



ABAC Adjudication Panel Determination No 196/21

Product: VB Beer
Company: Carlton & United Breweries
Media: Instagram
Date of decision: 15 September 2021
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns five Instagram posts for VB by Carlton & United Breweries (“the Company”). It arises from a complaint received on 13 August 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 13 August 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 Instagram posts

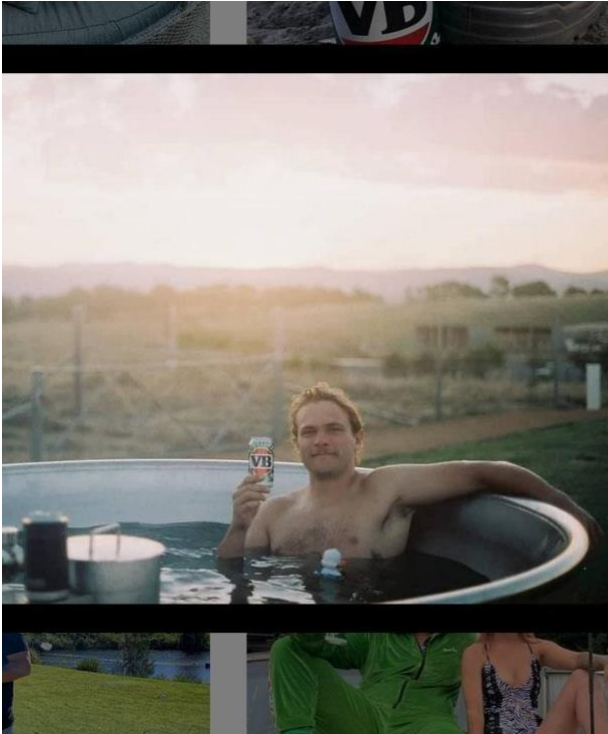
The Marketing

10. The complaint concerns the following five Instagram posts:

Instagram Post 1:



Instagram Post 2:



victoriabitter How to live the good life.
Credit: @ollieedmeades
10w

i.fear.no.beer By not being in Victoria under Chairman Dan 🤔
#chairmandan
10w Reply

Liked by mark_ssv8 and 805 others
MAY 27

Add a comment... Post

Instagram Post 3:



victoriabitter New years resolution: do more of this.
Credit: @connor_austine
31w

adamooooose Love 🍷❤️
31w Reply

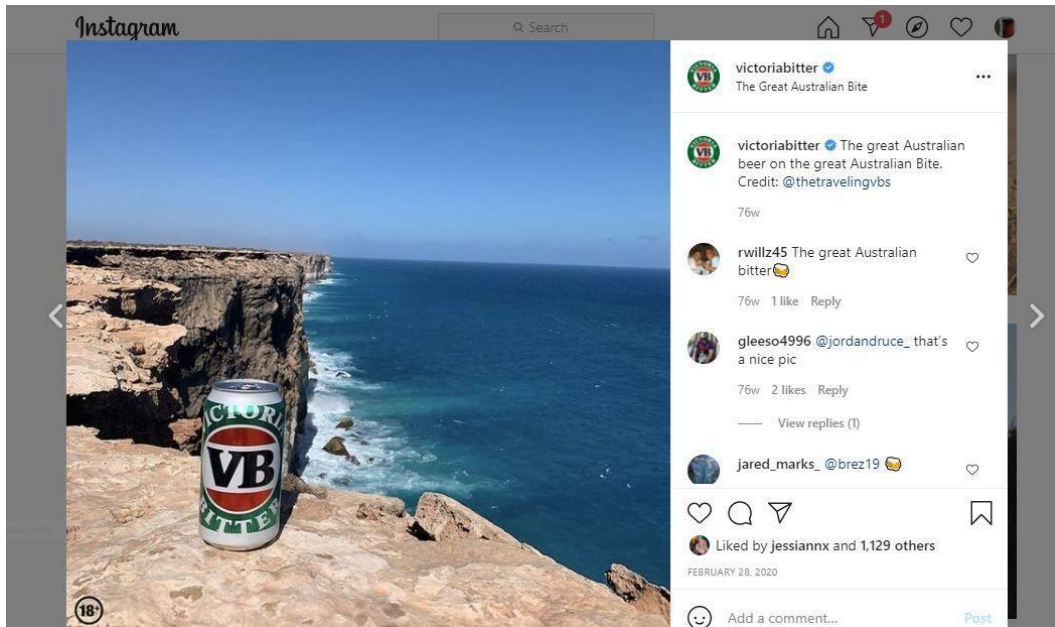
lachlanbraham_ @ollywood_
31w Reply

shobby @aleksthgr8 my outback paradise

Liked by lovelanefarmstay and 2,361 others
JANUARY 6

Add a comment... Post

Instagram Post 4:



Instagram Post 5:



The Complaint

11. The complainant objects to the marketing communications as follows:

Instagram Post 1:

A person standing on the edge of a cliff with an alcoholic beverage highly dangerous. You should not be bushwalking and consuming alcohol. The person in the post also appears to be under 20 when you view their Instagram profile

Instagram Post 2:

A person who appears to be drinking beer in a bathtub. Highly dangerous if a person falls asleep due to intoxication or cannot get out of the bathtub, this could result in a fatality. I do not believe should be promoting drinking while in a bath. As you can see previous upheld adjudications by ABAC from people with alcohol in surrounding bodies of water.

Instagram Post 3:

A person who appears to be drinking beer in a bathtub especially as it alludes that the person will or has consumed 3 long necks. Highly dangerous if a person falls asleep due to intoxication or cannot get out of the bathtub, this could result in a fatality. I do not believe should be promoting drinking while in a bath. As you can see previous upheld adjudications by ABAC from people with alcohol in surrounding bodies of water.

Instagram Post 4:

Extremely dangerous if a person has consumed this can then goes to pick this up whilst under the influence of alcohol.

Instagram Post 5:

Extremely dangerous to have feet overhanging a cliff while opening an alcoholic beverage. Consuming alcohol whilst sitting on the edge of a cliff would drastically increase the chances of falling off. This is not something that should be promoted for people to sit on edge of cliffs consuming alcohol.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (a)(i) 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 the Australian Alcohol Guidelines.
 - (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.
 - (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's Response

13. The Company responded to the complaint by letter emailed on 24 August 2021. Its principal comments were:

Alcohol Advertising Pre-vetting Service Approval

- The Instagram posts referred to in the complaint did not receive Alcohol Advertising Pre-vetting Service approval.

Responsible and moderate portrayal of Alcohol Beverages

Instagram Post 3

- The post in question shows a person taking a sip from a VB longneck while relaxing in a bath looking over a desert landscape. The position of the VB bottles above what is presumably a hot bath, in front of a sunny window, implies that they are there as set dressing props rather than as items to be consumed. A reasonable person would not expect two longnecks to remain cold, and thus drinkable, in those circumstances.
- Furthermore, the presence of bubbles and the clear reference to relaxation in the post copy suggests that the individual will be consuming the beer he is depicted sipping from at a leisurely pace, and an extended time period rather

than rapidly. The consumption of 2.9 standard drinks in these circumstances is consistent with the NHMRC Guidelines of consuming no more than 10 standard drinks a week and no more than 4 standard drinks on any one day.

Responsibility toward Minors

Instagram Post 1

- The individual is neither a paid model or actor and has not been remunerated for this post.
- The post is within an Age Restricted Environment. Furthermore, the individual's face is not shown.

Alcohol and Safety

Instagram Post 1

- By holding a can of VB it is not implied that the person has recently or is in the process of consuming alcohol. The can does not appear to be open and it is being held in a way that is evidently meant to showcase the can against the scenic backdrop. There is no suggestion in the image that the individual has consumed or is about to consume the beverage while in that posture.
- Standing on the edge of a cliff, such as that pictured, does not require a high degree of alertness or physical co-ordination in order to avoid falling and sustaining serious injury. In Determination 40/21 ABAC determined that "hiking over rough terrain (as opposed to a walk over level ground) does require physical co-ordination to be performed safely". I note that the individual's footwear (Crocs sandals) does not suggest that they have engaged in a particularly onerous hike, and although the person is shown standing at the edge of a cliff, a reasonable person would not conclude that the individual has scaled a cliff face in order to reach that vantage point.
- In any case, the individual is not depicted as consuming the product and there is no implication that they have recently consumed it.

Instagram Post 2

- Holding a can of VB does not necessarily imply that the person has recently or is in the process of consuming alcohol. The individual can is not open, and the focus of the image is the idyllic nature of the setting.
- Sitting in a deep bath, such as that pictured, does not require a high degree of alertness or physical co-ordination in order to avoid drowning. We accept that activities such as swimming in pools or the ocean, operating a boat, or engaging in water sports require a high degree of alertness or physical coordination, but a mature adult sitting calmly in a bathtub of chest-height water is not at imminent risk of drowning. [Royal Life Saving Australia](#) suggests that almost all bathtub drownings are children under the age of 5. A reasonable person would not conclude that there is any risk to the individual in this picture.

