



ABAC Adjudication Panel Determination No. 122/19

Product: Pirate Life
Company: Carlton & United Breweries
Media: Digital (Instagram)
Date of decision: 2 January 2020
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 Instagram posts by @gzpirateliferacing that reference Pirate Life beer which is owned by Carlton & United Breweries (“the Company”) and arises from a complaint received 9 December 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 9 December 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 Instagram posts.

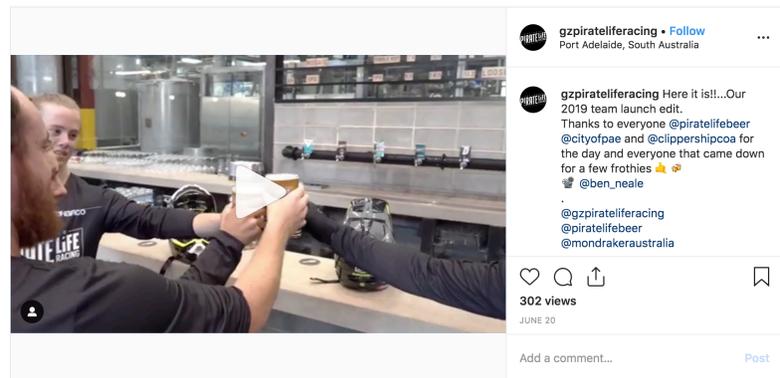
The Marketing Communications

9. The following posts by GreyZone Pirate Life Racing are referenced in the complaint.

- Post 1:



- Post 2:



- Post 3:



The Complaint

10. The complainant is concerned that:

- all three posts feature two riders that have been competing in under 19s competitions according to other posts and are accordingly paid models or actors under 25 years of age;

- Pirate Life through a previous complaint have established editorial control over GZ Racing; and
- The third post has already been determined to breach the ABAC in a prior decision.

The ABAC Code

11. Part 2 of the ABAC Code provides that the Code does not apply to
(b)(v) Sponsorship
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;
 - they are not a paid model or actor and are shown in a Marketing Communication that has been placed within an Age Restricted Environment;
13. Part 6 of the ABAC Code includes definitions including:

Sponsorship means any agreement or part of an agreement involving payment or other consideration in lieu of payment by a Marketer to support a sporting or cultural property, event or activity, in return for which the sponsored party agrees to be associated with or promote the sponsor's Alcohol Beverage or outlet. Sponsorship also includes naming rights of events or teams and the inclusion of a brand name and/or logo at an event or on uniforms of participants (excluding branded merchandise).

The Company's Response

14. The Company responded to the complaint by letter dated 20 December 2019. The principal points made by the Company were:
 - Pirate Life sponsors the downhill mountain bike team 'GreyZone Pirate Life Racing' on a yearly basis. The Instagram page GZPirateLifeRacing is an asset of GreyZone Pirate Life Racing and is administered by GZ Pirate Life Racing. This is not a Pirate Life asset.
 - These individuals are not paid actors or models. They are members of a downhill mountain biking team, GreyZone Pirate Life Racing, that is sponsored by Pirate Life. The individuals are depicted on the GZ Pirate Life Racing Instagram account, which is administered by GZ Pirate Life Racing, and is not a Pirate Life asset.
 - The marketing communications referenced in the complaint are not alcohol beverage marketing communications within the scope of the ABAC Code. The Code defines 'Marketing Communications' as *marketing communications in*

Australia generated by or within the reasonable control of a Marketer ... including but not limited to brand advertising (including trade advertising), competitions, digital communications (including in mobile and social media), product names and packaging, advertorials, alcohol brand extensions to non-alcohol beverage products, point of sale materials, retailer advertising and Marketing Collateral.

