



ABAC Adjudication Panel Determination No 77/22

Product: Beer
Company: Better Beer
Media: TikTok
Date of decision: 25 October 2022
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Louisa Jorm
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 19 September 2022 and concerns social media marketing via TikTok by Better Beer (“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:
 - 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 the 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 meet 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

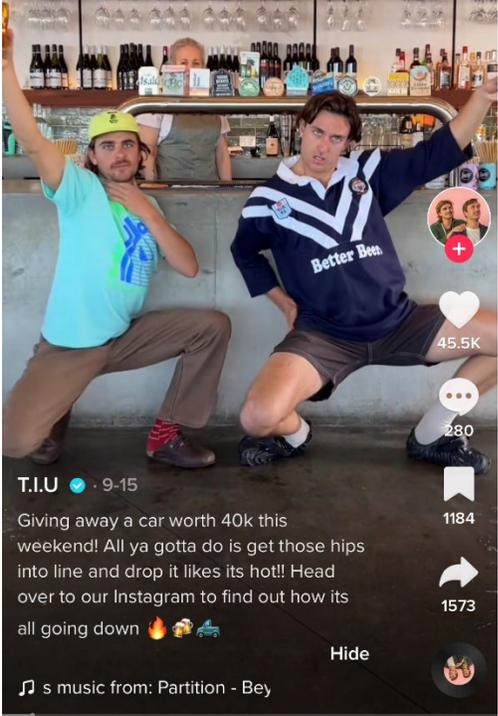
7. The complaint was received on 19 September 2022.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint was completed in this timeframe.

Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverage marketing features an independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not sought for the marketing.

The Marketing Communication

10. The complaint relates to a video promoting a competition posted to The Inspired Unemployed's TikTok account:

| Link to Post: | Screenshot of Post: |
|---|--|
| <p>Link to Post on TikTok</p> |  |

The Complaint

11. The complainant objects to the marketing as follows:
- *Promotion of drinking beer, encouraging minors to perform drinking beer acts for the chance to win a car.*
 - *No terms and conditions....*

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:

- (b)(i) have Strong or Evident Appeal to Minors;
- (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).

Strong or Evident Appeal to Minors means:

- (i) likely to appeal strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
- (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionery or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

The Company's Response

14. The Company responded to the complaint by email on 27 September 2022. The principal comments made by the Company were:
 - The alcohol marketing communication referred to in the complaint did not receive ABAC pre-vetting approval for their content and/or placement.
 - The post to The Inspired Unemployed's TikTok page is an alcohol Marketing Communication.
 - Better Beer has reasonable control over the marketing. Better Beer approved the posts on the Inspired Unemployed Instagram, Facebook & TikTok pages and has the ability to request 'Better Beer' branded posts to be taken down.
 - We do not target minors in any communications as we can't convert them to purchasers due to the 18+ age limit on drinking.
 - Better Beer Social Media has age gates. Inspired Unemployed do not have age gates.
 - Age restriction controls are not available for Inspired Unemployed. As you will see in the confidential analytics of the Inspired Unemployed Pages, they have easily exceeded 75% followers above 18.

- The marketing communications have not been placed with content primarily aimed at Minors.

