



ABAC Adjudication Panel Determination No 69/21

Product: Alcohol
Company: Gage Roads Brew Co
Media: Instagram
Date of decision: 14 May 2021
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 an Instagram post by Gage Roads Brew Co (“the Company”). It arises from a complaint received on 6 April 2021.
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 6 April 2021.
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 the marketing.

The Marketing

10. This determination relates to a video posted to Instagram featuring Letty Mortensen sitting on the beach, promoting a competition. A screenshot is shown below:



The Complaint

11. The complainant has the following concerns about the marketing:

A video promoting a competition starring Letty Mortensen. Rusty (a partner in the competition) state that Letty Mortensen was 21 in a 2019 post. (<https://us.rusty.com/blogs/surf/letty-mortensen>)

An adult under 25 years old prominently displayed and promoting the beverage is a breach of Section 3(b)(iii).

The ABAC Code

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; or
- they are not a paid model or actor and are shown in a Marketing Communication that has been placed within and Age Restricted Environment.

The Company's Response

13. The Company responded to the complaint by letter emailed on 14 April 2021. The principal points made by the Company were:

- The complaint received on 2 April 2021, relates to a video promoting a competition starring Letty Mortensen <https://www.instagram.com/p/CNEoYv1Irdh/> on the basis of ' An adult under 25 years old prominently displayed and promoting the beverage is a breach of Section 3(b)(iii)'. The complainant references a previous Rusty Blog post, published in 2019 stating Letty was 21 years of age. The detail referenced in this article is incorrect.
- Gage Roads Brew Co. has demonstrated compliance to the ABAC code and have previously pre-vetted communication material, however as this process is discretionary for social media, pre-vetting was not sought for this post.
- Letty's birth date is 5th October 1996, which at the time of responding to this complaint makes him 24.5 years of age.

- Letty Mortensen was not a paid model or actor. He did not receive any remuneration (cash or non-cash, directly or indirectly) for participating in the Instagram post.
- The Instagram post relates to a collaboration undertaken between Rusty & Gage Roads to give away collaboratively designed Rusty Surfboards.
- Letty Mortensen is contracted to Rusty as part of their athlete program. He has no affiliation with Gage Roads.
- All Gage Roads social platforms are age restricted, thus only people aged 18 and over would have been able to view this video content.
- Our understanding is that the intent of Section 3(b)(iii) of the code is to ensure advertising does not feature talent that could be seen or understood to be under the age of 18 years as part of marketing communications. Letty Mortensen, whilst being slightly under 25 years of age and missing the cut-off by 6 months, does not in any way appear to be under 18 years of age. Whilst we accept we could have done more to ensure the talent was over the age of 25, Gage Roads Brew Co. refutes any suggestion we have deliberately sought to represent talent appearing under the age of 25 as part of this communication.

The Panel's View

14. Liam (Letty) Mortensen is an Australian professional surfer. Rusty is a company which markets surfboards and related equipment as well as surf/beach themed clothing. Rusty appears to have a 'sponsorship' or similar relationship with several professional surfers including Mr Mortensen. The Company and Rusty have a 'collaboration' which has given the consumers of Gage Roads beer the opportunity to win Rusty surfboards. The collaboration also features co-branded clothing items being available from Rusty.
15. The Company posted on its Instagram account a video of Letty Mortensen speaking about the competition while holding bottles of Gage Roads. It is this video which has attracted the complaint, with the concern being that Mr Mortensen is under the age of 25. Part 3 (b) (iii) of the ABAC provides that an alcohol marketing communication (which includes an Instagram post) must not depict an adult who is under 25 years of age and appears to be an adult unless:
 - they are visually prominent;
 - they are not a paid model or actor and are shown in a marketing communication that has been placed within Age Restricted Environment
16. The complainant believed, based on a media story, that Mr Mortensen is 22 or 23 years of age. According to biographical information on Mr Mortensen on the Rusty

website however, he was born on 5/10/1996, which makes him 24 as at the time of the Instagram video. In either case, Mr Mortensen was not 25 when the video was made and posted by the Company.

17. In responding to the complaint, the Company submitted:
 - its Instagram post was made on an Age Restricted Environment;
 - Mr Mortensen was not a paid model or actor; and
 - the policy intent of the ABAC standard is to ensure that no adult features in alcohol marketing who could be mistaken for being a minor, and there is no question that Mr Mortensen would be thought to be under 18 years old.
18. The policy intention of the ABAC standard is not limited to avoiding confusion by showing adults who have a youthful appearance and may be thought to be under 18. This is one goal, but another is the overall aim of the ABAC Scheme to portray alcohol use in a mature and responsible manner, and this is assisted by featuring in marketing adults who are a bit older than having just turned 18. The test created by the provision is factual - a person shown is at least 25 or they are not, and in this case, Mr Mortensen was 24.
19. It can be accepted that the Company itself did not pay Mr Mortensen to appear in the video, but it is reasonably evident that Rusty, the Company's partner in the surfboard competition and the co-branding collaboration, does have a commercial relationship of some kind with Mr Mortensen. It is also evident that Mr Mortensen has appeared in the video because of his relationship with Rusty. It would be inconsistent with the intent of the Part 3 (b) (iii) provision to permit a person under 25 to be featured in marketing material because one partner in the collaboration had a commercial relationship with the person but the other partner did not.
20. The complaint is upheld.