



ABAC Adjudication Panel Determination No 118/24

Product: Barry RTD
Company: Alter Ego Drinks
Media: Social Media - Instagram
Date of decision: 17 September 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 August 2024 about social media posts marketing Barry RTD (“the product”) by Alter Ego Drinks (“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. 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 is within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaint was received on 15 August 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 item.

The Marketing

10. The complaint relates to five Instagram posts, as shown below:

Post 1

https://www.instagram.com/p/C8MSQe6xbd2/?utm_source=ig_web_copy_link&igsh=MzRIODBiNWFIZA==



Post 2

https://www.instagram.com/p/C70qJkNxj9f/?utm_source=ig_web_copy_link&igsh=MzRIODBiNWFIZA==



Post 3

https://www.instagram.com/p/C7n4bkqhx63/?utm_source=ig_web_copy_link&igsh=MzRIODBiNWFIZA==



Post 4

https://www.instagram.com/p/C7WBHBsxduR/?utm_source=ig_web_copy_link&igsh=MzRIODBiNWFIZA==



Post 5

https://www.instagram.com/p/C7EFHKTRIGr/?utm_source=ig_web_copy_link&igsh=MzRIODBiNWFIZA==



Complaint

11. The complainant objects to the marketing as follows:
 - *Their Instagram feed is littered with photos of the famous footballers.*
 - *I'm very surprised to see young, famous, attractive footballers advertising the Barry alcoholic drink.*
 - *It seems to be encouraging alcohol consumption to young, easily influenced teenagers.*

The ABAC Code

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

- (i) have Strong or Evident Appeal to Minors, in particular;
 - (A) specifically target Minors;
 - (B) have a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
 - (C) use imagery, designs, motifs, language, activities, interactive games, animations or cartoon characters that are likely to appeal strongly to Minors;
 - (D) create confusion with confectionery, soft drinks or other similar products, such that the marketing communication is likely to appeal strongly to Minors; or
 - (E) use brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.
- (iii) depict in a visually prominent manner:
 - (A) paid models, actors or Influencers that are and appear to be Adult but are under 25 years of age; or
 - (B) other people that are and appear to be Adult but are under 25 years of age UNLESS the depiction has been placed within an Age Restricted Environment.

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

Age-Restricted Environment means:

- licensed premises that do not permit entry by Minors; or
- age-restricted account or post within a social media platform which:
 - requires users to register and login to use the platform, including the provision of their full date of birth; and
 - is able to hide the existence of any alcohol-related pages, sites and content such that they are not visible other than to a user who has registered on the platform as being an Adult.

The Company Response

14. The Company responded to the complaint by emails dated 21 August and 13 September 2024. Its primary comments were:
- The social media posts referred to in the complaint were not submitted for Alcohol Advertising Pre-vetting Service (AAPS) approval.
 - We strongly believe that the social media posts do not breach Part 3 (b)(i) of the ABAC Code. The content is not targeted at minors, nor does it have strong or evident appeal to them. The Barry Instagram page is age-gated and restricted to individuals of legal drinking age, ensuring that only adults can access the content.
 - The individuals featured in the posts—Bailey Smith, Nick Daicos, Josh Daicos, Charlie Curnow, and Reece Walsh—are all professional athletes who are founders and shareholders of the Barry RTD brand. Their inclusion in these posts is based on their legitimate role in the company rather than an intent to appeal to minors.
 - Additionally, we would like to refer you to the following ABAC determinations which were dismissed on similar grounds, specifically regarding the inclusion of professional athletes not being deemed as having strong appeal to minors:
 - Determination 134/23 (6 September 2023): (<https://www.abac.org.au/wp-content/uploads/2023/09/134-23-FINAL-Determination-6-September-2023.pdf>)
 - Determination 32/18 (9 April 2018): (<https://www.abac.org.au/wp-content/uploads/2018/04/32-18-Determination-XXXX-Gold-9-4-18.pdf>)
 - Determination 10/22 (11 February 2022): (<https://www.abac.org.au/wp-content/uploads/2022/02/10-22-Determination-Peroni-and-Corona-11-February-2022.pdf>)
 - These cases establish a precedent where the involvement of professional athletes was not deemed to strongly appeal to minors.
 - Bailey Smith, Nick Daicos, and Reece Walters are all under the age of 25 and are shareholders of Barry RTD.
 - Part 3(b)(iii)(A) of the Code prevents a marketing communication from including a paid influencer. The individuals in question are not paid for their involvement in any marketing communication promoting Barry RTD, nor in any other capacity at the company. Their involvement stems from their genuine interest in the product and because for their being shareholders in

