



## **ABAC Adjudication Panel Determination Nos 117, 118, 119 & 120/21**

**Product:** Beer  
**Company:** Blackflag Brewing Pty Ltd  
**Media:** Instagram  
**Date of decision:** 4 June 2021  
**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 advertising by Blackflag Brewing Pty Ltd (“the Company”). It arises from four complaints received from a single complainant on 17 May 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 complaints raise concerns under the ABAC Code and accordingly are within the Panel’s jurisdiction.

## The Complaint Timeline

7. The complaints were received on 17 May 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.

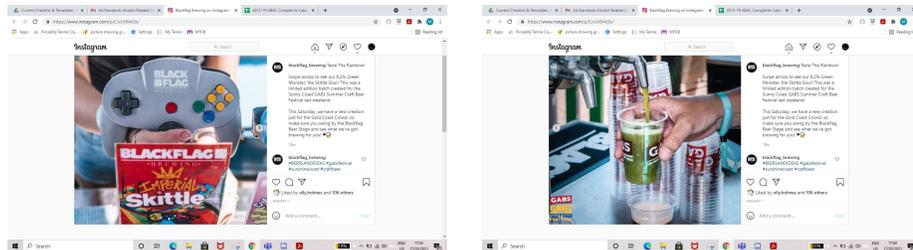
## Pre-vetting Clearance

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.

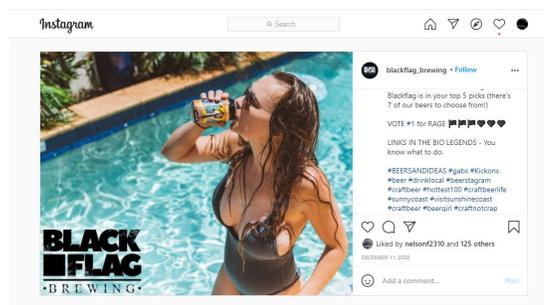
## The Marketing

10. This determination relates to the following Instagram posts:

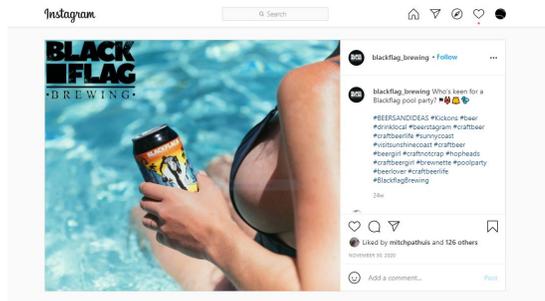
### Instagram Post 1:



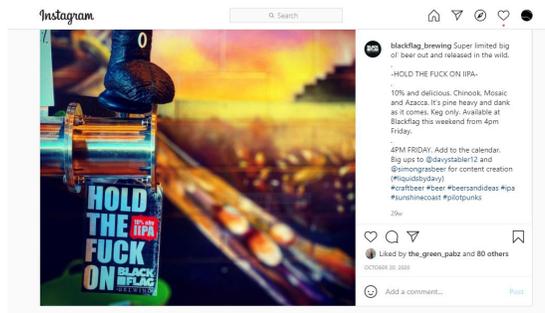
### Instagram Post 2:



### Instagram Post 3:



### Instagram Post 4:



## The Complaints

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

### Instagram Post 1:

*This branding and post create an appeal to minors by using candy branding to brand their own beers.*

### Instagram Post 2:

*This post illustrates drinking while partaking in a high-risk activity of swimming. This is a breach of the code.*

### Instagram Post 3:

*This post demonstrates someone taking part in a high-risk activity while drinking, it invites others to do so by the line in the caption "Who's keen for a Blackflag pool party".*

#### **Instagram Post 4:**

*The language of the beer would encourage people to swear while ordering and describing the beer. This is a breach of 3a(ii) as it encourages offensive behaviour.*

#### **The ABAC Code**

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (a)(ii) 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 Australian Alcohol Guidelines;
  - (b)(i) have Strong or Evident Appeal to Minors;
  - (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.
13. Part 6 of the ABAC Code provides that:

#### **Strong or Evident Appeal to Minors** means:

- (i) likely to appeal strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
- (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

## **The Company Response**

14. The Company responded to the complaint by letter emailed on 26 May 2021. The principal points made by the Company were:

### **Removal of the posts**

- Regardless of the comments made below, the posts have been removed.

### **Alcohol Advertising Pre-vetting Service Approval**

- No advice was sourced for vetting

### **Instagram Post 1**

- This was a one (1) off beer created specifically for GABS- Great Australian Beer Spectacular. The first image does not pertain to the product as a consumable product via can, tap or dispensing system. The second image displays a product being poured with no imagery pertaining to the Skittles confectionary brand. This was made available at an 18+ event only.

### **Instagram Posts 2 & 3**

- Both images depicted are post swimming. They were photographed after the fact. Image one (1) is modelling standing next to a pool, not within the water. Image two (2) is imaged with feet in the water from the edge of a pool. Neither image displays alcohol beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical co-ordination as no swimming is observed.

### **Instagram Post 4**

- This post could be considered offensive when discussing the beer. It will be removed.

