



ABAC Adjudication Panel Determination No 186/21

Product: Wine
Company: Blackhearts and Sparrows
Media: Instagram
Date of decision: 25 August 2021
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns an Instagram post by Blackhearts and Sparrows (“the Company”). It arises from a complaint received on 22 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 complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

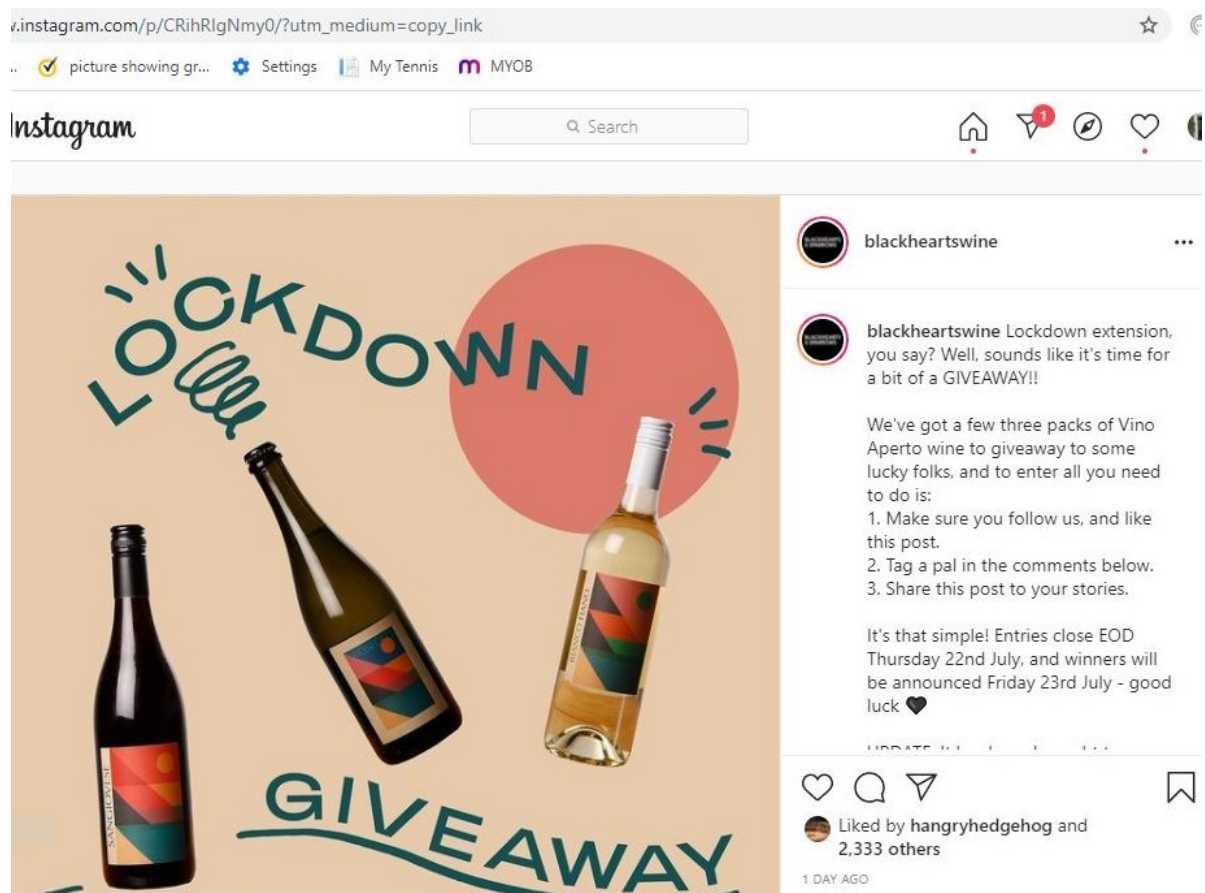
7. The complaint was received on 22 July 2021.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint 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 complaint concerns the following Instagram post:



The Complaint

11. The complainant is concerned about the advertising as follows:

The Instagram post is a call out for a competition. The competition involves following, liking, tagging a pal, and sharing the post to your stories.

This competition will work around any measures the advertiser or Instagram have taken to avoid showing sponsored content to minors. Instagram manages sponsored posts for restricted items like alcohol by not showing them to certain ages.

The model of this competition works around this by getting individual users to share the content, which could appear to minors. All previous efforts to create an age gate on the content would be abandoned with this competition.

The ABAC Code

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

(b)(iv) be directed at Minors through a breach of any of the Placement Rules.

13. Part 6 of the ABAC Code contains the following definition:

Placement Rules means:

...

(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 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.

...

Available Age Restriction Controls means age restriction, targeting or affirmation technologies available to restrict a Marketing Communication to

Adults, but this does not require a third party platform, website or account that is not primarily related to alcohol.

