



ABAC Adjudication Panel Determination No. 107/20

Product: Burton x Pirate Life Frontside Ale
Company: Pirate Life Brewing
Media: Digital (Youtube & Facebook)
Date of decision: 17 August 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 a Youtube video for Transfer Snowboard magazine featuring ‘Inspired Unemployed’ & Jye Kearney that includes a product placement of Frontside Ale by Pirate Life Brewing (“the Company”) and arises from a complaint received 28 July 2020.
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 Code”) – 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 and Policies – which place 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 the 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 28 July 2020.
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 was completed in this timeframe.

Pre-vetting Clearance

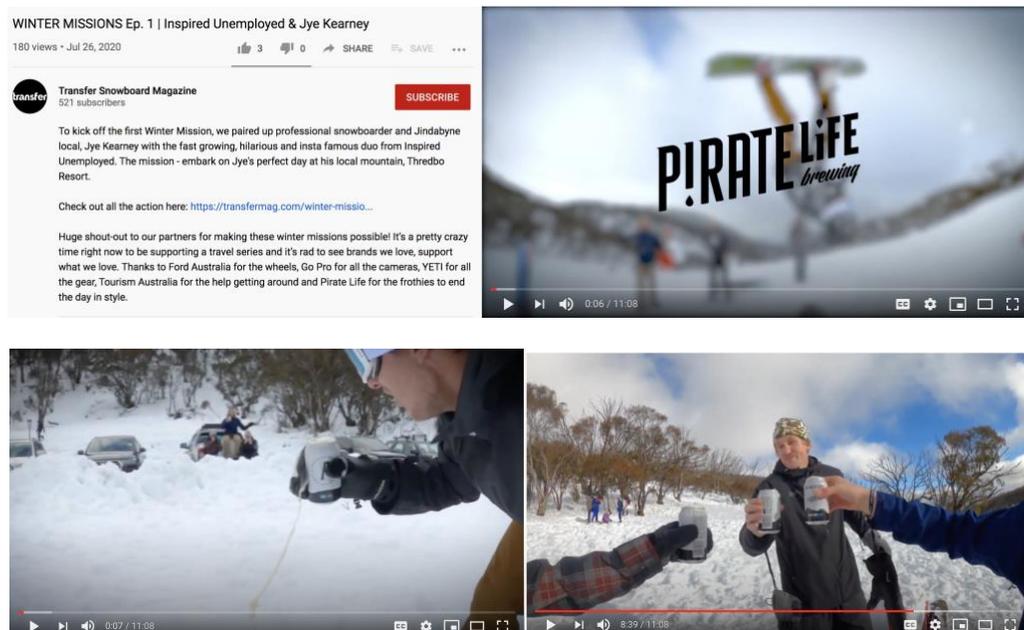
9. The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for this marketing communication.

The Marketing Communications

10. The complaint goes to two items. The first is a video created for Transfer Snowboard Magazine entitled 'Inspired Unemployed with Jye Kearney - Winter Missions Ep 1'. The episode is available on the Transfer website and also the video streaming platform Youtube. The second item is a Facebook post by the Company which references the video.

Youtube Video - https://www.youtube.com/watch?v=HX9QhDtBW_c&feature=youtu.be

11. The episode is hosted by Richie Carroll who drives Jack Steele and Matt Ford (The Inspired Unemployed) to the Thredbo Resort for a day of snowboarding at locations selected by professional boarder Jye Kearney. We first see video footage of the men snowboarding at Thredbo Resort.
12. At around 8 minutes into the video we see the men placing snow in an esky in the back of their ute together with cans of Pirate Life beer. We then see Matt handing beers to the other men, opening his can with his teeth, and then Richie, Matt and Jye calling "Cheers" and touching cans. In the next scene we see Jack standing with a beer in his hand as they are constructing a ramp from snow.
13. We first see Jye performing a backflip using the ramp and then Jack repeatedly performing backflips trying to improve his technique. Jack then performs a backflip holding a can of Pirate Life and sipping from the can as he snowboards away from the ramp after the jump.
14. In the next scene we see Jye perform the backflip naked apart from briefs and a blindfold and one of the men hand him a can of Pirate Life as he unclips his snowboard and walks away.
15. In the final scene the men sit on the back of the ute talking about their day and drinking Pirate Life beer.





Facebook Post - <https://www.facebook.com/PirateLifeBrewing/posts/2671452476405970>

16. Facebook post of 27 July 2020 on Pirate Life's Facebook account.



The Complaint

17. The complainant contends that the video is 'sponsored content' and contains 'product placement' of Pirate Life products. It is argued the relationship between the Company and the video is demonstrated in part by the Facebook post. The video is said to show alcohol use while performing high risk activities of snowboarding including a backflip.

The ABAC Code

18. Part 3 of the ABAC Code provides that:
 - (d) A Marketing Communication must NOT 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

19. The Company responded to the complaint by letter dated 7 August 2020. The principal points made by the Company were:
 - a) 'Winter Missions' is a content series from Transfer, a snowboarding publication, which "pair[s] professional and not so professional snowboarders with interesting people from all walks of life – celebrities, influencers, athletes, Olympians and more."
 - b) Pirate Life often sponsors winter sports, such as snowboarding, as well as individual snowboarders, such as Jye Kearney, who is featured in this video. Pirate Life has also previously collaborated with snowboarding brand Burton.
 - c) Pirate Life is a sponsor of the 'Winter Missions' series produced by Transfer. Pirate Life contributes its product, in this case beer, along with a number of other sponsors, as outlined by Transfer in the paragraph below.

