



ABAC Adjudication Panel Determination No. 65/19

Product: Burton x Pirate Life Frontside Ale
Company: Carlton & United Breweries
Media: Packaging & Digital (Instagram)
Date of decision: 3 October 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 packaging and an Instagram post promoting Pirate Life Frontside Ale by Carlton & United Breweries (“the Company”) and arises from a complaint received 12 September 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

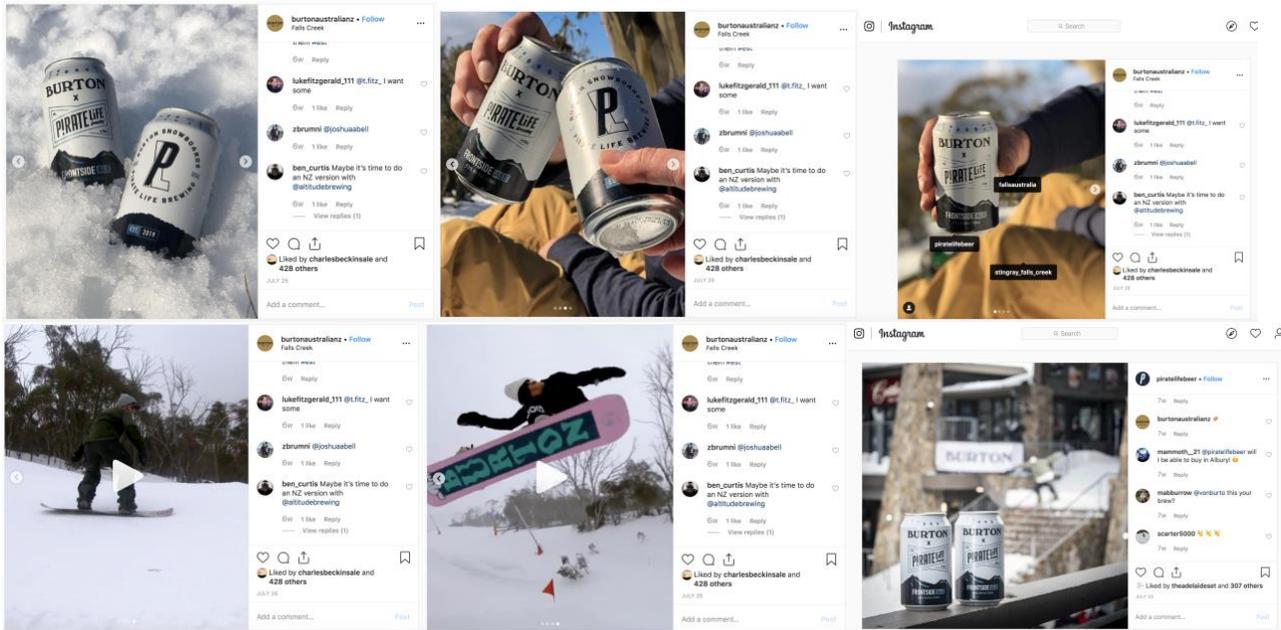
7. The complaint was received on 12 September 2019. The Panel endeavours to make a decision within 30 business days of the receipt of a complaint and this complaint has been determined within that timeframe.
8. The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for the packaging or Instagram posts.

The Marketing Communications

9. The packaging of Burton x Pirate Life Frontside Ale is included following.



10. Instagram posts referred to in the complaint by @burtonaustranz and @piratelife are included following. The fourth and fifth images below are screenshots from the fourth image in the Instagram post by @burtonaustralianz, which is a 16 sec video of several people performing tricks on snowboards.



The Complaint

11. The complaint is about the name of the product and a number of Instagram posts on the account of Burton Australia and one post on the account of the Company. The complainant is concerned that:
 - Pirate Life and Burton (a snowboard equipment company) have collaborated to make a snowboarding related beer.
 - Advertising for the product shows snowboarding and beer in the same context which creates a link between snowboarding and drinking and would breach section 3(d) of the ABAC as snowboarding requires a high level of alertness
 - The beer itself is named after a snowboarding trick, creating a connection between snowboarding, performing tricks and consumption of beer.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (d) show (visibly, audibly or by direct implication) the consumption of an Alcohol Beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical co-ordination, such as the control of a motor vehicle, boat or machinery or swimming

The Company's Response

13. The Company responded to the complaint by letter dated 20 September 2019. The principal points made by the Company were:
 - Pirate Life and Burton have engaged in a brand collaboration, including the production of a Pirate Life x Burton ale-style beer. The genesis of this campaign is an effort to draw on Pirate Life's existing successful sponsorships of alternative sports such as wakeboarding and mountain biking by extending into winter activities. Snowboarding and specifically the Burton brand are a natural fit for Pirate Life as a collaboration partner, with similar audiences and brand identities.
 - We reject the assertion made by the complainant that either the name or advertising of the beer implies a link between consuming alcohol and performing the physical act of snowboarding. The name and advertising are an homage to snowboarding and the snowboarding lifestyle, but we have taken significant steps to ensure that none of the advertising or branding shows or implies the beer should be consumed before or during the physical act of snowboarding or performing snowboarding tricks and manoeuvres.
 - The specific post by @burtonaustralianz was not explicitly authorised by either Pirate Life or Carlton & United Breweries. However, the images draw on content created by Pirate Life and Burton in collaboration.

