30 pm on bad decision involving booze and boys
 - 8 July at 4-30 pm on drunk me determined to embarrass me
 - 6 July at 11-45 am on Stephanie getting blacked out wasted
27. The Company stated it has removed these posts and will review its social media posts more broadly to assess if they meet regulatory requirements on not promoting excessive alcohol consumption. This is a prudent measure as posts of the type identified in this determination are arguably inconsistent with the Company's obligations under the Queensland liquor licensing regime as well as the ABAC.
28. The complaint is upheld.