



ABAC Adjudication Panel Determination Nos 183 & 187/21

Product: Beer
Company: 40/20 Beer Company Pty Limited
Media: Instagram
Date of decision: 25 August 2021
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns website and social media advertising by 40/20 Beer Company Pty Limited (“the Company”). It arises from two complaints received on 21 July 2021 and 26 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 complaints raise concerns under the ABAC Code and accordingly are within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaints were received on 21 July 2021 and 26 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 complaints concern the following images on the Company's website and social media pages:

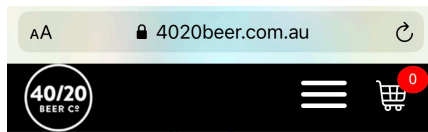
Post 1 – Tom Myers:



Website Picture 1 – Tom Myers:

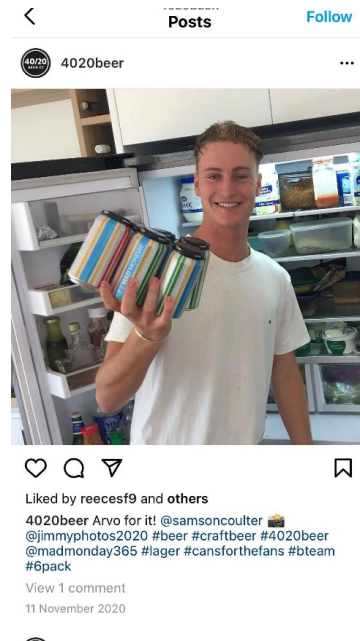


Website Picture 2 – Samson Coulter:



@Samsoncoulter

Post 2 – Samson Coulter



Post 3 – Tiaan Cronje:



Post 4 – Samson Coulter and Tiaan Cronje:



Website Picture 3 – Harley Ross: Post 5 – Harley Ross:



Post 6 – Dylan Moffat:



Post 7 – Dylan Moffat:



Post 8: Unknown people



Post 9: Unknown person



Post 10: Unknown people



Post 11: Unknown person



The Complaints

11. The complainants are concerned about the advertising as follows:

Complaint No. 183/21 received 21 July 2021:

- *This brewery is advertising 'surfers' under the age of 25. As you can see on their website <https://www.4020beer.com.au/b-team/> and their social media channels www.instagram.com/4020beer*
- *It appears the brewery seems to be in a commercial arrangement with 'Surfers' who appear under the age of 25. Samson Coulter according to a GQ magazine advert is under 25 and there are several instances of promoting this brewery:*

<https://www.google.com.au/amp/s/www.gq.com.au/entertainment/celebrity/samson-coulter-on-working-with-simon-baker-and-elizabeth-debicki-i-was-freaking-out/news-story/5067a17d19971799e2c811dcc18bc628/amp>

Complaint No. 187/21 received 26 July 2021:

- *[We] completely object to the depiction of person/s under the age of 25 in marketing communications. For the most part in a setting that is not an age restricted environment. It appears as though the company is in an agreement whether commercial or otherwise with person/s displayed on their social media, making the company fully aware of their age and misuse of alcohol advertising guidelines.*
- *To that end we attach screenshots of this identified breach.*
- *With respect to the above, as you can clearly see, Samson Coulter is under the Age of 25:*

<https://www.gq.com.au/entertainment/celebrity/samson-coulter-on-working-with-simon-baker-and-elizabeth-debicki-i-was-freaking-out/news-story/5067a17d19971799e2c811dcc18bc628>

- *With respect to the above, as you can clearly see, Dylan Moffat is under the age of 25:*

<https://www.boardriding.com/riders/dylan-moffat>

- With respect to the above, as you can clearly see, Tiaan Cronje is under the age of 25:

<https://www.beachescovered.com.au/the-stories/2017/4/3/grom-of-the-season>

- With respect to the above, as you can clearly see, Harley Ross is under the age of 25:

<https://stabmag.com/style/ice-cream-and-hotdogs-with-harley-ross/>

- The above article is dated March 8 2016, and perpetuates Harley Ross as a Grommet. Website www.surfmentor.com ascertains 'A grom is a shortened word for grommet and means a surfer, or more recently also a skateboarder, usually under the age of 16'
- Furthermore to the above it appears the company has formed a team to advertise their liquor with person/s under the age of 25 on their company website > <https://www.4020beer.com.au/b-team/>
- Furthermore, the same breaches appear on their company's Facebook page > <https://www.facebook.com/4020beer>

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.

13. Part 6 of the ABAC Code provides that:

Age-Restricted Environment means:

- licensed premises that do not permit entry by Minors; or
- a non alcohol-specific age-restricted digital platform (including, for example, a social media website or application) which;
 - requires users to register to login to use the platform including the provision of their full date of birth; and

- is able to hide the existence of any alcohol-related pages, sites and content such that they are not visible other than to a user who has registered on the platform as being an Adult.

The Company's Response

14. The Company responded to the complaint by phone on 30 July 2021. Its principal comments were:
 - The website and Facebook page were already age-gated, and the Instagram page has now been age-gated as well.
 - The posts referred to in the complaint have now been removed.
 - The Company is now familiar with the requirements of the Code, and has done everything in its power to address the matters identified in the complaint.
 - Moving forward, the Company will ensure this doesn't happen again.