- The packaging and name of the beer are an homage to snowboarding, but there is nothing in either the name or design of the can that shows or implies the beer should be consumed before or during snowboarding. The can design features no overt images of people performing snowboarding manoeuvres, the imagery on the can is of a mountain and, aside from the name of the product and co-branding with Burton, there are no textual references to snowboarding.
- The ABAC Guidance Notes in respect of clause 3(d) state that the intent of this provision is not to exclude every association between alcohol and such activities, however consumption cannot occur before the activity. The overall impression created by the packaging and name of the beer are within the spirit of this guidance, as the overall message and impression is a nod to the skateboarding culture, without creating any impression of consumption prior.
- In collaboration with the snowboarding brand, Burton Pirate Life's intention with both this product and advertising is to appeal to a subculture or consumer segment that is interested in winter sports. This is a common and longstanding marketing tactic for both craft and mainstream beer brands; with the rise of 'influencer'-based marketing, brands, including beer brands, are focused on marketing to consumers looking to align with a specific 'lifestyle' – in this case snowboarding, however the collaboration phenomenon is common across many interest categories. Some notable examples include:
 - Budweiser x Supreme. A 2009 collaboration between the Budweiser brand and skate culture brand Supreme:
<https://www.supremenewyork.com/news/398>
 - Union x Pabst Blue Ribbon and Union x Rainier. Snowboard bindings supplier Union has collaborated with both PBR(2011) and Washington brewer Rainier (2015):
<https://whitelines.com/archive/features/27-curious-snowboarding-collaborations.html>
 - Lululemon Curiosity Lager. A 2015 beer brewed for activewear company Lululemon by Vancouver-based craft brewer Stanley Park Brewing:
<https://www.racked.com/2015/9/28/9394515/curiosity-lager-lululemon-yoga-pants-beer>
- We note that the ABAC Panel does not comment on examples, only the subject matter of the complaint, however these instances illustrate and speak

to the fact that collaborations in this space are common and well understood by consumers.

- Further, we argue that it is a stretch of the imagination to suggest that the name 'Frontside' Ale could be taken as an implication that this beer is an appropriate beverage to be consumed while performing a snowboarding manoeuvre. The term 'frontside' in reference to snowboarding is not commonly known outside the subculture, thus the name is intended as a signal of authenticity to potential consumers invested in the snowboarding lifestyle.
- We do not accept that the @burtonaustralianz series of Instagram images shows or creates an implication of drinking alcohol in connection with physically performing the act of snowboarding. None of these images show the consumption of beer at all; the images are intended to advertise the existence of the product
 - Image 1: Person with a can sitting in the snow. The can pictured is closed and the fact the individual has removed their gloves suggests they have completed snowboarding activity, as snowboarding requires gloves to be worn at all times while engaging in the activity. The mere presence of snow cannot be taken as a suggestion that snowboarding activity is set to continue. The blue sky in the background and general quality of light would suggest that the individuals have come down from the mountain and are potentially set to enjoy a beverage in the winter afternoon sun.
 - Image 2: Two cans in the snow. Not only are the featured cans closed, there is no implication of consumption whatsoever, and the depiction of snow in this instance is to demonstrate that the product is being kept, and is best served cold. The presence of snow in this case is not enough to suggest that snowboarding has occurred, is occurring or will occur,
 - Image 3: Two people with cans sitting in the snow. Once again, the cans are closed and the removal of gloves suggests the individuals have completed snowboarding activity. As per Image 1, the mere presence of snow cannot be taken as a suggestion that snowboarding activity is set to continue. The blue sky in the background and general quality of light would suggest that the individuals have come down from the mountain and are potentially set to enjoy a beverage in the winter afternoon sun.
 - Video 1: Snowboarding demonstration. No alcohol is shown anywhere in this picture. Please note that in contrast to the previous images, the sky is overcast and it is snowing, implying the activity is taking place at a markedly different time of day to the preceding

images that do feature the beer. That this video is the final image in the series cannot be taken as implication that it takes place after the product images and any potential consumption – a reasonable consumer would understand that images featuring the product would naturally come at the beginning of an Instagram carousel, which provides users with an opportunity to showcase multiple images or videos in one post, as the primary objective of the post is to advertise the product.

In addition to the above, the post copy bolsters the interpretation that any consumption should take place after snowboarding is concluded. The copy makes clear that the overall impression is that the Burton x Pirate Life Frontside Ale is to be consumed in an après occasion: ‘we’re putting on après drinks this Saturday afternoon at 3pm’.