- The posts referenced by the complainant are not hosted on Pirate Life social media channels. They belong to the GreyZone Pirate Life Racing team, a mountain biking team sponsored by Pirate Life. Pirate Life has no editorial control over GZ Pirate Life Racing's social media assets.
- In posts 1 (stills) and 2 (video footage), the GZ Pirate Life Racing Team are shown going about their activities in a variety of Port Adelaide locations, including the Pirate Life brewery. They are not advertising the brewery or Pirate Life beers, rather they are showcasing their evident mountain biking prowess.
- With respect to Decision 86/19 and the third post referenced by the complainant, we did concede that the specific video dated 13 August 2019, which was posted by the GZ Pirate Life Racing team, did feature an instance of beer being consumed while mountain bikes were being used. We agreed that this element of the video breached the Code with respect to Part 3(d) Alcohol and Safety, however, as we noted, we do not believe the Instagram post to have been within our effective control at the time it was posted.
- CUB and Pirate Life contacted GZ Pirate Life Racing and asked them to remove the post from their social media channels as we did not feel it was an appropriate depiction of alcohol under the ABAC, and we were not comfortable with our brand being associated with such depictions. GZ Pirate Life Racing complied with this request from CUB and Pirate Life, however it appears that although they removed the post from Facebook, they missed the post on their Instagram. It has since been removed from Instagram as well.
- According to the Code, *Sponsorship means any agreement or part of an agreement involving payment or other consideration in lieu of payment by a Marketer to support a sporting or cultural property, event or activity, in return for which the sponsored party agrees to be associated with or promote the sponsor's Alcohol Beverage or outlet. Sponsorship also includes naming rights of events or teams and the inclusion of a brand name and/or logo at an event venue or on uniforms of participants (excluding branded merchandise).*
- This is reflective of the relationship between Pirate Life and the GZ Pirate Life Racing team. Pirate Life is the naming rights sponsor of the team. We do not sponsor the individual mountain bikers.
- The marketing communications are not assets of Pirate Life – they are wholly created by the GZ Pirate Life Racing team.
- While CUB and Pirate Life are aware that some of the people in this team are under the age of 25, we sponsor the team in aggregate. There is no prohibition

on this arrangement under the Code. We do not sponsor individual riders, and nor do we use them in our marketing communications. These individuals are not paid by Pirate Life; we provide sponsorship for the GZ Pirate Life Racing team.

- The posts, being assets created by the GZ Pirate Life Racing team, are not within the scope of the ABAC. The ABAC rules on 'marketing communications in Australia generated by or within the reasonable control of a Marketer'. That is not reflective of the relationship between Pirate Life and the team it sponsors, GreyZone Pirate Life Racing. Social posts are not required by the terms of the sponsorship; the GZ Pirate Life Racing team has posted them independently.
- 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.
- As per Decision 86/19, we have asked GZ Pirate Life Racing to remove the post where team members are featured cycling through the brewery as it does contain a clear instance of riders drinking while cycling, and that is not in keeping with how we would like Pirate Life to be portrayed.
- As outlined in our submission at the time, as a further mitigating step we have issued upgraded Responsible Marketing Guidelines to Pirate Life to share with GZ Pirate Life Racing and all sponsored entities, regardless of the formality of those relationships. Additional face to face training has also been made available.

The Panel's View

Introduction

15. GreyZone Pirate Life Racing is the name of a team of downhill mountain bike riders who participate in various competitions and perform tricks and other feats of skills using their bikes. While the team and its individual members appear to be essentially amateurs in their sport, the team does receive sponsorship from the Company. This sponsorship results in the team carrying the brand name of Pirate Life and team clothing bears the Company's branding.
16. It seems that some members of the team are aged so as to be able to compete in under 19 year old competitions and certainly at least a number of the team are under the age of 25. The complaint goes to the age of the team members and makes an argument that certain Instagram posts on an account maintained by the team breach Part (b)(iii) of the ABAC. This provision stipulates that alcohol marketing communications must not depict an adult who is under the 25 years of age unless they are not visually prominent or they are not paid and the marketing communication has been placed in an age restricted environment.
17. The Company advises that some team members are under 25 but argues the Instagram posts are not marketing communications to which the ABAC applies.

This is because the posts were made by the team and not the Company and the Company had no reasonable control over the making of the posts.

18. The complaint raises several issues which will be considered in turn, namely:
- are the Instagram posts marketing communications for the purposes of the ABAC and if so;
 - do the posts fall within the 'sponsorship' exception contained in the Code and if not;
 - are the posts inconsistent with the Part 3 (b)(iii) standard.

