



## ABAC Adjudication Panel Determination No 163/24

**Product:** 19 Crimes  
**Company:** Treasury Wine Estates  
**Media:** Digital – Instagram  
**Date of decision:** 24 November 2024  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Professor Richard Mattick  
Ms Jeanne Strachan

### Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 15 October 2024 about social media marketing for 19 Crimes (“the product”) by Treasury Wine Estates (“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 the 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 places 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, and 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. Occasionally, 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 15 October 2024.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint and this determination was made within the target timeframe.

## Pre-vetting Advice

9. A component of the ABAC Scheme is an advice service by which an alcohol marketer can obtain an independent opinion of a proposed alcohol marketing communication against the ABAC standards before public release. Pre-vetting advice is separate from the complaint process and does not bind the Panel but represents best practice on behalf of alcohol marketers. Pre-vetting advice was not obtained for the marketing.

## The Marketing

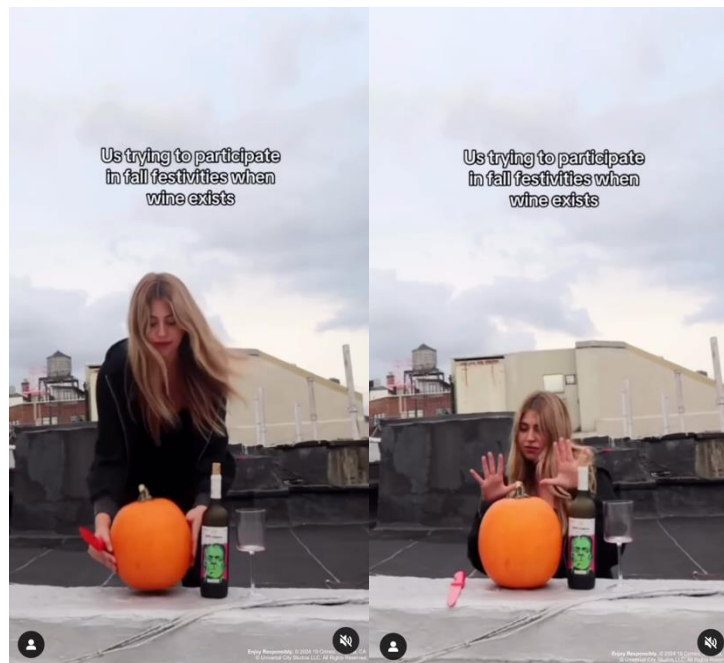
10. The complaint relates to an Instagram video reel post:

<https://www.instagram.com/reel/DBEudDkx6da/?igsh=encxcDkxYmxqZG44>

The post is accompanied by the following words:



The following are screenshots taken from the video:





## Complaint

11. The complainant objects to the marketing as it advertises drinking and using a sharp knife.

## The ABAC Code

12. Part 3 of the Code provides that An Alcohol Marketing Communication must NOT:

- (d) show (visibly, audibly or by direct implication) the consumption of Alcohol before or during any activity that, for safety reasons, requires a high degree of alertness or physical coordination, such as the control of a motor vehicle, boat or machinery or swimming.

13. Part 8 of the Code provides the following definition:

Alcohol Marketing Communication means a marketing communication for Alcohol, in any media, generated by, for, or within the reasonable control of an Alcohol Alternative producer, distributor or retailer, that has a discernible and direct link to Australia, apart from the exceptions listed in Part 2(b).

## The Company Response

14. Treasury Wine Estates Australia responded to the complaint by email on 30 October 2024. Their primary comments were:

- TWE Australia is committed to the ABAC Scheme (Scheme) and takes its obligations to responsibly promote its products very seriously. For the reasons set out below, TWE Australia submits there has been no breach by TWE Australia of Part 3(d) of the ABAC Responsible Alcohol Marketing Code (Code) and accordingly, requests that the Complaint be dismissed by the Panel.
- Treasury Wine Estates Limited is a global leader in wine and its key global markets include Australia, Asia, EMEA and the Americas. The group organisation structure is complex, but each region has a dedicated corporate entity with separate brand marketing teams. The 19 Crimes brand featured in the Advertisement, is sold across multiple regions, including Australia, the Americas and the UK. As a result, 19 Crimes has separate social media accounts for each of the regions it is sold in. The Advertisement was posted on the US Instagram account named '19 Crimes', however, there are two other 19 Crimes brand accounts. There is a dedicated account for Australia, named '19crimesAu', and another dedicated account for the UK and Ireland, named '19crimesuk.ie'.
- We understand that the 19 Crimes Instagram Account has 112,781 followers and only 2.2% of these followers are based in Australia.
- The Advertisement was only posted on the dedicated US Instagram account but did not have any geo-fencing restrictions.

