



ABAC Adjudication Panel Determination No 157/21

Product: Beer
Company: Burnley Brewing
Media: Social Media - TikTok
Date of decision: 10 July 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”) arises from a complaint received on 1 June 2021 and concerns advertising on TikTok by Burnley Brewing (“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 complaint raises concerns under the ABAC Code and accordingly are within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaints were received on 1 June 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.

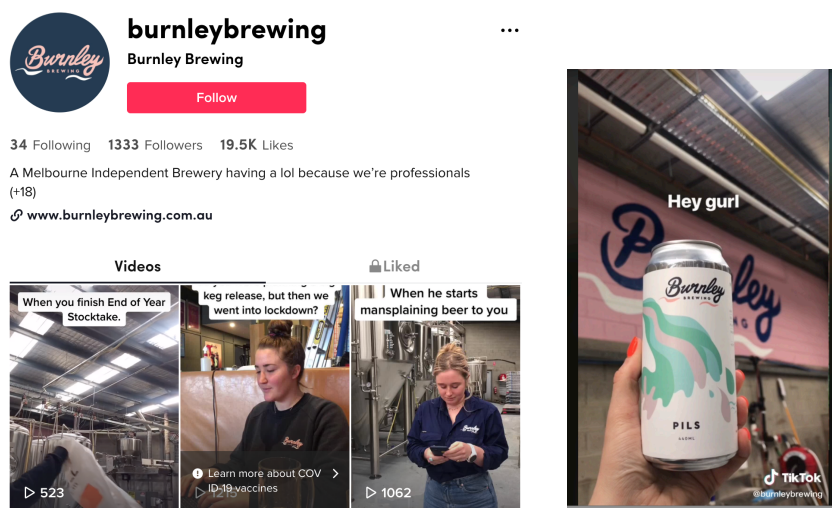
Pre-vetting Clearance

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 Company's TikTok account:

https://www.tiktok.com/@burnleybrewing?lang=en&is_copy_url=1&is_from_webapp=v1



The Complaint

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

As per determination 93/21 this page would breach the code section (b)(iv) around placement of advertisement around minors.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (b)(iv) be directed at Minors through a breach of any of the Placement Rules.

13. Part 6 of the ABAC Code provides that:

Placement Rules means:

- (i) A Marketing Communication must comply with codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy).
- (ii) A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.
- (iii) If a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, a Marketing Communication may only be placed where the audience is reasonably expected to comprise at least 75% Adults (based on reliable, up-to-date audience composition data, if such data is available).
- (iv) A Marketing Communication must not be placed with programs or content primarily aimed at Minors.
- (v) A Marketing Communication must not be sent to a Minor via electronic direct mail (except where the mail is sent to a Minor due to a Minor providing an incorrect date of birth or age).

The Company Response

14. The Company responded to the complaints by email on 10 June 2021. The principal points made on behalf of the Company were:

- We understand that TikTok’s policies explicitly exclude paid advertising for alcohol in Australia, however our reasons for Burnley Brewing’s dispute to the complaint are the following:
 - Our TikTok account started during and because of the first lockdown in 2020. It’s main goal is NOT to promote alcohol or drinking but to give our customers an insider look into what actually goes on at the brewery, as most people do not know the craft and work that goes into the beer making process. “Michael says they felt the brew team using it could offer a genuine peek behind the curtain. It’s similar to their approach with the Instagram account the brewers run called [@burnleybrewingbehindthebeer](#) – one that’s kept separate from their main account.” - Will Ziebell “TikTok on the Beer Clock”

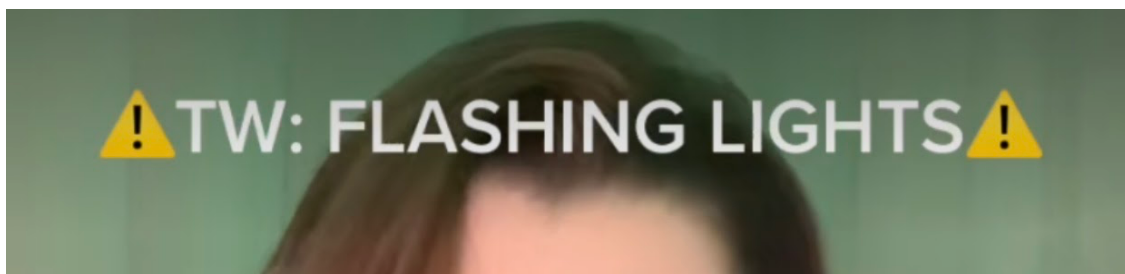
source: <https://craftypint.com/news/2589/tiktok-on-the-beer-clock>