Instagram Post 3

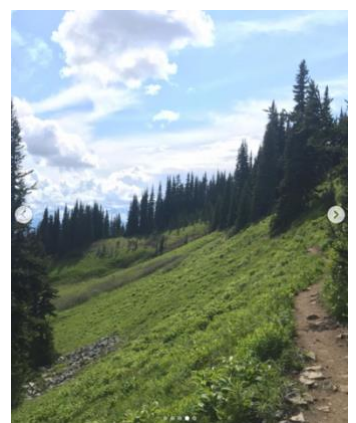
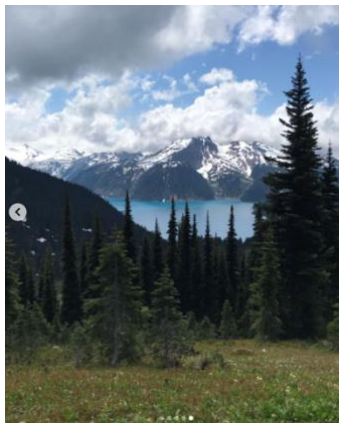
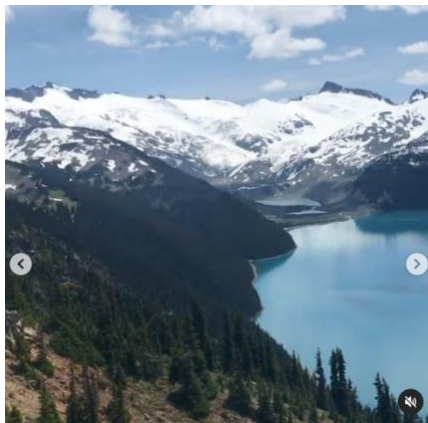
- Sitting in a deep bath, such as that pictured, does not require a high degree of alertness or physical co-ordination in order to avoid drowning. As per Instagram Post 2 above, a mature adult sitting calmly in a bathtub of chest-height water is not engaged in an activity requiring a high degree of alertness or physical coordination.

Instagram Post 4

- The post does not show or imply the recent or current consumption of alcohol by a person who will approach the edge of the high cliff top to retrieve the can of VB. The can is closed. A closed can poised picturesquely on the edge of a cliff cannot be said to imply alcohol has been or is being consumed by a hypothetical unseen individual.
- The approach to the cliff edge appears quite flat, however given the inherent instability of ocean cliff settings, i.e., due to wind or erosion, it can be assumed that someone would require reasonable alertness and coordination to avoid falling. It is for this reason that the can is depicted closed and there is no suggestion of consumption.

Instagram Post 5

- The image is obviously staged in such a way as to juxtapose the foam of the beer with the snow-capped mountain. It is not immediately clear that the beer will be consumed, and I note that as the photo is self-evidently not in Australia (the location is Panorama Ridge, Garibaldi Provincial Park, British Columbia), the individual has put great effort into obtaining or transporting a VB in or to that location, indicating that the intent of the image is artistic as opposed to documenting a drinking occasion.
- The complainant has asserted that the individual pictured is sitting with their legs over a cliff, but that is not clear from the picture. Other photos of the location, taken by the individual pictured, appear to indicate a perspective trick is at play, and the individual could be more accurately described as sitting at the top of a large hill. Unlike the prior image, which clearly shows an unstable ocean cliff, the location in this instance is a wooded hill overlooking a lake. The complainant has made an assumption about the location that is not reasonable and is not supported by the image.



- Carlton & United Breweries is committed to ensuring our promotional and marketing material does not promote or encourage any irresponsible consumption of alcohol. Our goal is for consumers to enjoy our products responsibly and in moderation, and to uphold community standards when it comes to the placement and content of our advertising.