- It is TWE Australia's view that the Advertisement does not breach 3(d) for the following reasons:
  - the person shown in the Advertisement only attempts to carve the pumpkin briefly (i.e. inserts the knife into the pumpkin) before stopping, with the audience inferring the task was too difficult for one person acting alone;
  - the knife appears to be stuck inside the pumpkin and unable to be removed. Only then did the person pour a glass of 19 Crimes wine;
  - the wine was consumed by the person after the knife had been briefly used and was clearly no longer being used;
  - after looking at the pumpkin longer, the person decides they will not be able to carve it and walks away with the glass of wine; and
  - there was absolutely no reference to using the knife again once the person commenced pouring the wine and/or during consumption.
- Therefore, the Advertisement does not show the consumption of Alcohol before or during any activity that requires a high degree of alertness or physical coordination.
- Under the Code, an Alcohol Marketing Communication is defined as a 'marketing communication for Alcohol, in any media, generated by, for, or within the reasonable control of an Alcohol producer, distributor or retailer, that has a discernible and direct link to Australia, apart from the exceptions listed in Part 2(b)'.
- The Scheme and Code do not extend to every alcohol marketing item that can be accessed in Australia over a global digital platform, such as Instagram. To fall within the ambit and jurisdiction of the Scheme and Code, advertising must have a discernible and direct link to Australia such as:
  - the Instagram account is under the control of an Australian alcohol marketer; or
  - if the Instagram account is under the control of an international entity there is a discernible and direct link to Australia so there is an Australian entity to which the ABAC obligations can attach, i.e. an Australian entity with reasonable control over the marketing communication.
- On 26 September 2024, the Rules and Procedures applying to the ABAC Scheme were revised whereby the Panel Chief Adjudicator is now authorised to not refer a complaint to the Panel if the complaint raises

issues that are more appropriate to refer to an alternate complaints adjudication forum. This includes where advertising is created in another country, accessed online in Australia and complained about to the ABAC Scheme but is more properly within the domain of the regulatory regime of another country, for example, the alcohol regulators in the US.

- TWE Australia is a global organisation and although it is headquartered in Australia, it has entirely separate operations to produce, distribute and retail in other regions outside Australia, including the US market. The Advertisement was created by a US marketing agency, solely for the purpose of advertising in the US market. TWE Australia's employees (who are based locally within Australia) had no reasonable control over this content being created or published on the 19 Crimes US Instagram account.
- The owner/holder of the 19 Crimes US Instagram account is Treasury Wine Estates Americas Co. headquartered in California, USA ("Treasury Americas").
- The Advertisement was not created or published by TWE Australia but by its related body corporate, Treasury Americas.
- The Advertisement was published on the US Instagram account and was intended to reach audiences based in the Americas and Canada. This is confirmed by the information section of the account, which contains the following wording: "Official Wine of UFC. Shop our top-rated @SnoopDogg Cali wines & our @officialuniversalmongers collaboration. 21+ | Enjoy responsibly". These are references to partnerships in the US, and the age reference is a US legal requirement that does not reflect the legal drinking age in Australia.
- This information differs from the other two 19 Crimes brand Instagram accounts for Australia and the UK/Ireland. The Australian Instagram account's information section contains the following wording: "19 Crimes Au. Where rebellion was born. #Obediencegetsyounowhere. Must be 18+ #drinkwise" and the UK and Ireland Instagram account's information section contains the following wording: "Available in UK + Ireland. Please Drink Responsibly" (NB. countries are represented by flag emoticons). It is clear from these differences that the 19 Crimes US Instagram account is targeted at an American and Canadian audience and is not directed at an Australian audience.
- Although the Advertisement and 19 Crimes US Instagram account can be accessed in Australia, TWE Australia's employees based within Australia had no reasonable control over the Advertisement being created or published. This was solely managed by the US-based 19 Crimes marketing agency and brand team. Accordingly, there is not a sufficient

nexus between the 19 Crimes US Instagram account and Australia to bring Advertisement within the ambit of the Scheme.