Huge shout-out to our partners for making these winter missions possible! It's a pretty crazy time right now to be supporting a travel series and it's rad to see brands we love, support what we love. Thanks to [Ford Australia](#) for the wheels, [Go Pro](#) for all the cameras, [YETI](#) for all the gear and [Pirate Life](#) for the frothies to end the day in style.

- d) Pirate Life does not have any effective or practical editorial control over Transfer's content, the sponsorship affords Pirate Life the ability to have its brand featured as a 'partner' of the Winter Missions content series along with a series of other brands.
- e) The video is a clear breach of the Code standard. Neither Pirate Life nor CUB has any editorial control over Transfer's Winter Missions series, however we will be taking this opportunity to educate Transfer on the responsible depiction of alcohol in its content.

- f) Pirate Life has not sought to direct users to the YouTube video. There is no direct link to the video – Pirate Life has posted some still images, which we believe to be in compliance with the Code and has further referenced its sponsorship of Transfer’s Winter Missions series. While we do not dispute that Transfer’s content, over which we have no editorial control, breaches the Code, we do not believe that the Pirate Life Facebook images constitute a breach.
- g) In fact, considerable care has been taken to ensure the sequence of photos depicts consumption taking place after snowboarding activity. In the first photo, a man is shown performing a backflip while onlookers at some distance in the background hold beer cans and watch this performance. It is not until a later photo, that the same man, having removed his gloves and snowboard to indicate he has completed snowboarding activity, is shown drinking a beer. There is no suggestion that the snowboarding man has consumed the beer prior to performing a backflip.
- h) 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.
- i) We are disappointed that in this instance, a third party’s content, that we have sponsored via the provision of product but over which we have not had any editorial control, has breached the ABAC. We are taking steps to ensure this will not be repeated in the future.

The Panel’s View

- 20. This determination concerns a complaint about a short (11 minute) video which shows branding and some use of Pirate Life beer. In order to understand whether the ABAC scheme has any application to the video, it is necessary to set out a brief background of the parties involved in the video. The video has been created by the Transfer Media Group which is a media and production outlet which produces a magazine and online content to service the Australian snowboarding community. The video is the first in a series entitled 'Winter Missions' which Transfer Media explains pairs professional snowboarders with 'interesting people from all walks of life' to take on a snowboarding experience.
- 21. The professional snowboarder in episode 1 of Winter Missions is Jye Kearney. Jye shares his snowboarding adventure with Jack Steele and Matt Ford. Messrs Steele and Ford are social media influencers come comedians known as 'The Inspired Unemployed'. The duo has established a very strong following on Instagram with 465,000 followers and have built upon this success to cross over into more traditional media platforms. The duo and their collaborators have been featured in Vogue Australia and GQ Australia.
- 22. As explained by the Company, collaborations with various partners are used as a marketing and brand promotion strategy for Pirate Life, including non-alcohol brands involved in winter sports, such as snowboarding. In this case, the Company is a 'sponsor' of the Winter Missions series which saw the Company supply product

to Transfer Media. The Company states it had no 'effective or practical editorial control over Transfer's content' with its supply of product resulting in having 'its brand featured as a partner of the Winter Missions series along with a series of other brands.'

23. The threshold issue is whether the video as a whole, or that part of the video which depicts Pirate Life product and branding, is an alcohol 'marketing communication' to which the ABAC scheme applies. To be an alcohol marketing communication for ABAC purposes, the representations of alcohol product and branding must be generated by or within the reasonable control of a producer, distributor or retailer of alcohol beverages. In short, did the Company:
 - create the marketing communication itself; or
 - have a relationship with the creator of the content which can be said to give the Company reasonable control over how its product or brand is portrayed; or
 - took actions to generate, or which could reasonably be expected to cause, the promotion of its product or brand by the creator of the content.
24. The video was created by Transfer Media, not the Company, and it can be accepted the Company had no practical editorial control over the content. The Company did, however, form a relationship with Transfer Media by which, at a minimum, it supplied product for use in conjunction with the making of the Winter Mission episode. The Company did this 'to have its brand featured as a partner' of the series. The Company both wanted and expected its brand, and likely its products, to be referenced in the episode. This means the references to the product within the video can be taken to have been generated by the actions of the Company and hence these references fall within scope of a marketing communication for ABAC purposes.
25. The video shows the men having a day at the snow fields at and near Thredbo. At one point, the men consume the product before snowboarding, with two of the men performing a backflip from an improvised snow ramp. Part 3(d) of the ABAC provides that a marketing communication must not show the consumption of alcohol before or during any activity that, for safety reasons, requires a high degree of alertness or physical co-ordination. Snowboarding is an activity which requires a high degree of alertness and physical co-ordination to be safely performed.
26. The Panel believes the video scenes involving the consumption of the product with the performance of snowboarding, does breach the Code standard, and it is noted the Company does not dispute these scenes are inconsistent with the ABAC requirements. While the Company does not have direct control over the video content, it should seek the cooperation of its marketing collaborator to have the video removed or modified to make consistent with the responsible depictions of alcohol use required by Part 3(d).
27. The complaint is upheld.