



ABAC Adjudication Panel Determination No 179/21

Product: Beer
Company: Bloke In A Bar
Media: Instagram
Date of decision: 14 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”) concerns Instagram advertising for beer (“the Product”) by Bloke In A Bar (“the Company”). It arises from a complaint received on 12 July 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:
 - 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;

- 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 12 July 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 advertising.

The Marketing

10. The complaint refers to the following Instagram advertisement:



The Complaint

11. The complainant is concerned about the advertising as follows:

The story post is utilising a person under 25 in their Alcohol marketing. Unsure if still under 18...

...This could resonate to people under legal age to commence drinking.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (b)(ii) depict a person who is or appears to be a Minor unless they are shown in an incidental role in a natural situation (for example, a family socialising responsibly) and where there is no implication they will consume or serve alcohol.
 - (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.

The Company's Response

13. The Company responded to the complaint by email on 12 July 2021. The principal points made were:
- This is not our post. We are simply resharing a post made by a member of the Bloke community in our story. It disappears after 24hrs.
 - It's not used to promote us or directing anyone to purchase the beer. We are simply resharing a story.
 - Our community is MUCH bigger than just beer. We are the biggest online sporting platform in the country.
 - We didn't pay anyone for the shoot. We didn't set the photoshoot up. We had absolutely nothing to do with the post other than resharing it. The post isn't even used for promotion.
 - You can't even see the guys face. It just says you can't drink them till you're 18. The guy in the photo may be 25 or over.
 - I honestly don't feel this is a breach as Bloke In A Bar is much more than just a beer.

The Panel's View

14. The 'Bloke in a Bar' is a rugby league and sports focussed business of former NRL player Denan Kemp. The Bloke in a Bar brand has been translated into various merchandise and includes an alcohol product. One of the media outlets of the business is an Instagram account and this determination concerns a time limited post on the account's story. The concern is that the post shows an under 25 year old promoting the Company's beer.
15. The Company points out that the Bloke In A Bar community is much bigger than just beer and is the biggest online sporting platform in the country and this post, in particular:
 - was not created, initiated or paid for by the brand;
 - was user generated and reshared in the Bloke in a Bar Instagram account's story, which means it disappears after 24 hours;
 - is not used to promote the brand or directing anyone to purchase the beer, but is simply resharing a story; and
 - does not show the person's face (they may be 25 or over) and just states you can't drink them till you're 18.

Is the post an alcohol marketing communication?

16. The company raises two primary reasons why the post should not be considered to be an alcohol marketing communication and therefore within the scope of the ABAC Code:
 - The first reason is that the post was not created by the brand and was only available for a limited time. While a brand cannot be held accountable for third party posts that it did not create, initiate or pay for, the Company can control what it chooses to repost on its Instagram account. Content placed on a social media account of an alcohol marketer is the responsibility of the marketer irrespective that the content was created by a third party and reshared or that it is only available for a limited time, within a social media story, as opposed to an enduring post.
 - The second reason is that the purpose of the post was not to promote the brand, but rather to share a story by a Bloke in a Bar community member, noting that the Bloke in a Bar community is much wider than the beer brand and is the largest online sporting platform in Australia. While this may have been the Company's intention, in this post the community member is holding and also referencing Bloke branded beer. Choosing to reshare a post that displays the brand's beer makes the resharing of the post an 'alcohol communication'. The Company is fully entitled to have the various arms to its

business i.e., sports commentary, alcohol products and venues, and clothing items. It is entitled to market its various products and services. However, when it's posts (including reshared third party posts) include or reference its beer products those posts should be consistent with regulatory requirements applying to alcohol marketing and this includes the standards contained in the ABAC. It needs to be kept in mind that an item of marketing material can have several purposes and having an intention to communicate with its online sporting community does not mean the same marketing item cannot also be regarded as an alcohol marketing communication. This will clearly be the case if alcohol products are placed in the marketing material from a business that retails alcohol products.

For these reasons the post referred to in the complaint is an alcohol marketing communication within the scope of the ABAC Code.

Is the post inconsistent with Part 3(b)(iii) of the ABAC Code?

17. Part 3 (b)(iii) of the ABAC provides that an alcohol marketing communication (which includes Instagram posts) must not depict an adult who is under the age of 25 unless they are not visually prominent, or the person has not been paid and the marketing communication has been placed within an age restricted environment.
18. In assessing if an alcohol marketing communication is consistent with a Code standard the Panel is to adopt the probable understanding of the marketing material by a reasonable person taking its content as a whole. This means that the life experience, values, and opinions common in a majority of the community is to be the benchmark. If the message to be derived from the marketing item can be understood in several ways, then it is the most probable interpretation which is to be preferred over a possible but less likely interpretation.
19. The Panel believes the post to be in breach of the ABAC standard, noting:
 - although the person's face is obscured by the beer product, they are visually prominent as the person and the beer are the two main focal points of the post;
 - the Company has stated that the person is not a paid model or actor, however, as the Bloke in a Bar Instagram account has not been aged restricted, the exception to this provision does not apply;
 - while the age of the person is not known and their face is not visible, the Panel believes that a reasonable viewer would assess the person as under the age of 25, noting:
 - the person's frame suggests a young male;

- the person's Instagram profile, '@joe_maher_03' is prominently shown in the post and includes the number 03, suggesting this is their year of birth, and a person born in 03 would be 17 or 18 years of age;
- a review of the @joe_maher_03 Instagram account shows the account holder is a young adult male who appears to be under the age of 25;
- a reasonable person would take the caption 'Not truly 18 till you've had the mothers milk @blokeinabar', as indicating that the person has recently turned 18; and
- while no one element alone is decisive, a reasonable person taking the content of the post as a whole would most probably understand the post as showing an under 25 year old male.

20. The complaint is upheld.