The Panel's View

14. This determination concerns five posts on the Company's Instagram account. The complainant believes each of the posts are irresponsible and inconsistent with applicable ABAC standards. The relevant standards provide that alcohol marketing communications must not:
 - encourage excessive or rapid alcohol consumption
 - depict an adult who is under the age of 25
 - show alcohol consumption before or during an activity requiring a high degree of alertness or physical coordination to be performed safely.
15. In assessing if an ABAC standard has been breached, the Panel adopts the standpoint of the probable understanding of the marketing item by a reasonable person. This means the life experiences, values and opinions held commonly by most members of the community is the benchmark. If the marketing message can be interpreted in several ways, it is the most likely meaning which is to be preferred over a possible but less likely interpretation.
16. Post 1 shows a man holding a can of the product while standing near the edge of a cliff. Two concerns are raised. Firstly, that the scene depicted is highly dangerous. Secondly, it is contended the man appears to be under the age of 25. The Company submits the scene does not show or imply alcohol consumption has occurred. Further, it is contended the man is not a paid actor and the post is placed in an age-restricted environment.
17. The Panel does not believe the post breaches either ABAC standard. The scene does not show alcohol consumption and the can held by the man does not appear to be opened. While the age of the man is not apparent as his face cannot be seen, even if he is under 25 the Company's Instagram account is an age-restricted environment and hence the image falls within the exception of the Part 3 (b)(iii) requirements on the age of adults in marketing communications.
18. Posts 2 and 3 are images of a man sitting in a bath - post 2 in a large outdoor bath, while post 3 in an indoor bath/hot tub. Post 2 shows the man holding a can of the product while post 3 shows consumption from a long neck bottle. The concern is about alcohol consumption in a bath being inherently dangerous. Post 3 also is argued to imply excessive consumption given two additional long neck bottles of the product are positioned near the bath.
19. The Company argues that sitting in a bath does not require a high degree of alertness or physical coordination to be conducted safely. It is noted that drownings in baths involve young children and not adults in most instances. The

Company also refutes that excessive consumption is suggested in post 3, as the additional bottles would be understood as props.

20. There is little doubt that many Australians would have at some time consumed alcohol while sitting in a bath and that the activity would not be commonly regarded as being particularly risky. That said, the manufacturers of hot tubs expressly recommend that alcohol not be consumed in a hot tub/jacuzzi for reasons such as:
 - use of a hot tub can cause dehydration and heat exhaustion and this will be exacerbated by alcohol consumption
 - the risk of breaking glass in the tub
 - alcohol use leading to behaviours that contribute to a drowning risk.
21. It would be fair to conclude that the risks associated with the use of a jacuzzi/hot tub would be more likely associated with excessive alcohol consumption than moderate consumption. Further, the nature of a jacuzzi/hot tub is likely to see a person spend a longer period in the water than would commonly occur with a bath if for no other reason than the water will grow cold in a bath.
22. The better practice would be to not show any alcohol consumption in a bath, but on balance, the Panel does not believe the depiction of a scene in post 2 is in breach of the Code. The scene is sedate, with a single can of the product shown being held by the man. There is no implication that the man has been affected by alcohol use and no cues that further consumption will occur. A reasonable person would not likely understand that taking a bath is an activity requiring a high degree of alertness or physical coordination to be done safely, in contrast to swimming in the ocean or being in a swimming pool.
23. Post 3 has the added dimension of showing the man drinking from a larger volume glass long neck bottle. Also, two other long neck bottles are shown on the edge of the bath and it appears that both of these bottles have been opened and are empty. The Panel believes these additional elements tip the post into breaching the Part 3 (a)(i) standard of encouraging excessive consumption. The image does raise a reasonable implication of the consumption of the three bottles. Three long neck bottles equals 9 standard drinks which exceeds the advice on drinking on a single occasion contained in the Australian Alcohol Guidelines.
24. Post 4 is a photograph of a can of product positioned near the edge of a cliff. The complainant contends it would be dangerous if a person had consumed the beer then went to pick it up under the influence of alcohol. The Panel does not believe the post breaches any ABAC standard. No person is shown in the image and the can appears to be unopened. There is nothing in the post to base the

complainant's suppositions about a person affected by alcohol acting in a dangerous manner.

25. Post 5 is a photograph of a man opening a can of the product while sitting on the edge of a cliff. Again, the concern is about the post showing alcohol consumption in conjunction with an inherently dangerous activity. The Company argues, based on other posts made by the man, the image might be misleading, and the man is not actually on the edge of a cliff. Further it is submitted that even though the can has been opened, it is 'not immediately clear that the beer will be consumed'.
26. The Panel believes the post does breach the Part 3 (d) standard. A reasonable person would understand sitting on the edge of a cliff is an activity requiring alertness to be performed safely and opening a can of beer is a clear implication that consumption is about to occur.
27. Accordingly, the complaint is upheld in part with posts 3 and 5 found to breach Part 3 (a)(i) and Part 3 (d) respectively.