



## ABAC Adjudication Panel Determination No. 32/19

**Product:** K.BOOCH Alcoholic Kombucha  
**Company:** The Beverage Company Pty Ltd  
**Media:** Digital (Facebook)  
**Date of decision:** 22 May 2019  
**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 a Facebook post promoting K.BOOCH Alcoholic Kombucha by The Beverage Company Pty Ltd (“the Company”) and arises from a complaint received 1 May 2019.
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 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 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**

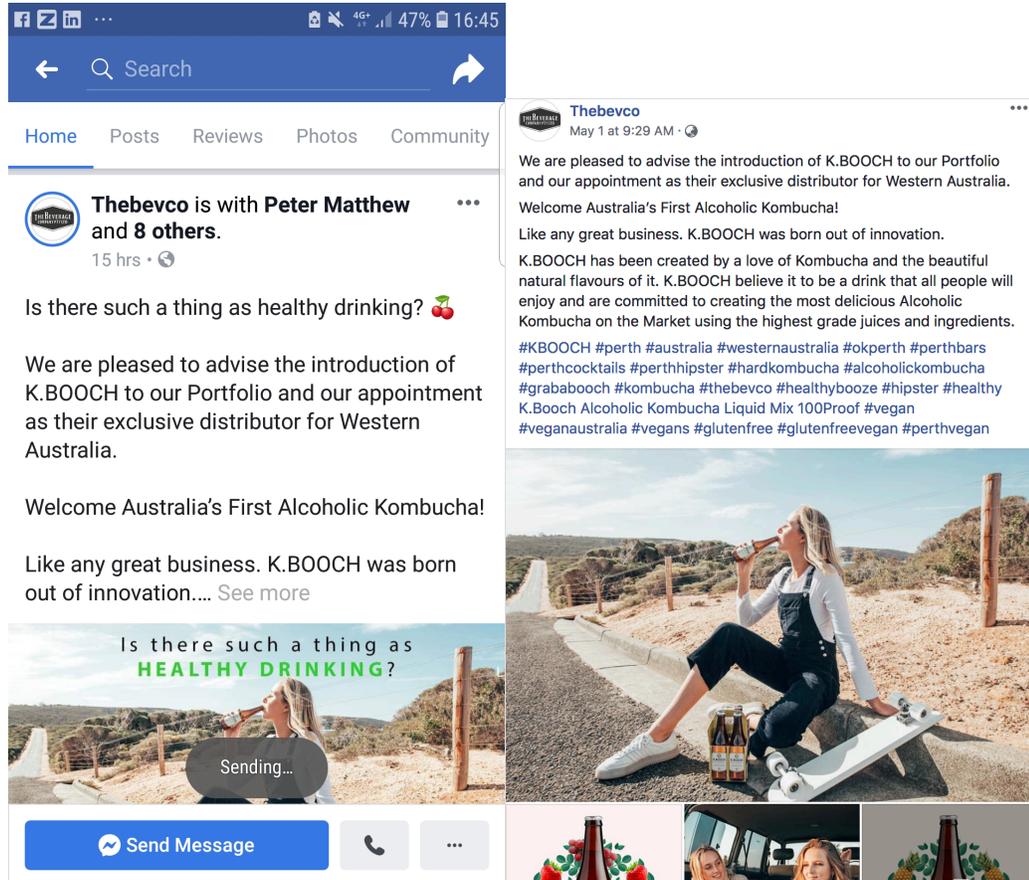
7. The complaint was received on 1 May 2019.
8. The Panel endeavour to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint 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 this marketing communication.

## The Marketing Communication

10. The complaint relates to a Facebook Post promoting K.BOOCH. The first image below is a screenshot supplied by the complainant and the following image shows a slightly modified post accessed by ABAC a day later.



## The Complaint

11. The complainant objects to the marketing as:
- Alcohol is not healthy and never should be advertised as a healthy beverage. Its negative impact is well documented; and
  - Advertising alcohol picturing a woman about to ride a skateboard is grossly irresponsible.

## The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (c)(iv) suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation

- (d) A Marketing Communication must NOT 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. K.BOOCH Alcoholic Kombucha Co responded to the complaint by emails dated 7 & 8 May 2019. The principal points made by this company were:

- a) Bevco, our sales agency in Western Australia, did not ask for our approval on the post.
- b) The reference to 'healthy' is phrased as a question, not a statement. I did not see or approve this statement and the statement has been removed. In response to the 'USE' of the word KOMBUCHA. Firstly, that is what the name of the process of fermenting Black Tea and Sugar is. There are no other definitions. What we do is continue the fermentation process of this already, slightly alcoholic liquid. All 'non' Alcoholic Kombucha is already mandatorily labelled with 'less than .5% ABV' which in itself references Kombucha as a potentially alcoholic beverage. Furthermore, we believe that by continuing the secondary fermentation process and explaining what we are doing lets the consumer know it is an Alcoholic Product
- c) In Reference to the woman sitting with the skate board. Part 3(d) of the code states that the following activities are not to be referenced:
- Driving a motor vehicle
  - Boat
  - Machinery
  - Swimming

There is no mention of skateboards, surfboards, bikes or the like, that we could draw reference to in the code that would not allow us to use the image suggested. The image is of a woman sitting with a skateboard and does not reference her skating.

