



ABAC Adjudication Panel Determination Nos 125, 126, 127 & 128/21

Product: Ned Whisky
Companies: Top Shelf International Pty Limited
Media: Instagram
Date of decision: 18 June 2021
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from four complaints received from a single complainant on 17 May 2021 and concerns Instagram advertising of Ned Whisky (“the Product”) by Top Shelf International Pty Limited (“the Company”).
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.

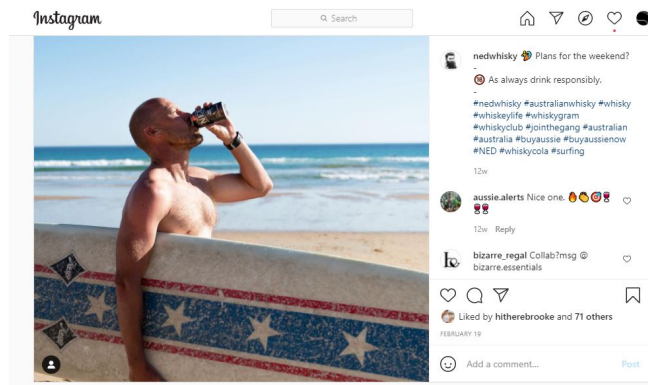
Pre-vetting Clearance

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.

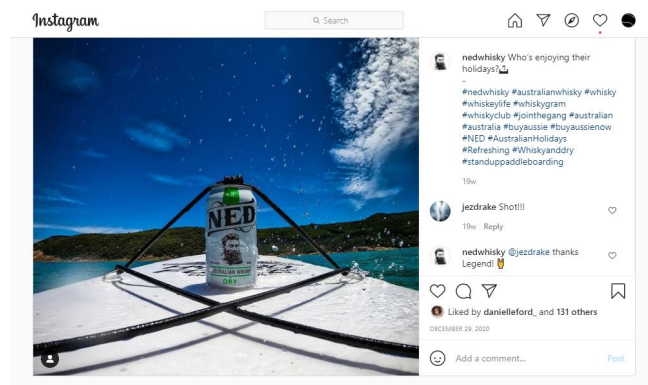
The Marketing

10. This determination relates to the following Instagram posts:

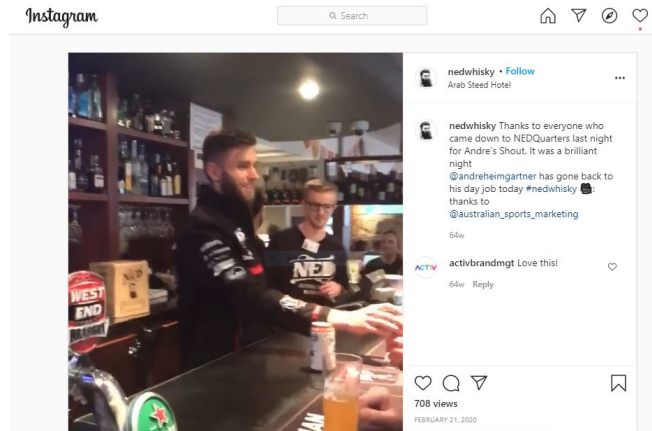
Instagram Post 1:



Instagram Post 2:



Instagram Post 3:



Instagram Post 4:



The Complaints

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

Instagram Posts 1 & 2:

These posts demonstrate drinking alcohol during the high-risk behaviours of swimming and surfing.

Instagram Post 3:

Andre Heimgartner (8 June 1995) was 24 at the time this marketing communication was posted. This marketing communication uses a 24 year old prominently displayed in a non-natural situation in a non-age restricted area.

Instagram Post 4:

The caption implies coming to the event or drinking the beer will get you "looked after" by the Kelly Gang girls. This implies social success with women could be achieved by drinking Ned Whisky.