- Burnley Brewing TikTok examples:
 - https://www.tiktok.com/@burnleybrewing/video/6940906102473198850?lang=en&is_copy_url=1&is_from_webapp=v1
 - https://www.tiktok.com/@burnleybrewing/video/6964538182687853825?lang=en&is_copy_url=1&is_from_webapp=v1
 - https://www.tiktok.com/@burnleybrewing/video/6962007627941383426?lang=en&is_copy_url=1&is_from_webapp=v1
 - https://www.tiktok.com/@burnleybrewing/video/6896188764721335554?lang=en&is_copy_url=1&is_from_webapp=v1
- These examples are just a few of how our account focuses on the work life situations that can occur in the brewery setting, rather than the advertising of alcohol and promotion of irresponsible drinking.
- To reference the “Basic Babe” determination of June 2021, under section 18, TikTok Australia have determined the “Australian user base is expanding and “aging up”, with significant and growing usage in the over 18 cohort.” Because of this, the Roy Morgan data from June 2020, again referenced in the “Basic Babe” determination, is twelve months out of date and no longer accurate as this social media interface continues to grow.
- The suggestions that the users of TikTok are “aging with the app” are mirrored by the “Influencer Marketing Hub”

source: <https://influencermarketinghub.com/tiktok-stats/>
- As stated by the ABAC placement rules (Rule iii), “a Marketing Communication may only be placed where the audience is reasonably expected to comprise at least 75% Adults (based on reliable, up-to-date audience composition data, if such data is available).”
- The most up-to-date demographic information on TikTok comes from “statista.com”, published in April 2021, based on the distribution of TikTok users in the United States as of March 2021, by age group. It states that the age bracket of 10-19 year olds make up 25% of the user population. Suggesting the remaining 75% are adults.

source: <https://www.statista.com/statistics/1095186/tiktok-us-users-age/>
- Under section 18 of the “Basic Babe” determination TikTok were contacted and advised the following:
 - TikTok’s policies explicitly exclude paid advertising for alcohol in Australia.
 - TikTok community guidelines restrict the way in which alcohol can be shown in posts/content.

- TikTok will remove content that violates their community guidelines.
- TikTok includes safety features that can be applied by minors and/or their parents.
- The Burnley Brewing TikTok account does not spend money on TikTok advertising, nor has it posted content that violates the community guidelines, hence why no content has been removed.
- There are users on TikTok that have “FLASHING LIGHTS” warnings informing people affected by epilepsy to scroll past that video. The Burnley Burnley TikTok account does already have under it’s “Bio” a 18+ warning and could potentially add to each video a “OVER 18” warning as well to inform any minor to scroll past.



Example of FLASHING LIGHTS warning

- Because of the reasons above, Burnley Brewing do not agree with the complaint made and do not believe we are in breach of the ABAC placement rules.

The Panel’s View

15. Burnley Brewing is an independently owned and operated craft brewery located in Melbourne. In 2020 the Company opened an account on the social media platform Tik Tok. This determination addresses a complaint that the Company has breached the ABAC requirements, not by posting inappropriate content, but by simply having an account on Tik Tok at all. The complaint cites the Panel's decision in Determination 93/21 dated 1 June 2021 as the basis as to why the Company's account breaches the ABAC Placement Rules.
16. The Company responds to the complaint at two levels. Firstly, it is argued that the Company's account and its individual posts provide a behind the scenes look at what it is like at a craft brewery. As such it is contended that the account and posts don't amount to the advertising of alcohol or the promotion of irresponsible drinking. Secondly, it is submitted that the users of Tik Tok are 'changing and ageing' quite rapidly and that the most recent available data on the audience profile of Tik Tok account holders is that they have become predominately adult. These arguments will be looked at in turn.

Is the Company's Tik Tok account an ABAC marketing communication?

17. The ABAC Scheme does not capture every mention of alcohol made over social media platforms. In fact, most of the many tens of thousands of alcohol references made every day do not fall within the ambit of the Scheme. The ABAC applies only to marketing communications generated by or within the reasonable control of an Australian producer, distributor, or retailer of alcohol beverages. Clearly the Company is an Australian alcohol beverage producer, but is its Tok Tok account (and individual posts) a 'marketing communication'?
18. While the Code defines 'marketing communication' widely, not every communication output from an alcohol company is necessarily a marketing communication. For instance, a company's financial statements or annual report or internal staff communications or business correspondence are not marketing communications for ABAC purposes. But what of the Company's Tik Tok account? This is argued to be a 'lifting of the curtain' of how a brewery works and not advertising of a particular alcohol beverage.
19. The Panel finds that the Tik Tok account is an ABAC marketing communication. The Panel notes:
 - the Code definition of a marketing communication expressly captures digital sites including social media platforms;
 - the definition also expressly captures communications which go to the building of an alcohol company's brand more generally, beyond the direct promotion of a specific alcohol beverage; and
 - the Tik Tok account and the individual posts can have more than a single purpose i.e. it can be both informative about a craft brewery's operations as well as promoting and building the Company's overall brand.