- In the @piratelife Instagram post, once again the cans are closed. A reasonable consumer would understand that the images are intended to advertise the product in a picture with visual interest and in conjunction with the collaborator brand Burton, which can be seen in a banner in the background. There is no suggestion in the images or copy that the person performing the snowboarding tricks in the background has consumed or will consume the product. The composition of the image reinforces this interpretation in that as there is significant visual distance implied between the beers and the snowboarder in the use of perspective. The setting is clearly not at the top of a ski or snowboarding run, and again, the presence of snow and the alpine setting is not enough to draw an implication of consumption of alcohol before or during snowboarding – many activities can be engaged in an alpine setting, not all of which require a high degree of alertness or physical co-ordination. Apres-ski, or in this case snowboarding, activities also take place in settings such as the one featured in this image.
- CUB is committed to ensuring our promotional and marketing material and that of our associated entities such as Pirate Life, does not promote or encourage any irresponsible consumption of alcohol. Our goal is for consumers to enjoy our products responsibly and in moderation. Accordingly, we have taken all reasonable precautions both in the naming and marketing of this product to ensure that while it is intended to appeal to consumers who participate in the snowboarding lifestyle, it is in no way intended to be consumed before or during snowboarding activities.

The Panel’s View

Introduction

14. Burton Snowboards is an American company founded in 1977 which has become the largest global manufacturer of snowboards. Burton has a presence in Australia

known as Burton Australia. As well as snowboards, Burton sells a range of clothing and winter outdoor equipment.

15. Pirate Life is the brand name of a craft brewery which commenced the production of beers in Adelaide in 2014. The brand and the brewery appear to have been acquired by AB InBev, the parent company of Carlton & United Breweries, in late 2017. This determination concerns a collaboration between Burton and CUB which has seen the production of a speciality beer branded as 'Burton x Pirate Life-Frontside Ale'. This product name and the promotion of the product via Instagram posts by both Burton and Pirate Life has attracted the complaint.
16. The majority of the Instagram posts nominated by the complainant as demonstrating a breach of the ABAC have appeared on the Instagram account of Burton. Burton is not an alcohol beverage entity and its marketing activities, such as its Instagram posts, are not prima facie captured by the ABAC scheme which applies to marketing by alcohol industry participants. That said, CUB accepts that the Burton posts draw on content created as a result of the business collaboration between the two entities and it can be taken that CUB has had a reasonable measure of control over the portrayal of its beer product branding by Burton to make the Burton posts marketing communications for ABAC purposes.

The Product Name and Packaging

17. The contention advanced by the complainant is that the product name and the Instagram posts create a direct link between snowboarding and alcohol use. In relation to the name and product packaging, it is argued that the Burton name is used on the packaging which positions the product with snowboarding. Further the term 'frontside' is a type of snowboarding manoeuvre which further reinforces the product packaging with engaging in snowboarding.
18. Part 3 (d) of the ABAC provides that an alcohol marketing communication (which includes a product name and packaging) must show the consumption of alcohol before or during any activity that for safety reasons requires a high degree of alertness or physical coordination. Clearly snowboarding is a sport which does require a high degree of physical coordination. The issue therefore is whether the packaging of itself is showing (including by direct implication) the consumption of alcohol before or during the performance of snowboarding.
19. The product name is directly associating Burton, the snowboard manufacturer, and an alcohol product. Indeed, the whole point of the collaboration is the direct association of the product with Burton and the sport of snowboarding. This, however, is not of itself a breach of the ABAC standard. It is permitted to associate an alcohol product with an activity such snowboarding. What is not permitted is to show the use of alcohol before or during the actual conduct of an activity such as snowboarding.

20. The Panel does not believe the packaging, or the product name is in breach of the standard. It is noted:
- the packaging does not depict snowboarding occurring;
 - the term 'frontside' could not be considered as being widely understood outside the snowboarding fraternity as referring to a particular snowboarding manoeuvre, and even so, the term of itself does not imply the product should be consumed before or during the performance of a frontside trick; and
 - taken as a whole, the packaging does not directly imply that it is acceptable to consume alcohol before or during the sport of snowboarding.

The Instagram Posts

21. The Instagram posts consist of a number of staged photographs of the product in the snow or being held by people wearing snowboarding clothing. One of the posts is a video of a snowboarder performing some manoeuvres. The issue is whether a reasonable person viewing the posts would understand the posts as showing alcohol use occurring before or during snowboarding (or other activity requiring a high degree of physical coordination for safety reasons).
22. CUB contends the static posts do not breach the standard as they do not show alcohol use and the video of snowboarding would not be understood as following the consumption of alcohol. Cues such as the cans not being opened and the individuals holding the cans having no gloves on are argued to demonstrate either no consumption has occurred, or no actual snowboard activity is taking place.
23. The Panel does not believe the posts breach the standard. While the posts showing the product associate the product with winter, snow and snowboarding this is not of itself a breach of the standard. These posts do not show alcohol use. The video captures a snowboarder in action, but this person is not shown either with the product and certainly not consuming the product.
24. The complaint is dismissed.