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 an Age Restricted Environment;
 - (c)(ii) show (visibly, audibly or by direct implication) the consumption or presence of an Alcohol Beverage as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success.
 - (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 Response

13. The Company responded to the complaint by letter emailed on 28 May 2021. The principal points made by the Company were:
- We advise that we accept the Panel's decision in relation to these complaints.

Alcohol Advertising Pre-vetting Service Approval

- The Instagram posts were not the subject of pre-vetting approval applications pursuant to the Alcohol Advertising Pre-vetting Service.

Instagram Post 1

- Top Shelf International Pty Ltd (TSI) does not believe that there is a direct implication that the individual is consuming alcohol before surfing or that otherwise there is an adverse safety implication or inference that arises. In our view a reasonable person would view the post in the context of themes of outdoors, outdoor physical activity in clear sky and sunshine and the uplifting effect they have on the human spirit. Overlaying this is that the image is of the surfer leaving the beach.

- Notwithstanding our view, the post has been withdrawn.

Instagram Post 2

- In relation to whether Instagram Post 2 directly implies that a person is consuming alcohol before and/or whilst paddle boarding by showing a picture of a can of Ned Whisky strapped to the front of a paddle board which appears to be on open water:
 - TSI does not believe that this implication can be validly or justifiably drawn. There is no indication that the can is being consumed. However, more relevantly the reasonable person would see the post as one that is a fun theme of taking a can with an image of Ned Kelly for a ride on a surfboard; amusing in a similar vein as that of having, by way of example, a dog on a surfboard.

Instagram Post 3

- In relation to whether Instagram Post 3 breaches Part 3 (b)(iii) of the Code by depicting an Adult who is under 25 years of age:
 - The assumption made by TSI is that the person being referred to in the question is Andre Heimgartner and not that of the individual wearing spectacles.
 - At the time of the post it is now TSI's understanding that Andre Heimgartner was under 25 years of age. However, as a driver of V8 Supercars, a sport that is both physically and mentally demanding and as an articulate individual with considerable skill set across his chosen profession a reasonable person would consider as unsustainable an assertion that Andre Heimgartner was not an adult.
 - TSI's understanding is that the Andre Heimgartner is not a paid model or actor but if so he was not to TSI's knowledge acting in that capacity in the Instagram post.
 - TSI had and continues to have a sponsorship arrangement with Kelly Grove Racing, formerly Kelly Racing which employs, or contracts the services of, Andre Heimgartner. TSI's arrangement with Kelly Racing, as at the time of the post it then was, included that it would make Andre Heimgartner in his capacity as the driver of the NED liveried V8 Mustang super car available for public appearances at certain TSI events. This was one such event at which spontaneously and unbeknown to TSI, Andre stepped behind

the bar, presumably in response to a spirit of fun being had by patrons.

- The Ned Whisky Instagram account is age restricted and hence an Age Restricted Environment.
- The post has been removed.

Instagram Post 4

- In relation to whether Instagram Post 4 breaches Part 3 (c)(ii) of the Code by showing (visibly, audibly or by direct implication) the consumption or presence of an Alcohol Beverage as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success:
 - TSI does not believe that a reasonable person either viewing the image or reading the caption would infer that an assertion that presence of the NED alcoholic beverage was a cause of or contributor to the achievement of the listed or any other indicator of 'success' could reasonably be made out. The image is clearly one that is "posed" and the caption one that is nothing more than a reference to being associated with the product that the males in the image were holding. Any suggestion that there was some form of "future success" that would occur as a result of the image or the caption would be one that a reasonable person would not consider to be well founded or in fact at all sustainable.