The Company's Response

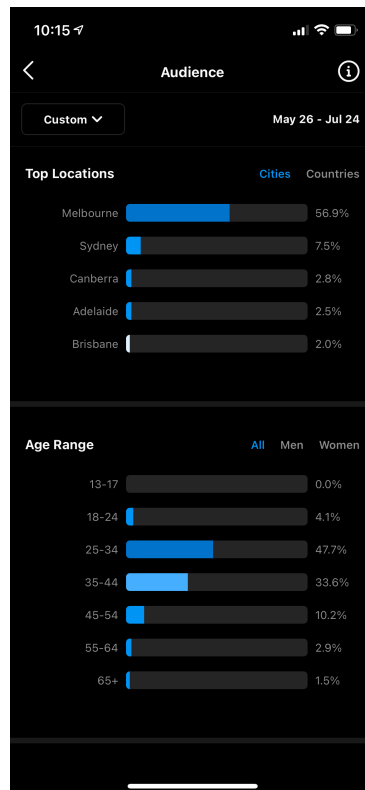
14. The Company responded to the complaint by email on 27 July 2021. Its principal comments were:

Alcohol Advertising Pre-vetting Service Approval

- Unfortunately, prior to this complaint, we weren't aware of the Pre-Vetting service offered by ABAC. We are now taking steps to ensure that we're fully informed of all the guidelines, and intend to make use of the service in the future in relevant circumstances.

Responsibility toward Minors

- As a business, we're very conscious and careful of the language and imagery we use when speaking about alcohol, and we take our community responsibility very seriously. Our social media following and clientele are predominantly in the 25-34 age bracket - we track our audience insights via Instagram analytics (attached) and none of the people who engage with our brand are under 18:



- Our product range of predominantly median-high price-point boutique wine also lends itself to an older audience. We have also now fully utilised the Age Restriction Controls within Instagram to strictly ensure that no minors are able to view our communications in any capacity.
- Prior to this complaint, we were unfortunately unaware that by adding the 'share' component to our competition giveaway we would breach any protocols or guidelines in our marketing practices. Had we known that this element of the giveaway would potentially deliver messaging about our giveaway to minors, we would not have included it.

Further context to the competition post

By the time the complaint had been sent through to us (Sunday 25th July 2021), the competition had already closed. It ran for four days only and had finished as of midnight Thursday 22nd of July, with the competition copy removed from the post and comments turned off on that post the morning of Friday 23rd July 2021 to ensure that there would be no further engagement with it. The original copy included terms & conditions clearly outlining that the competition was only open to entrants who were 18+ plus with a valid ID. We also make sure that winning recipients fit these criteria prior to dispatching any prizes.

ORIGINAL POST COPY

Lockdown extension, you say? Well, sounds like it's time for a bit of a GIVEAWAY!!

We've got a few three packs of Vino Aperto wine to giveaway to some lucky folks, and to enter all you need to do is:

- 1. Make sure you follow us, and like this post.*
- 2. Tag a pal in the comments below.*
- 3. Share this post to your stories.*

It's that simple! Entries close EOD Thursday 22nd July, and winners will be announced Friday 23rd July - good luck ♥

T&Cs

- Entrants must be 18+ with valid ID.*
- The winners will be chosen at random & contacted via DM, if no response is received within 24 hours, the prize will be offered to the next randomly drawn entrant.*
- This giveaway is in no way associated with Instagram*

#blackheartsandsparrows #blackheartsgiveaway #blackheartswine #vinoaperto #giveaway #lockdown #freewine

Concluding comments

- Finally - thank you for bringing this complaint to our attention. As outlined, we were previously unaware of the issues in relation to this giveaway. As a small business representing local producers, we take pride in communicating about them carefully, ethically, and respectfully, and doing the right thing by the communities that we're involved with. We endeavour to take the learnings from this complaint and the ABAC guidelines and apply them to all of our marketing communications in the future. Since receipt of this complaint, our communications manager has undertaken the ABAC online training, with the intention of more staff members who are involved in content creation also going through the training course going forward.

The Panel's View

15. Blackhearts and Sparrows is a Victorian based and family owned specialty wine and beer retailer. A complaint has been received about an Instagram post on the Company's Instagram account, with the concern relating to the call out in the post to follow, like, share and tag the post, which the complainant believes will mean the post will then be visible to minors, even where the content has been age gated.
16. 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. Broadcast mediums such as free to air television have no particular technical capacity to target audiences so proxy requirements are used such as the reasonably expected audience of a program with which an advertisement is broadcast. In contrast, social media channels, such as Instagram do have technical capacities to target audiences based on a range of characteristics such as age.
17. Placement Rule 2 provides that if a media platform such as Instagram appears to have age restrictions controls available, then a marketer must use those controls to exclude minors from the audience. Instagram does have age restriction controls which the Company should have been able to utilise.
18. The Company advised that the nature of its product offerings and factors such as the price point of its products means that under 18 year olds do not engage with its social media posts. In support of this the Company supplied data drawn from the analytics function of Instagram which showed that its Instagram account had no followers aged under 18. That said, the Company intimated that prior to the complaint, it was not entirely familiar with the age restriction controls available to it, but it had now fully applied the available controls.

19. In contrast, the complainant appears to have assumed that an age restriction control was applied to the brand account and their concern instead focused on the post calling for the competition to be followed, liked, tagged and shared. It was contended that this will mean that the post will be directed toward minors who are tagged or with whom the post is shared, in effect, working around the age restriction feature on Instagram.
20. Advice obtained by the Panel's Executive Officer is that Instagram age restriction controls in fact do not permit this method of defeating the age restriction controls, even if this was the intent of an alcohol marketer. Facebook have advised that "when age gating is applied to the organic content on either Facebook or Instagram, it will not be visible to an underage user. Even if they are tagged, they don't receive a notification and should not be able to view the content."
21. Given that the Company had not fully utilised the available age restriction controls, the Company was not fully compliant with Placement Rule 2 and the complaint is upheld.