14. The Beverage Company Pty Ltd responded to the complaint by letter dated 13 May 2019. The principal points made by this company were:

- a) There is no requirement for pre-vetting of social media posts in the ABAC Rues & Procedures and the post was put to a closed form specifically engaged with the alcohol beverage industry being 'WA Bartenders' and 'WA Restaurant Staff' under the discussion topic "Thoughts on Alcoholic Kombucha?".
- b) The Beverage Company is the appointed wholesale distribution agent for K.BOOCH in Western Australia. K.BOOCH would be generally aware that we would be promoting their product from time to time, including in social media posts. However, K.BOOCH were not specifically advised of the post prior to its posting to the 'WA Bartenders' and 'WA Restaurant Staff' Facebook pages. Images included in the post of 1 May 2019 were supplied by K.BOOCH to The

Beverage Company. Further, K.BOOCH have since the post issued their agents and distributors, including The Beverage Company with marketing guidelines for all future social media posts and any advertising.

- c) We have considered the comments contained in the complaint and we grant that the post was initiated to generate a discussion on an Alcoholic Kombucha. It was posted to the closed groups, 'WA Bartenders' and 'WA Restaurant Staff' under the discussion topic "Thoughts on Alcoholic Kombucha?". We do not believe that the post suggested the consumption of K.BOOCH offers a therapeutic benefit. However, we have since removed the reference to "Is there such a thing as healthy drinking?"
- d) We do not believe that the placement of a skateboard in the image breaches the ABAC Responsible Alcohol Marketing Code Section 3(d) in relation to Alcohol and Safety. The placement of a skateboard does not at any time imply that the person will skateboard after consumption. In any event, we note that the use of a skateboard does not require the high degree of alertness or physical co-ordination, such as the control of a motor vehicle, boat or machinery or swimming as claimed by ABAC.
- e) We also note that the complainant refers to a woman about to skateboard as 'grossly irresponsible' and there are no grounds for this assertion. We view our role seriously in the responsible sale and distribution of Alcoholic Beverages and we would not expressly or deliberately seek to promote the irresponsible consumption and use of Alcohol at any time.

### **The Panel's View**

- 15. Kombucha is a fermented beverage which tastes somewhat like a sour apple cider. It is made from either a green or black tea base and the drink is popularly regarded as having some health benefits, although the scientific basis for this belief is unproven. K.BOOCH is an alcohol producer which has put onto the Australian market several different flavours of an alcoholic version of kombucha.
- 16. The Beverage Company (Bevco) is a distributor of alcohol products and has gained the rights to distribute K.BOOCH in Western Australia. To promote the product, Bevco has posted on its Facebook page images and text regarding the product. Bevco explains these posts were directed at Western Australian bartenders and restaurant staff but the Facebook post is accessible to the public and has come to the attention of the complainant. This determination considers if the Facebook post is consistent with the standards for responsible alcohol marketing contained in the ABAC.
- 17. The ABAC is a quasi-regulatory scheme which relies on alcohol industry participants both accepting the ABAC standards and the availability of a public complaints process to assess the consistency of marketing communications against Code standards. Neither K.BOOCH or Bevco are signatories to the ABAC and as a result have not bound themselves to comply with Panel determinations about their marketing. That said both companies have expressed their commitment to responsible marketing and have cooperated with Panel processes enabling this determination to be made.

18. The relevant Facebook post features a picture of a woman consuming the product while sitting on a curb with an upturned skateboard next to her. The complainant believes this image is inappropriate as it is associating the use of a skateboard with alcohol use. Also, the complainant takes the first line of the text accompanying the picture 'Is there such a thing as healthy drinking' to be implying that claims are being made about the health value of an alcoholic beverage when the complainant contends no alcohol drink can be regarded as being healthy.
19. For its part, the ABAC contains two standards which are relevant to the Facebook post and concerns raised by the complainant. The first standard is that alcohol marketing must not suggest that alcohol consumption offers any therapeutic benefit (Part 3(c)(iv)). The second standard states that marketing communications must not show the consumption of alcohol before or during any activity, that for safety reasons, requires a high degree of alertness or physical co-ordination (Part 3(d)).
20. The Companies in responding to the complaint don't accept the Code standards have been breached. It is argued the post makes no health benefit claims and that skateboarding is not an activity captured by Part 3(d). Further, it is argued the image of the woman doesn't show her skateboarding or imply that the skateboard will be used after the consumption of the product.
21. In assessing if a Code standard has been breached the Panel is to adopt the viewpoint of a 'reasonable person' and how the marketing communication would be probably understood by this person. The concept of the reasonable person is borrowed from the common law system and means that the opinions, values and life experiences common in a majority of the community is to be the benchmark.
22. The Panel does not believe that the post is making a claim of a positive health benefit from consuming the product. At its highest the post is posing a question as to whether any alcoholic drink could be said to be healthy, but it does not make any such assertion. It is not considered that a reasonable person would interpret that a therapeutic benefit from the product was being claimed.
23. In relation to the Part 3(d) standard, the Panel does believe that skateboarding is self-evidently an activity that to be safely carried out requires a rider to be alert and physically co-ordinated. To show or imply alcohol consumption occurring before or during skateboarding will be in breach of the standard. The question is whether the Facebook post would be interpreted as the rider consuming the product after any skateboarding activity had concluded or whether the activity is yet to occur or is taking place.
24. On balance, the Panel believes the standard has been breached. The post features the woman drinking the product while sitting on the curb of a quiet road, possibly near a beach. There is no visual cue given that the skateboard would not be used or that the activity has concluded e.g. there is no shot of a motor vehicle or some other way the rider might leave the spot other than on the skateboard. A reasonable person would likely believe the image was directly associating the use of a skateboard with the consumption of the product.
25. Accordingly, the complaint is upheld in part.