Does the Company's Tik Tok account breach the ABAC Placement Rules?

20. The complaint relies on the Panel's Determination 93/21 as the basis as to why the Company's Tik Tok account breaches the Placement Rules. In that decision the Panel considered the Tik Tok posts of an alcohol company and whether the posts were consistent with ABAC Placement Rules. Three Placement Rules were considered:
 - Rule 2- requiring that available age restrictions controls to exclude minors be utilised;
 - Rule 3- if there are no age restriction controls, then a marketing communication may only be placed where the audience is reasonably expected to comprise at least 75% adults; and

- Rule 4 - marketing communications are not to be placed with programs or content primarily aimed at minors.
21. The Panel found that Tik Tok did not have age restriction controls which enabled an alcohol company to exclude minors as such. The platform does have a range of safeguards about content and community guidelines which are at Attachment A of this determination for reference and completeness. The platform does not permit paid alcohol advertising, although alcohol companies having accounts and making posts is not of itself prohibited by Tik Tok. The position on age restriction controls has not changed since the decision in Determination 93/21.
 22. The Panel concluded in the earlier Determination, that Placement Rule 3 had been breached given that on the available information it could not be reasonably expected that the Tik Tok audience for alcohol company posts met the 75% adult benchmark. This was based on the history of the platform and that it was initially, and through the earlier phases of its global expansion, a platform with very high numbers of minors as account holders. This position was however noted as changing with the advice from the platform being 'it is true to say that while we do have younger people aged between 13 and 18 using our platform, the Australian user base is expanding and 'ageing up' with significant usage in the over 18 cohort'.
 23. The Company contends that more recent data than that at hand at the time of Determination 93/21 indicates the 'tipping point' has been reached and that it can now be reasonably expected that the audience of the Company's account and its posts would meet the 75% adult benchmark. To this end the Company cites data dated 22 June 2021 which shows that 25% of American users of the platform are aged 10 to 19. No additional data on Australian users of Tik Tok was referenced by the Company. The Panel's Executive Officer was able to source April 2021 Nielsen data on laptop users of Tik Tok which showed only 5% of users were minors, but it must be noted that the vast bulk of users access social media via mobile devices i.e. phones/tablets and the users of laptops will be heavily skewed towards adults.
 24. As the Panel has noted in previous decisions involving global social media platforms, the back of house operations of the platforms isn't always easy to navigate nor is information about how the platform's algorithm works particularly transparent. For Tik Tok there has been a recent public release about the workings of the algorithm. This is important, as the absolute number of minors and adults using the platform is only part of the question of the 'reasonably expected audience' of an alcohol marketing communication. Each user of Tik Tok receives a curated feed of posts determined by the platform's algorithm and this is driven (at a high level) by:
 - the interests expressed when a person becomes a user;

- user interactions e.g. the videos/posts liked and shared by the user, accounts followed, comments posted, and content created;
 - video information e.g. captions, sounds and hashtags; and
 - device and account settings e.g. language preference, country setting and device type.
25. In turn each of these factors is weighted to each individual Tik Tok user by a recommendation system which considers indicators of interest such as whether the user watches a video from beginning to end or quickly leaves the video after viewing for a few seconds. In overly simplistic terms, if a person likes cat videos, watches cat videos and comments on cat videos, the algorithm will continue to add cat videos to the person's feed. To receive the Company's posts, a user will have given indications and had user characteristics which the operation of the algorithm recognises as showing an interest in the Company and the subject matter of its posts and account.
26. The nature of social media is dynamic. Change is rapid. Successful platforms achieve global audiences of hundreds of millions, if not billions of people in ever shortening timeframes. Tik Tok is 'ageing'. While the Panel cannot conclude that the overall Australian user profile for the platform has now reached the 75% adult level as submitted by the Company, the information on the operation of the platform's algorithm which was not considered in Determination 93/12 does suggest that Tik Tok users with an interest in craft brewing will be far more likely to see the Company's posts than users showing no interest in craft brewing. With no data to answer the question definitely, the Panel believes it unlikely that a typical under 18-year-old on Tik Tok is going to have expressed interests or have user characteristics to be fed Company posts.
27. Drawing this together the Panel finds as follows:
- the Company's account and posts are marketing communications for ABAC purposes and need to comply with ABAC requirements including the Placement Rules;
 - the potentially applicable rules to alcohol marketing communications served over Tik Tok are Placement Rules 2, 3 and 4;
 - Rule 2 has not been breached as while Tik Tok does have user options to restrict the receipt of content, the platform to date has not offered an age restriction control to alcohol companies to exclude minors from receiving posts or accessing an account;
 - Rule 3 has not been breached as information on the operation of the platform's algorithm strongly suggests that while minors are a significant