The Panel's View

15. 40/20 Beer is an Australian made and owned brand based in Manly New South Wales. These complaints relate to various posts on the Company's social media accounts and three pictures of people on its website. The Company is not a signatory to the ABAC scheme and is not contractually bound to meet Code standards or abide by Panel determinations but has indicated their willingness to comply.
16. ABAC has received complaints from two different complainants who are concerned that the 40/20 social media pages and website are showing images of Adults who are under 25 years of age.
17. Part 3 (b) (iii) of the ABAC provides that an alcohol marketing communication must not 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 Age Restricted Environment.
18. In responding to the complaint, the Company submitted:
 - its website and Facebook account were age gated;

- its Instagram account is now age gated but wasn't at the time of the complaint; and
 - the posts have been removed and moving forward the Company will ensure this doesn't happen again.
19. The images complained about are visually prominent, the Instagram account was not age restricted at the time the complaint was made and an age affirmation on a company website does not meet the definition of an 'age restricted environment' as defined in the ABAC Code. Accordingly, any images of adults under 25 years of age on the Company's Instagram account and website at the time of the complaint are inconsistent with the ABAC standard. One of the complainants also raised concerns about images of these people on the brand's Facebook account. As the Facebook account was age restricted, images of 18-24 year olds are permitted on that account, provided they are not paid models or actors (this includes reward – such as free product).
20. The Company has not provided ABAC with the names and ages of the people shown in the complained about posts. In the absence of this information, the Panel has made reasonable endeavours to determine the relevant ages based on appearance and information gleaned from social media and internet searches.

Post 1 and Website Picture 1 – Tom Myers

21. Post 1 (dated 15 August 2020) and Website Picture 1 appear to be images of Tom Myers, a Sydney surfer. The Panel believes that Tom Myers was at least 25 at the time of the Instagram post as:
- He won the 16 and under Boy's division of the Rip Curl GromSearch National Series held at Duranbah Beach on the Gold Coast of Australia in December 2006.¹ Had he been born after 15 August 1995, he would have been under 11 years old at the time of doing this, which is possible, but unlikely.
 - In July 2010, Tom Myers competed in the ASP Fantastic Noodles Pro Junior Under 21s.² If he had been under 25 at the time of the Instagram post, he would have been under 15 in July 2010. Again, this is possible, but unlikely.
 - The Panel believes that the person pictured appears to be over 25 years of age.

¹ <https://surfeuropemag.com/features/news/australian-rip-curl-gromsearch-results.html>

² <https://www.swellnet.com/news/form-guide/2010/07/16/pumping-waves-juniors-charge-fantastic-noodles-pro-junior>

Post 2 and Website Picture 2 – Samson Coulter

22. Post 2 (dated 11 November 2020) and Website Picture 2 are pictures of Samson Coulter, who is a Sydney surfer and actor. The Panel believes that Samson Coulter was under 25 at the time of the complaint as internet articles dated 30 April 2018³ and 7 May 2018⁴ noted that he was 18 years old, meaning that he would be, at the most, 21 years old in November 2020.

Post 3 – Tiaan Cronje and Post 4 - Samson Coulter and Tiaan Cronje

23. Post 3 dated 13 December 2020 is a picture of surfer Tiaan Cronje and Post 4 dated 17 April 2021 is of Samson Coulter and Tiaan Cronje. The Panel has previously outlined its reasons for believing that Samson Coulter was under 25 years old at the time of the post.
24. The Panel also believes that Tiaan Cronje was under 25 at the time of the complaint as he participated in the World Surf League Men's Junior Tour in 2020⁵, meaning that he would have been aged 18 years or younger last year (18 being the upper age limit for competing in juniors).

Website Picture 3 and Post 5 – Harley Ross

25. Website Picture 3 and Post 5 (which is dated 13 November 2020) are pictures of surfer Harley Ross, who the Panel believes was under 25 at the time of the complaint as he participated in the World Surf League Men's Junior Tour in 2016⁶, meaning that he would have been aged 18 years or younger five years ago (18 being the upper age limit for competing in juniors).

Posts 6 & 7 – Dylan Moffat

26. Post 6 (dated 15 April 2021) and Post 7 (dated 22 June 2020) are pictures of surfer Dylan Moffat, who the Panel believes was under 25 at the time of the complaint as:
- In an article on the Daily Telegraph website dated 5 October 2017 it was noted that he was 18 years old.⁷

³ <https://www.beachescovered.com.au/the-stories/surfingsamsononscreen>

⁴ <https://www.gq.com.au/entertainment/celebrity/samson-coulter-on-working-with-simon-baker-and-elizabeth-debicki-i-was-freaking-out/news-story/5067a17d19971799e2c811dcc18bc628>

⁵ <https://www.worldsurfleague.com/athletes/13005/tiaan-cronje?yearResultsTourCode=mjun>

⁶ <https://www.worldsurfleague.com/athletes/6076/harley-ross?yearResultsTourCode=mjun>

⁷ <https://www.dailytelegraph.com.au/newslocal/manly-daily/promising-surfer-dylan-moffat-misses-graduation-for-world-titles/news-story/e02fec93bb4e91c8dd88cefb0097ad40>

- In an internet article dated 15 August 2021 it was noted that he was 21 years old.⁸

Posts 8 – 11 – Unknown

27. The Panel has not been able to establish the identities and ages of the people shown in posts eight through to 11. However, based on the appearance of the people in the photos, the Panel believes that a reasonable person would consider them to be under 25 years of age.

Conclusion

28. The Panel finds all the posts and pictures on the website and Instagram account that were referenced in the complaints to be in breach of Part 3 (b) (iii) of the ABAC, with the exception of Post and Website Picture 1. Any of these images reproduced on the Company's Facebook page of people that have been remunerated by the Company, through product, a fee or a sponsorship arrangement also breach the ABAC standard.

⁸ <https://www.boardriding.com/riders/dylan-moffat>