The Panel's View

Introduction

15. Better Beer is a collaboration between Matt Ford and Jack Steele and the founder of the Torquay Beverage Company, Nick Cogger. Messrs Ford and Steele are better known as The Inspired Unemployed who are social media influencers. The pair have 1.5 million followers on each of TikTok and Instagram, and 827,000 on Facebook.
16. The complaint concerns a video posted to The Inspired Unemployed's TikTok account promoting a Company competition to win a 2017 Ford Ranger ute with Better Beer decals. The competition invited participants to post a video story on Instagram of themselves and their friends performing *The Drop* dance move while holding a glass of beer.
17. The promotional video shows several scenes in various locations of people performing *The Drop* dance move as they hold a beer. The accompanying soundtrack is Partition by Beyonce. The text accompanying the TikTok post reads "*Giving away a car worth over 40k this weekend! All ya gotta do is get those hips into line and drop it like it's hot!! Head over to our Instagram to find out how its all going down 🔥👯🚗*".
18. The complainant argues that the video will encourage minors to perform "drinking beer acts" for the chance to win a car. It was also stated that the competition has no terms or conditions. This concern raises two ABAC issues, namely:
 - does the video and competition have strong or evident appeal to minors - Part 3 (b)(i); and
 - has the placement of the video on Tik Tok occurred consistently with the requirement of the ABAC Placement Rules - Part 3(b)(iv)?
19. The TikTok post was on The Inspired Unemployed's account, and not the Company's as such. The Company however accepts that it had reasonable control over the post so as to make it a Company marketing communication for ABAC purposes.

Strong or Evident Appeal to Minors

20. The complainant is concerned that the post will attract minors to alcohol. This concern raises Part 3 (b)(i) of the ABAC that provides that alcohol marketing communication must not appeal strongly to minors. The standard might be breached if the marketing:
 - specifically targets minors;
 - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; and
 - uses imagery, designs, motifs, animations, or cartoon characters that are likely to appeal strongly to minors or create confusion with confectionery or soft drink.
21. Assessment of the consistency of a marketing communication with an ABAC standard is from the probable understanding of a reasonable person. This means that the life experiences, values, and opinions held by a majority of the community are to be the benchmark.
22. The Panel has considered the Part 3 (b) standard on many past occasions. While each marketing communication must always be assessed individually, some characteristics within marketing material which may make it strongly appealing to minors include:
 - the use of bright, playful, and contrasting colours;
 - aspirational themes that appeal to minors wishing to feel older or fit into an older group;
 - the illusion of a smooth transition from non-alcoholic to alcoholic beverages;
 - creation of a relatable environment by use of images and surroundings commonly frequented by minors;
 - depiction of activities or products typically undertaken or used by minors;
 - language and methods of expression used more by minors than adults;
 - inclusion of popular personalities of evident appeal to minors at the time of the marketing (personalities popular to the youth of previous generations will generally not have strong current appeal to minors);

- style of humour relating to the stage of life of a minor (as opposed to humour more probably appealing to adults); and
 - use of a music genre and artists featuring in youth culture.
23. It should be noted that only some of these characteristics are likely to be present in a specific marketing communication and the presence of one or even more of the characteristics does not necessarily mean that the marketing item will have strong or evident appeal to minors. It is the overall impact of the marketing communication rather than an individual element that shapes how a reasonable person will understand the item.
24. The Panel believes that the video does not breach the Part 3 (b)(i) standard. In reaching this conclusion the Panel had regard to:
- the people shown are all adults aged 25 or more and are depicted as adults;
 - the dress and appearance of the adults is not likely to resonate strongly to minors;
 - the scenes used include a bar with elderly patrons, a bowling club, bottle shop, the exterior of a house, a paddock and a suburban street, and none of these settings are likely to appeal strongly to minors;
 - the dance performance is likely to have appeal across age groups including minors; and
 - taken as a whole, the video and a competition with a ute as the prize is more likely to appeal to adults with any appeal to minors being incidental rather than strong or evident.
25. For completeness, the complainant observed that the competition did not have terms and conditions. This is not accurate, as the entry terms to the competition were available by following the directions from the Instagram post. The competition was not open to minors and the terms of the competition advised potential entrants that their video entry would need to meet ABAC standards concerning the responsible portrayal of alcohol.

The Placement Rules

26. The ABAC Placement Rules have the policy aim that alcohol marketing should be directed toward adults and to the extent possible away from minors. The Rules endeavour to achieve this goal by creating obligations on marketers to use the technical capacity of different media to target the audience of alcohol marketing communications. Social media platforms, such as Facebook, Instagram and

TikTok do have technical capacities to target audiences based on a range of characteristics such as age, although the operation of the age restriction and age targeting facilities varies considerably from platform to platform.