the company. The fact that these individuals have invested in Barry RTD does not mean they are "paid models, actors, or influencers" within the context of the ABAC Code. The Code in no way prevents individuals under 25 from owning an interest in an alcohol company.

- We trust that this response addresses the concerns raised by the complaint. Please let us know if further information or clarification is required. We are committed to responsible advertising and fully respect the ABAC adjudication process.
- Thank you for your attention to this issue.

The Panel's View

Introduction

15. In September 2023 a new Ready to Drink (RTD) shochu, vodka and soda water flavoured RTD branded as 'Barry' was released to the Australian alcohol market. The company producing Barry is a collaboration between AFL Western Bulldogs' player Bailey Smith (aged 23) and experienced alcohol industry figures.
16. Beyond Mr Smith, the Company advised that four other footballers are 'founders and shareholders' in the Barry RTD brand namely:
 - AFL Collingwood players Nick Diacos and Josh Diacos aged 21 and 25 respectively;
 - AFL Carlton player Charlie Curnow aged 27; and
 - NRL Brisbane Broncos player Reece Walsh aged 22.
17. Promotion of the brand has included social media channels, and this determination arises from a complaint about five Instagram posts that show two or more of the footballers. The complainant contends that by featuring young and famous footballers, the posts target young, easily influenced teenagers.
18. This concern raises Part 3 (b) of the Code, which has two limbs and both are relevant to the complaint. The first limb in Part 3 (b)(i) requires that alcohol marketing material must not have strong or evident appeal to minors. Strong or evident appeal might occur if the marketing material:
 - specifically targets minors;
 - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult;

- uses imagery, designs, motifs, language, activities, interactive games, animations or cartoon characters that are likely to appeal strongly to minors; and
 - creates confusion with confectionery, soft drinks or other similar products, such that the marketing communication is likely to appeal strongly to minors.
19. The second limb in Part 3 (b) regards the age of persons shown in an alcohol marketing communication. Part 3 (b)(iii) provides that it is not permitted to depict in a visually prominent manner:
- paid models, actors or influencers who are and appear to be adult but are under the age 25 years of age; or
 - other people that are and appear to be adults but are under 25 years of age unless the depiction has been placed within an Age Restricted Environment.
20. Accordingly, the complaint raises several issues about the application of the Part 3 (b) requirements to the Instagram posts and these will be addressed in turn as follows:
- Do the posts have a strong appeal to minors?
 - Do the posts show persons under the age of 25, outside the limited exceptions?

Strong appeal to minors

21. The marketing concerns five posts made to the Company's Instagram account. In each of the posts at least two and sometimes up to four of the players are depicted in a casual social setting. The men are not shown wearing football gear but are dressed casually mostly in t-shirts and shorts. They are shown consuming the product or at least cans of the product are placed with them. The accompanying text to the posts references a current AFL or NRL game.
22. The Company contends that the posts do not strongly appeal to minors arguing:
- the content is not targeted at minors, nor does it have strong or evident appeal to them;
 - the individuals featured in the posts—Bailey Smith, Nick Daicos, Josh Daicos, Charlie Curnow, and Reece Walsh—are all professional athletes who are founders and shareholders of the Barry RTD brand. Their inclusion in these posts is based on their legitimate role in the company rather than an intent to appeal to minors;