segment of the overall user profile of Tik Tok users, it is unlikely that over 25% of the 'reasonably expected audience' of the Company's account and posts would be minors; and

- Rule 4 has not been breached as each Tik Tok user has an individually curated feed of content and the operation of the algorithm suggests that the Company's posts would not be fed with content primarily aimed at minors.

28. The complaint is dismissed.

Attachment A

From TikTok Australia:

From the outset, it is important to note that TikTok has extremely stringent advertising policies, which explicitly **exclude** paid advertising for alcohol. Details of our advertising policies are available [here](#) and are strictly enforced by our teams. These policies include the prohibition of: "Ads promoting alcoholic beverages, (wine, beer, spirits etc) alcohol clubs/subscription services and alcohol making kits."

With regard to younger users and the TikTok community more broadly, our highest priority is their safety and wellbeing. Our [Community Guidelines](#) make clear what is and is not allowed on our platform, which includes specific provision for content related to alcohol. The Community Guidelines read:

We do not allow the depiction, promotion, or trade of drugs or other controlled substances. The trade of tobacco and alcohol products is also prohibited on the platform.

Do not post, upload, stream, or share:

- Content that depicts or promotes drugs, drug consumption, or encourages others to make, use, or trade drugs or other controlled substances
- Content that offers the purchase, sale, trade, or solicitation of drugs or other controlled substances, alcohol or tobacco products (including vaping products)
- Content that provides information on how to buy illegal or controlled substances
- Content that depicts or promotes the making of illicit alcohol products
- Content that depicts or promotes the misuse of legal substances, or instruction on how to make homemade substances, in an effort to become intoxicated

Our Community Guidelines apply to everyone and everything on TikTok. We proactively enforce them using a mix of technology and human moderation. We also encourage our community members to use the [tools we provide on TikTok](#) to report any content they believe violates our Community Guidelines.

We will remove any content – including video, audio, livestream, images, comments, and text – that violates our Community Guidelines. Creators are notified of our decisions and can appeal if they believe no violation has occurred. We will suspend or ban accounts and/or devices that are involved in severe or repeated violations; we will consider information available on other platforms and offline in these decisions. When warranted, we will report the accounts to relevant legal authorities.

As well as the above mentioned mechanisms to manage potentially problematic content on TikTok, we have a range of safety tools and resources that are available to [younger users](#) and [parents and care givers](#) to support the safe use of our platform.

Tools include Family Pairing which allows parents and teens to customise their safety settings based on individual needs. A parent can link their TikTok account to their teen's and set controls including:

- **Screen Time Management:** Decide how long your teen can spend on TikTok each day. You can set your teen's screen time limit directly from your own account, and if your teen has multiple devices, the set time limit will apply to each device individually.

- **Restricted Mode:** Restrict the appearance of content that may not be appropriate for all audiences.
- **Search:** Decide whether your teen can search for content, users, hashtags, or sounds.
- **Discoverability:** Decide whether your teen's account is private (your teen decides who can see their content) or public (anyone can view their content).
- **Suggest account to others:** Decide whether your teen's account can be recommended to others.
- **Direct Messages:** TikTok users become eligible for Direct Messages at 16. Parents may restrict who can send messages to the connected account, or turn off direct messaging completely. Please note: direct messaging is automatically turned off for registered accounts between the ages of 13 and 15.
- **Liked videos:** Decide who can view the videos your teen liked.
- **Comments:** Decide who can comment on your teen's videos.

Data regarding our audience demographics are commercial in confidence. While we cannot provide a breakdown of demographic information, it is true to say that while we do have younger people aged between 13 and 18 using our platform, the Australian user base is expanding and "ageing up", with significant and growing usage in the over 18 cohort.

TikTok Australia is highly engaged with our trust and safety teams regarding the Alcoholic Beverages Advertising Code Scheme, its aims and operation, and how it may relate to user generated content on our platform. We are continually working to improve our platform to ensure the safety and wellbeing of the TikTok community.