- The 19 Crimes US Instagram account is solely controlled by Treasury Americas and can only be accessed by the US 19 Crimes brand team. However, TWE Australia can request the Advertisement be removed if found inconsistent with the Code (which TWE Australia denies).
- Based on the above and similar to recent Determination No 139/24, TWE Australia does not consider the Advertisement to be an 'Alcohol Marketing Communication' for the purposes of the Code.
- As a responsible marketer, TWE Australia has demonstrated a long-standing commitment to upholding both the letter and the spirit of the ABAC Code, including by actively engaging in the pre-vetting process on a regular basis for marketing communications intended for Australian audiences. TWE Australia also maintains strict internal and external processes, including internal guidelines (in the form of a detailed marketing checklist, Responsible Marketing Handbook and Guidelines which all specifically refer to the Code) to assist our marketing and communication teams to develop campaigns that strictly adhere to the requirements of the Code. These teams are also trained regularly on the responsible marketing of alcohol.

## **The Panel's View**

### **Introduction and context**

15. This determination relates to a complaint received about a social media video promoting the wine brand 19 Crimes. The video is Halloween-themed and shows a person attempting to carve a pumpkin and then pour themselves a glass of wine. The complainant is concerned that the post is irresponsible as it advertises drinking alcohol in conjunction with the dangerous activity of using a sharp knife.
16. 19 Crimes is one of the wine brands produced by Treasury Wine Estates Limited (TWE), a global alcohol company headquartered in Australia. The threshold question for this determination turns on whether the Instagram account on which the video was posted is marketing within the scope of the ABAC Scheme. This arises because the account was operated by a US company within the TWE group to market the product to North American rather than Australian consumers.
17. This is the third recent determination that involves the interplay between the ABAC Scheme as part of the Australian regulatory regime applying to alcohol marketing and individual items of marketing on Instagram accounts accessed in Australia but argued not to be marketing to Australian consumers. With



apologies to the complainant for this determination being longer than strictly necessary, the Panel will use this decision to guide alcohol marketers on how the ABAC Scheme applies in these circumstances.

18. The first relevant case was Determination 139/24 dated 18 October 2024. This involved an Instagram post for Heineken beer with the following salient features:

- Heineken is a product freely available on retail sale in Australia and the Instagram post was accessed by an Australian consumer;
- the post was made on an Instagram account held and managed by the Heineken Company in the Netherlands;
- in Australia, the distribution of Heineken is in the hands of Lion Australia under a license granted by the Heineken Company and Lion Australia did not create the post;
- the Netherlands curated Instagram account was directed to marketing Heineken to consumers in the Northern Hemisphere with no apparent indication that the account's content was directed towards Australian consumers and no evidence that Australian consumers were interacting with the account;
- there is a separate Heineken Instagram account under the control of Lion Australia that is promoting the product to Australian consumers; and
- as an entity outside of the Heineken Group, Lion Australia had limited influence over Instagram marketing by the Heineken Company.

19. The second case is Determination 154/24 dated 8 November 2024. This involved an Instagram post for Kahlua with the following salient features:

- Kahlua is a product freely available for retail sale in Australia and the Instagram post was accessed by an Australian consumer;
- the post was made on an Instagram account held and managed by The Absolut Company in Sweden as part of the global Pernod Ricard Group;
- Kahlua is distributed in Australia by another entity with the Pernod Ricard Group namely Pernod Ricard Australia;
- Pernod Ricard Australia did not create the post;
- the Swedish based and curated Instagram account appeared to be directed at English-speaking countries with 50% of the followers in the USA and UK and the other 50% in various countries including nearly 4% being Australians;

- the account's content was largely 'nationality neutral' with no references to Australia but equally no strongly evident focus on any specific nation;
- there is no separate Australian Instagram account for Kahula; and
- Pernod Ricard Australia is not consulted in the management of the Instagram account or the creation of content but as part of the Pernod Ricard Group it has some influence within the Group and was able to raise the complaint with its Swedish counterpart and the post was removed.

20. The current case has the following salient features:

- 19 Crimes wine is freely available on retail sale in Australia and the Instagram post was accessed by an Australian consumer;
- the post was made on an Instagram account held and managed by Treasury Wines Estates Americas in the USA as part of the global TWE Group;
- 19 Crimes in Australia is produced and distributed by TWE Australia;
- the American based and curated Instagram account appears substantially directed at the North American market with 2.2% of the account's followers being Australians;
- there is a separate Australian Instagram account for 19 Crimes managed and curated by TWE Australia;
- while TWE Australia did not create the post, there is some shared content between the Australian and American accounts particularly featuring a relationship with the brand of the rapper Snoop Dogg; and
- TWE Australia within the TWE global group can request the removal of posts from the American account.