- the Instagram account is age-restricted and confined to adults; and
 - several ABAC determinations establish a precedent that professional athletes are not deemed as having strong appeal to minors.
23. The Panel has considered what features of a marketing communication might contribute to strong appeal to minors on many past occasions. While each marketing communication must always be assessed individually, some characteristics within marketing material that 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.
24. 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. The overall impact of the marketing communication rather than an individual element shapes how a reasonable person will understand the item.
25. In deciding the compliance of a marketing communication with a Code standard the Panel is to place itself in the position of a reasonable person and assess the probable understanding of the marketing by that person. A 'reasonable person' is a concept taken from the common law system and means that the life experiences, values and attitudes shared by most members of the community are the benchmark.

26. As noted, the inclusion of popular personalities of evident appeal to minors is one of the characteristics that will evaluate the appeal of a marketing communication to minors. In this regard, the Company argued that the Panel had established a precedent that the use of professional athletes in alcohol marketing would not have strong appeal to minors. Three Panel decisions were referenced by the Company.
27. Determination 10/22 involved a TV interview of Ash Barty immediately after she had won the Australian Open Tennis tournament. The Panel found that the interview was not an alcohol marketing communication to which the ABAC standards applied and hence there was no consideration given to Ms Barty's potential appeal to minors.
28. Determination 32/18 involved a video shown on a screen at a stadium during the lunch break of a cricket match. The video was an explanation of a crowd catch competition that was sponsored by a beer brand. The narrator of the video was the former test cricketer Adam Gilchrist. One issue the Panel considered was the appeal of the promotional video to minors given the profile of Mr Gilchrist.
29. The Panel noted that while Adam Gilchrist was a respected figure, his appeal was to an older audience given he had last played international cricket in 2008 and no minor at the game could have been older than 8 years old when he had played his last game. This decision holds little relevance to the current circumstances.
30. The third determination raised by the Company (134/24) is relevant. It concerned a TV alcohol ad featuring AFL player and Collingwood captain Darcy Moore who was 27 at the time the ad was broadcast. The Panel noted that the inclusion of public figures - be they sportspeople, entertainers, or other celebrities - will have the potential to draw the attention of minors. It will be a case-by-case assessment if a particular individual will have a particular attractiveness and strong appeal to minors. Some factors might include:
 - the age of the individual with generally younger persons being likely more relatable than older adults; and
 - the basis of the person's celebrity/public standing - for instance, a gamer/influencer might resonate more strongly with minors than say a test cricketer.
31. Further, the nature of the marketing communication and how the public figure is depicted will be important in assessing the probable appeal of the advertisement to minors. For instance, showing a sports person engaging in their sport or wearing their sports uniform/gear will draw a stronger association to the activity they are known for, as opposed to say being shown at a family dinner.

32. The Panel did not believe that the Darcy Moore TV ad breached the Part 3 (b)(i) standard and reaching this conclusion noted:
- Darcy Moore would be recognised by both adults and minors who follow AFL and he would be particularly liked by supporters of the Collingwood team;
 - Mr Moore is aged 27 and is portrayed in an adult setting;
 - the content of the ad is light-hearted but the humour is satirical and adult focussed and pokes fun at the media/expert commentary of sport; and
 - overall, the reasonable person would conclude that the ad is directed towards adults, any appeal to minors would be incidental rather than strong or evident.
33. Accordingly, the use of professional athletes will be a factor to weigh in assessing how a reasonable person would probably understand the appeal of an alcohol marketing communication to minors. This is always a case-by-case assessment, but there is no starting point assumption that professional athletes will not have an appeal to minors as contended by the Company.
34. The fact that the Company had no intention to attract minors, and the footballers were involved because of their role with the Barry brand is not the test. The assessment of an alcohol marketing item is from the understanding of the reasonable person and not what the marketer intended.
35. It should be noted that the use of age restrictions on the Instagram account means that the Company has met its obligations under the ABAC Placement Standards to direct its marketing to adults and away from minors. Compliance with the Placement Standards however is not a trade-off from meeting the content standards. In other words, the obligation of a marketer is to both direct alcohol marketing to the extent reasonably possible away from minors and to also devise marketing messaging that does not strongly appeal to minors.
36. On balance, the Panel does not believe the posts would strongly appeal to minors. In reaching this conclusion the Panel noted:
- the use of current and relatively young footballers in marketing will elevate the appeal of the marketing material to minors, particularly male teenagers, and great care will be needed with the marketing featuring the footballers;
 - that said, the posts show casual adult settings and not activities likely to be highly engaging to minors;
 - the imagery does not draw out that the men are footballers eg no football clothing or equipment is shown; and