27. Three Placement Rules are relevant in this case, namely:
 - 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;
 - Rule 4 - marketing communications are not to be placed with programs or content primarily aimed at minors.
28. TikTok became freely available worldwide in 2018 after originating in China. While the platform does not release a complete set of its demographic or other data about its users, some publicly available information about Australian use of the site indicates:
 - there are around 7 million Australian users;
 - in 2021 the TikTok app was the most downloaded other than QR Code related to the Covid pandemic; and
 - TikTok is the 8th most used social media platform in Australia but is growing quickly.
29. TikTok does not permit paid alcohol advertising. It does however, subject to its community safety guidelines, permit “organic content” which references alcohol. Advice from the platform was that the Inspired Unemployed video promoting the competition “does not violate our current policies concerning the trade of alcohol”. It was noted that alcohol was not offered as a prize in the competition.
30. TikTok also does not have age restriction controls enabling minors to be excluded from the posts of an account holder. This means that Placement Rule 2 has not been breached in relation to the post made to the TikTok page. While the complaint was about TikTok, it is noted that the Company advised that the Inspired Unemployed’s Facebook page was not age restricted. Both Facebook and Instagram permit social influencers to age restrict posts about alcohol and accordingly the Inspired Unemployed posts referencing Better Beer can be and must be aged restricted consistently with ABAC requirements.

31. Placement Rule 3 applies when age restriction controls are not available and require that a marketing communication may only be placed where the audience is reasonably expected to comprise at least 75% adults. In general terms, TikTok commenced its life with a high proportion of users being under 18. With the rapid growth of the platform both in Australia and worldwide, this profile has changed with a greater proportion of users being adults. The platform was asked to supply data on the demographics of its Australian users but advised it does not release this information. It did advise that “it continues to be the case that TikTok’s Australian audience is ‘ageing up””.
32. The Company did supply a report drawn from TikTok analytics of the age profile of its followers. While it asked that this information be kept confidential, it did show that over 75% of the followers of the Inspired Unemployed are adults. This data relates to followers as opposed to the audience of the competition post as such, but it is reasonable to assume that Placement Rule has not been breached.
33. Placement Rule 4 requires that a marketing communication must not be placed with content primarily aimed at minors. This rule is most applicable when thinking of an ad inserted into a program, such as an ad seen with a TV program or screened prior to a movie at the cinema. With a TokTok post, each post is its own freestanding content. With social media, the content fed to an individual account holder is driven (at a high level) by a number of factors including:
 - 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;
 - the platform interactions of “friends”;
 - video information e.g. captions, sounds and hashtags; and
 - device and account settings e.g. language preference, country setting and device type.
34. Given that more than 75% of The Inspired Unemployed’s followers are aged 18 or over, the Panel does not find that Placement Rule 4 has been breached.

Concluding comments

35. Drawing this together the Panel finds as follows:
 - The Inspired Unemployed’s posts are marketing communications for ABAC purposes and need to comply with ABAC requirements;

- The competition promotion video made to The Inspired Unemployed's TikTok account does not have strong or evident appeal to minors, and does not breach Part 3 (b)(i) of the Code;
- ABAC's Placement Rules apply to the posts, in particular Rules 2, 3 and to some extent 4;
- Rule 2 has not been breached as TikTok to date has not offered an age restriction control to exclude minors from receiving posts or accessing an account;
- Rule 3 has not been breached as based on data provided by the Company, it is unlikely that over 25% of the "reasonably expected audience" of The Inspired Unemployed's social media accounts and posts would be minors;
- Rule 4 might arguably apply but the content received by each user of TikTok is driven by individual account settings and the analytics of the users likes and content choices and it is not possible to reliably conclude that the video would have been fed with other content primarily aimed at minors; and
- While not the subject of the complaint, the Company and the Inspired Unemployed are able to age restrict alcohol referencing posts on platforms such as Facebook and Instagram and must do so to meet ABAC requirements.

36. The complaint is dismissed.