The Panel's View

14. Ned Whisky is distilled in Victoria and has become a popular Australian made spirit in a market which is dominated by international producers. The Company employs the usual range of social media channels to promote its products and activities and this determination concerns four Instagram posts. These concerns will be examined in turn.
15. Post 1 shows a surfer holding a surfboard on a beach drinking from a can of the product. The complaint argues the post demonstrates alcohol consumption during the high-risk activity of swimming and surfing. The ABAC provides alcohol marketing must not show consumption before or during an activity that for safety reasons requires a high degree of alertness or physical co-ordination. Swimming and surfing are activities which require alertness and physical co-ordination.
16. The Company submits the post would be viewed as associating the product with the outdoors, activity in clear sky and sunshine and 'the uplifting effect they have on the human spirit'. The issue is whether a reasonable person would take the post as placing alcohol consumption after surfing has been completed or before.

The Panel believes it likely the post would be understood as placing alcohol use prior to entering the water given:

- the surfer appears to be dry and has not yet been in the sea; and
- the scene seems to be in the morning rather than later in the day when it might be assumed that surfing has finished.

17. Post 2 is a video of a can of product attached to a surfboard being paddled in the sea. No one is seen with the can or board. Again, the complaint goes to associating alcohol consumption with swimming/surfing. The Company contends that the post is light-hearted like having a dog on a surfboard, and there is no indication the product is being consumed. On balance, the Panel believes placing a can of product on a board which is being used does raise a direct implication of consumption during the activity of surfing/paddle boarding and is inconsistent with the ABAC standard.

18. Post 3 shows a picture of New Zealand born Supercars racing driver Andre Heimgartner behind a bar and apparently serving beers to patrons. Mr Heimgartner is a member of the Kelly Grove racing team, and this team is sponsored by the Company. The post is dated 21 February 2020 and Mr Heimgartner's birthday is 8 June 1995, making him 24 at the time of the post. Part 3 (b)(iii) of the ABAC provides that an adult depicted in an alcohol marketing communication must be at least 25 years of age unless:

- they are not visually prominent; or
- they are not a paid model or actor, and the marketing communication has been placed within an age restricted environment.

19. The Company submits that while Mr Heimgartner was a few months shy of his 25th birthday at the time of the post, he is clearly a mature individual, was not paid by the Company for his attendance at the bar at which the photograph was taken, and that the Company's Instagram account is age restricted. The application of the ABAC provisions to this post is slightly complicated, but in short:

- the Company's sponsorship of the racing team of which Mr Heimgartner is a member, means that the ABAC standards do not apply to Mr Heimgartner being outfitted in racing livery bearing the Company's branding - racing jackets, helmets etc;
- the Instagram post however goes beyond the 'sponsorship exception' and the Part 3 (b)(iii) standard applies to the post.

20. Mr Heimgartner was not 25 at the time of the post and, prima facie, it is a breach of the standard on the age of persons appearing in alcohol marketing for him to be used in a marketing communication:
- Mr Heimgartner is visually prominent in the post; and
 - the Company advises its commercial sponsorship is with Kelly Grove racing and not Mr Heimgartner and he did not receive any payment for his attendance at the bar or for his image being used in the post.
21. Drawing all this together, on the basis that the Company's account is age restricted i.e. - minors will not be able to access the post - then the post falls within the exclusion provided for Part 3 (b)(iii) and the post is not in breach of the Code.
22. Post 4 shows two men and two women sitting at a table. The men are holding cans of product and the women are wearing 'Kelly Gang' branded singlets. The accompanying text reads- 'The Kelly Gang girls looking after the locals at NED FEST in Yarrawonga this arvo'. The complainant reads into the post that social success with women could be achieved by drinking the product. The Company refutes the post would be understood as suggesting success will be achieved using the product.
23. It is likely the 'Kelly Gang girls' are employed for the event and asked to wear the tight-fitting branded singlets which raises an issue of the objectification of women. This question however, falls more directly under the AANA Code of Ethics than the ABAC. The women's interaction with the male patrons would be probably understood as arising from employment obligations and not the impact of drinking the product. A reasonable person is sufficiently worldly to interpret the image and the post for what it is. The Panel does not believe the post breaches the Part 3 (c)(ii) standard.
24. The complaint is upheld in relation to Posts 1 and 2 and dismissed in relation to Posts 3 and 4.