### **Jurisdiction of the ABAC Scheme**

21. What is common between the three cases is:

- the posts complained about are on Instagram accounts held and managed outside of Australia for products available in Australia;
- the Instagram accounts can be accessed by Australian consumers; and
- in each case the Australian-based legal entity distributing the alcohol products in Australia argued that the posts and Instagram accounts in question are not within the jurisdiction of the ABAC Scheme.

22. The ABAC Scheme is part of the Australian regulatory framework applying to alcohol marketing occurring in Australia. There are regimes in most other nations that regulate alcohol marketing taking place within the boundary of those individual nation-states. A challenge posed by the nature of alcohol as a product and social media platforms such as Instagram is that they operate globally. This means social media posts including those promoting alcohol brands can often be accessed from most parts of the world irrespective of the origin of the post.
23. The remit of the Panel and the ABAC standards does not extend to every alcohol marketing item that can be accessed in Australia over a global digital platform. To fall within the ambit of the Scheme the marketing item must have a discernible and direct link to Australia such as:
- the Instagram account is under the control of an Australian alcohol marketer; or
  - If the Instagram account is under the control of an international entity there is a discernible and direct link to Australia so there is an Australian entity to which the ABAC obligations can attach i.e. an Australian entity with reasonable control over the marketing communication.
24. While each complaint and the surrounding factual circumstances must always be assessed on their own merits, the following indicators are suggestive that a marketing communication accessed in Australia but not created specifically for the Australian market is within the scope of the ABAC Scheme:
- the product being marketed is freely on retail sale in Australia in contrast to the product having to be ordered and sent to Australia specifically
  - the marketing communication for the product is easily accessed in Australia by Australian consumers e.g. there is no geo-blocking constraint ostensibly stopping the marketing from being seen in Australia
  - the marketing communication and/or the medium by which it is transmitted (eg social media account) can be reasonably considered as promoting the product to Australian consumers with factors such as:
    - there is content that references Australia or
    - there is interaction with the marketing from Australian consumers such as the social media account having Australian-based followers or user-generated comments from Australia
  - the marketing and/or the account it is placed appear to have a global rather than a country-specific focus ie the marketing is directed towards consumers in various countries including but not limited to Australia

- there is an Australian entity with a discernible connection to the marketing as indicated by:
  - the Australian entity being part of the wider corporate group that created and controls the marketing communication or
  - the Australian entity has a commercial relationship with the creator or controller of the marketing communication
- the Australian entity has a measure of control over the marketing communication as indicated by the Australian entity:
  - having been involved in the marketing communication's creation or
  - being aware of the marketing communication or the medium over which the marketing is carried can readily be accessed by Australian consumers or
  - having the ability to request that the entity with control over the marketing communication remove the marketing communication from being viewed in Australia.

25. Conversely, the following indicators are suggestive that the marketing communication is outside the jurisdiction of the ABAC Scheme:

- the product being marketed is not readily available in Australia
- the marketing communication is not readily accessed in Australia, for instance by requiring the use of a VPN to bypass geo-blocks
- there are no or few indicators of Australian references in the content of the marketing or there are no or few Australian-located followers of the medium by which the marketing communication is transmitted
- there is a separate communications medium for the product that is promoting the product to Australian consumers e.g. an Australian Instagram or Facebook account is promoting the product
- the Australian entity with rights over the product had:
  - no involvement in the creation or approval of the marketing; and
  - was unaware that the marketing communication would be disseminated; and
  - no ability to request or secure the removal of the marketing communication.

26. It should be stressed that the overall assessment of these indicators and the factual circumstances of the case determine if the marketing communication is within the jurisdiction of the ABAC Scheme. In other words, it is not simply a checklist approach of adding up how many indicators are in place.
27. Having regard to the indicators, the Panel held in Determination 139/24 that the Heineken Instagram account was not within the jurisdiction of the ABAC Scheme given:
- there was no Australian content or interaction of Australian consumers on the account
  - the account's content was evidently directed to the Northern Hemisphere
  - there was a separate Australian focussed Instagram account promoting the product to Australian consumers
  - the Australian entity was not part of the Heineken group, had no involvement in the Instagram post or account and had no apparent ability to have the post removed.
28. In contrast, the Panel held in Determination 154/24 that the Kahlua Instagram account was within the scope of the ABAC Scheme given:
- the account was global marketing for the product apparently directed towards English-speaking nations
  - there was no separate Australian focussed Kahlua Instagram account
  - the content of the account appeared largely 'nationality neutral' with no Australian-specific content but little content sourcing it as being directed at any specific country
  - almost 4% of the account's followers were Australian residents
  - while the Australian entity did not create or approve the post, it was part of the Pernod Ricard global group and had sufficient standing to raise the complaint within the group and the post was removed as a result.