- taken as a whole the appeal to minors would probably be understood as incidental rather than strong or evident

Age of adults in alcohol marketing and the use of an Age Restricted Environment

37. The second limb of the Part 3 (b) requirements goes to the age of persons shown in alcohol marketing. Minors cannot be shown and there is a general age threshold of 25 imposed by the standard. The purpose of the 25-year-old age threshold is twofold. Firstly, to avoid confusion by showing adults who have a youthful appearance and may be thought to be under 18. Secondly to portray alcohol use maturely and responsibly and this is assisted by featuring adults who are a bit older than 18.
38. Up until 2014, the Code did not permit adults under 25 to be shown in alcohol marketing unless shown incidentally as a part of a crowd or background scene. With improvements in the age controls available with social media platforms, the Code has permitted since 2014, adults aged 18 to 25 to be shown, although the exception to the 25-year threshold is quite limited to:
 - depictions in a non-visually prominent manner; or
 - depictions in an age-restricted environment and the person under 25 was not a paid model, actor or influencer.
39. The posts show one or more of Bailey Smith (aged 23), Nick Daicos (aged 21) and Reece Walsh (aged 22) in a prominent manner. The Company argues however the posts do fall within the exception in Part 3 (b)(iii) as the men:
 - appeared from a genuine interest in the product and from being shareholders in the Company;
 - are not 'paid models, actors or influencers';
 - age restriction controls available on Instagram were applied; and
 - the ABAC does not prevent under 25-year-olds from owning an interest in an alcohol company.
40. The last point is certainly correct. The ABAC Scheme plays no role in regulating the ownership or business structure of alcohol companies. Alcohol businesses need to be licenced but this sits with government bodies and ABAC is confined solely to the marketing of alcohol products.
41. Equally, however, being an owner or having a financial stake in an alcohol business does not give the owners a dispensation from Code standards about marketing. It is entirely clear that Messrs Smith, Daicos and Walsh until they are at least aged 25 can't be shown in alcohol marketing in non-age restricted

environments such as a TV or a print ad or in outdoor marketing like a billboard.

42. There have been only a handful of previous Panel decisions on the Part 3 (b)(iii) standard (or its equivalent in earlier versions of the Code). In Determination 69/21 the Panel considered an Instagram post from an alcohol company featuring the professional surfer Letty Mortensen who was 24 years old at the time. Mr Mortensen was sponsored by a surfboard manufacturer and this manufacturer was in a collaboration with the alcohol company.
43. Mr Mortensen was not paid by the alcohol company to appear in the post but it was evident his role in the post arose because of the commercial relationship with the surfboard manufacturer. The Panel believed it was inconsistent with the intent of the ABAC standard that an influencer like Mr Mortensen appear in the post even though he was not paid by the alcohol company.
44. The intent behind the Part 3 (b)(iii) requirement is that under 25-year-olds are not to be shown in alcohol marketing. The age-restricted environment exception is limited and permits for example the use of a photograph of patrons in a bar where the persons present are over 18 but under 25.
45. The three footballers aged under 25 have the public profile and following to be fairly regarded as influencers. They each have a direct financial interest in the business. It would be an artificial distinction to conclude this interest in the Company does not bring them within the intended scope of being a paid model/actor/influencer.
46. Accordingly, the Panel finds that as each of the posts features at least one person under the age of 25, then the posts are in breach of Part 3 (b)(iii) of the Code.
47. The complaint is upheld.