Are the posts ABAC marketing communications

19. The ABAC does not purport to regulate every reference to alcohol made over social media or other mediums. To fall within the ambit of the ABAC the reference to alcohol must be a marketing communication from a producer, distributor or retailer of alcohol beverages (a marketer). A marketing communication is broadly defined and captures social media posts such as Instagram posts, but these posts must be generated by or be within the reasonable control of a marketer.
20. The Company maintains that it did not make the posts nor did its sponsorship agreement with the team require the team to make Instagram posts. It is stated that the Company has no editorial control over the posts. That said, it seems the Company does have, arising from its sponsorship agreement, some ability to moderate and influence how the team portrays the Pirate Life brand.
21. Determination 74 & 86 /19 considered posts made by the team on their social media accounts of Facebook and Instagram. The Panel concluded that while the Company does not have close supervision over the social media posts nor does it give prior approval for posts referencing Pirate Life, it does have a sufficient level of control over how its brand is portrayed to make the posts marketing communications for ABAC purposes.
22. The Company argues that in essence the earlier decision was incorrect, and the Panel gave too much weight to the control the Company has over the social media posts of the team. The Panel nonetheless believes the posts are marketing communications and notes:
- the posts use material which, in part, was filmed at the Company's Adelaide brewery;
 - access to the brewery could not be obtained without the prior consent and involvement of the Company;
 - the sponsorship arrangements may not require the making of the posts, but the Company would reasonably expect and hope the team would undertake activities which will give some exposure to the Company's brand; and
 - the Company has some ability (at least post facto) to control the way its brand is portrayed by the team in its social media posts.

The Sponsorship Agreement

23. The ABAC gives a carve out to the application of ABAC standards to 'sponsorship'. The Code describes sponsorship as any agreement involving payment or other consideration by a marketer to support a sporting event or activity in return for which the sponsored party agrees to be associated with or promote the sponsor's alcohol beverage. Sponsorship includes naming rights of teams and the inclusion of a brand name and/or logo on team uniforms.
24. The Panel has considered the sponsorship exception in previous decisions. The exception extends only so far capturing the direct manifestation of the sponsorship but does not mean that subsequent marketing communications which reference or flow from the sponsorship do not have to meet ABAC standards.
25. In the current case the marketing communications feature racing team members, in one instance posing in a photograph at the Company's brewery, and in two other instances comprising videos of team members riding in the streets of Adelaide including the Company's brewery. The sponsorship exception would capture elements such as:
 - the team members (irrespective of their age) wearing uniforms with Pirate Life branding;
 - bike riding while wearing branded uniforms; and
 - team members competing in events and use of footage of this in broadcasts or subsequent use of the footage in social media posts.
26. The sponsorship exception from the ABAC standards does not include the presentation of information or other promotion of the Company's products and product attributes. So, depictions of team members consuming beer which feature in each of the posts goes beyond the scope of the sponsorship exception and are marketing communications to which the standards apply.

Consistency with the ABAC Standard

27. There are three posts. The third post deals with a video which the Panel decided in Determination 74 & 86/19 was in breach of Part 3 (d) of the Code. The Company explains it sought to have the team remove the video after the previous determination, which it did from its Facebook page. It should have also been removed from the Instagram account, but was inadvertently missed. It has now been removed.
28. The concern raised about the other two posts is that they depict team members under the age of 25. The first post is a photograph of team members wearing their Pirate Life branded uniforms. The photograph is set in the Company's brewery and each team member is holding a partially consumed beer. One team member is seen sipping from his beer.
29. If the photograph was of team members in their branded uniforms alone, then this would fall within the sponsorship exception and the age of the team members would not be relevant. The addition of the members drinking beer is a promotion of the product which takes it outside the sponsorship exception and hence the age of the team members becomes relevant. While the Company did not advise the ages of

each of the four men shown, it is implicit in the Company's response to the complaint that at least one of them is under the age of 25.

30. The marketing communication was on Instagram. Part 3(b)(iii) requires that person appearing in alcohol marketing be at least 25 years old, but this requirement is removed if the persons shown are not paid and the marketing is shown in an 'age restricted environment'. The individual team members are not paid by the Company; however, the team Instagram account does not appear to meet the criteria of being an age restricted requirement. Certainly, the Company did not seek to make this argument.
31. The second post is a video of team members riding, ending at the brewery and team members consuming a beer. Like the photograph, at least one of the team members shown is under 25. If the post was only team members riding in Adelaide wearing branding uniforms, then this would be a depiction of the team undertaking activities within the scope of the sponsorship. The final scene set in the brewery when the members dismount from their bikes and consume a beer, takes the clip outside the sponsorship exception.

Conclusion

32. The Panel upholds the complaint finding:
 - the three posts are marketing communications for ABAC purposes;
 - posts 1 and 2 show activity which is promoting the Company's product and take the posts outside the scope of the sponsorship exception;
 - posts 1 and 2 depict at least one person under the age of 25 in breach of the requirements of Part 3 (b)(iii); and
 - post 3 was previously held in Determination 74 & 86/19 to breach Part 3 (d) of the Code.