### **The Current Case**

29. The Instagram video referred to in the current complaint was generated by and uploaded to an Instagram account operated by Treasury Wine Estates Americas Co (TWE Americas).
30. While TWE Australia is the distributor of 19 Crimes in Australia, it is argued:

- TWE Australia is a global organisation and although it is headquartered in Australia, it has entirely separate operations to produce, distribute and retail in other regions outside Australia, including the US market;
- 19 Crimes has separate social media accounts for each of the regions it is sold in and TWE Australia maintains a separate Instagram account for the brand in Australia;
- the advertisement was created by a US marketing agency, solely for the purpose of advertising in the US market and was only posted to the dedicated US Instagram account and not the Australian account, noting that no geo-fencing restrictions were in place;
- Only 2.2% of the US account's 112,781 followers are from Australia;
- TWE Australia's employees (who are based locally within Australia) had no reasonable control over this content being created or published on the 19 Crimes US Instagram account; and
- the 19 Crimes US Instagram account is owned and controlled by TWE Americas and can only be accessed by the US 19 Crimes brand team, however, TWE Australia can request the advertisement be removed.

31. Having regard to the indicators outlined above, some suggest the marketing is within the scope of the ABAC Scheme and others suggest the opposite. Favouring the inclusion within the Scheme's jurisdiction are:

- the product is freely available in Australia and the Instagram account carrying the post can be readily accessed within Australia
- there is some Australian consumer engagement with the account with 2.2% of its followers being Australian residents
- TWE Australia is part of the group responsible for the account and it can request its American counterpart to remove the post.

32. On the other hand, there are strong indications the post and Instagram account should not be regarded as being within the scope of the ABAC Scheme, namely:

- TWE Australia did not create the post nor does it curate the Instagram account
- the content of the account clearly suggests that it is marketing the product to North America
- importantly there is a separate Australian Instagram account clearly designed to promote the product to Australian consumers.

33. Weighing up the factual circumstances and assessing the indicators as a whole, the Panel believes the Instagram account and hence the post does not fall within the jurisdiction of the ABAC Scheme. Rather the account and the post are marketing to North America and are subject to the regulatory regime applying to alcohol marketing in the USA and Canada.
34. There is one other point that should be touched upon, and that is the responsibility of an Australian headquartered global alcohol company for marketing directed to overseas markets. Should the fact that the TWE global group is Australian-led mean that its marketing should meet Australian regulatory standards even when the marketing is directed at non-Australian markets?
35. The regimes applying to alcohol marketing vary considerably worldwide with alcohol marketing prohibited in some nations and other nations having little regulatory restrictions. While it depends on perspective, Australia through its mix of direct government regulation and industry-led codes of practice such as the ABAC would likely be regarded as freely permitting alcohol marketing subject to high standards of responsibility as to the content and placement of the marketing materials.
36. The ABAC Scheme does not and cannot have extra-territorial impact and its operation is confined to marketing and alcohol companies in Australia. The Scheme does maintain relationships with some international self-regulatory bodies. For instance, the Heineken Instagram post mentioned earlier was able to be referred by ABAC to a regulatory body in the Netherlands for consideration under the regime in that nation.
37. TWE is not bound by the ABAC Scheme to market in North America to Australian standards. But as an Australian global alcohol company, best practices in corporate and social responsibility would have it satisfying individual national regulatory requirements but also the Australian standards if the Australian standards are higher than those in place in the market it is operating.

## **Conclusion**

38. This has been a technical decision and would have disappointed the complainant who raised a simple concern only to receive a detailed dissertation on when marketing does or does not enliven the jurisdiction of the ABAC Scheme to make a decision. The Panel regrets this was the outcome for the complainant.
39. That said, the determination will help guide alcohol marketers to better understand their obligations in the globalised environment of digital social media platforms.

40. As a formal decision, the complaint is dismissed on the basis that the post and the Instagram account on which it was made are not marketing communications within the jurisdiction of the ABAC Scheme.