## **The Panel's View**

15. Blackflag Brewing Co is a craft brewery and bar located in Queensland's Sunshine Coast. This complaint relates to four posts on the Company's Instagram account raising issues relating to three separate Code standards.
16. The first complaint concerns a post that includes two images and references a limited release product called 'Skittle Sour'. The complainant submits the post would appeal to minors by adopting branding used for the confectionary 'Skittles'. This concern brings into play Part 3 (b) (i) of the ABAC which provides that an

alcohol marketing communication (which includes product labels and packaging) must not have strong or evident appeal to minors. This standard might be breached if the branding:

- specifically targets minors;
- has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; and
- uses imagery, designs, motifs, animations, or cartoon characters that are likely to appeal strongly to minors or create confusion with confectionery or soft drink.

17. The Company responds that:

- this was a one (1) off beer created specifically for GABS- Great Australian Beer Spectacular;
- the first image does not pertain to the product as a consumable product via can, tap or dispensing system; and
- the second image displays a product being poured with no imagery pertaining to the Skittles confectionary brand, and was made available at an 18+ event only.

18. Assessment of the consistency of a marketing communication with an ABAC standard is from the probable understanding of a reasonable person. This means that the life experiences, values, and opinions held by a majority of the community is to be the benchmark. A person who interprets a marketing message in a different way is not 'unreasonable' but possibly their understanding would not be shared by most people.

19. The Panel has considered the Part 3 (b) standard on many past occasions. While each marketing communication must always be assessed individually, some characteristics within marketing material which may make it strongly appealing to minors include:

- the use of bright, playful, and contrasting colours;
- aspirational themes that appeal to minors wishing to feel older or fit into an older group;
- illusion of a smooth transition from non-alcoholic to alcoholic beverages;
- creation of a relatable environment by use of images and surroundings commonly frequented by minors;

- depiction of activities or products typically undertaken or used by minors;
  - language and methods of expression used more by minors than adults;
  - inclusion of popular personalities of evident appeal to minors at the time of the marketing (personalities popular to the youth of previous generations will generally not have strong current appeal to minors);
  - style of humour relating to the stage of life of a minor (as opposed to humour more probably appealing to adults); and
  - use of a music genre and artists featuring in youth culture.
20. It should be noted that only some of these characteristics are likely to be present in a specific marketing communication and the presence of one or even more of the characteristics does not necessarily mean that the marketing item will have strong or evident appeal to minors. It is the overall impact of the marketing communication rather than an individual element which shapes how a reasonable person will understand the item.
21. A marketing communication can give rise to strong appeal to minors if it's promotion of the product creates confusion with confectionary or a soft drink. Confusion with a soft drink might occur if:
- the packaging fails to clearly identify the product as an alcohol beverage through use of an alcohol term like beer, ale, vodka, style of wine etc or reliance is made of more subtle alcohol references or terms understood by regular adult drinkers but less likely to be understood by minors e.g., IPA, NEIPA;
  - the packaging has a visual design that resembles a soft drink, such as the display of fruit images, bright block colours and the use of a font style or iconography found typically on soft drinks or fruit juices;
  - the use of terms commonly associated with a soft drink or fruit juice e.g., orange, lemon, blueberry, pop, smash etc; and
  - the type of physical package used and whether this is like that used by soft drinks or fruit juices e.g., prima style juice box.
22. The Panel believes the post with the 'Imperial Skittle' branding and gaming control does breach the Part 3 (b) standard. The Panel noted:
- the branding resembles that employed by the popular confectionary, Skittles, adopting the same font, packaging colouring and rainbow motif used on the confectionary;

- the accompanying text reference to 'taste the rainbow' is drawn from skittles confectionary;
  - placing the branding with a gaming control increases its familiarity with minors; and
  - the overall impact raises the illusion of a smooth transition from a non-alcoholic product to use of an alcohol beverage.
23. The second and third complaints relate to images of a woman wearing a swimsuit in or around a swimming pool. The concern is that the posts illustrate drinking while partaking in a high-risk activity of swimming.
24. The Company responded that:
- both images depicted are post swimming and were photographed after the fact;
  - image one (1) is modelling standing next to a pool, not within the water;
  - image two (2) is imaged with feet in the water from the edge of a pool;
  - neither image displays alcohol beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical co-ordination as no swimming is observed.
25. The relevant standard in Part 3(d) states that marketing communications 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, such as swimming.
26. The Panel believes that both posts breach the ABAC standard. The woman is wet and appears to have been swimming, but is still shown either on the edge of or in the swimming pool in her bathers, with no cues that she has concluded swimming for the day. The Panel is of the view that a reasonable person would consider it likely that the woman will resume swimming after consuming the alcohol beverage or that swimming while consuming alcohol is acceptable. The caption with the second post reinforces this understanding with the statement, 'Who's keen for a Blackflag pool party?'
27. The fourth complaint relates to an Instagram post that shows an image of a tap badge for a product named 'Hold the Fuck on IIPA' with the caption, 'Super Limited big 'ol beer out and released in the wild'. The complaint raised a concern that the name of the beer would encourage people to swear while ordering and describing the beer and this is a breach of Part 3 a (ii) as it encourages offensive behaviour.
28. The ABAC standard in Part 3 (a) (ii) provides that an alcohol marketing communication must not show or encourage irresponsible or offensive behaviour

that is related to the consumption or presence of an alcohol beverage. The Panel does not believe that this Instagram post, or the name of the beer encourages offensive behaviour related to the consumption or presence of alcohol. The complainant's primary concern is about the acceptability of the language used in the post within the community and this issue falls within the AANA Code of Ethics rather than the ABAC Code.

29. The first, second and third complaints are upheld but the final complaint is dismissed.