



**Ad Standards** Community Panel  
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**AdStandards.com.au**

Advertising Standards Bureau Limited  
ACN 084 452 666

# Case Report

|          |                                      |                             |
|----------|--------------------------------------|-----------------------------|
| <b>1</b> | <b>Case Number</b>                   | <b>0409/18</b>              |
| <b>2</b> | <b>Advertiser</b>                    | <b>Lion</b>                 |
| <b>3</b> | <b>Product</b>                       | <b>Alcohol</b>              |
| <b>4</b> | <b>Type of Advertisement / media</b> | <b>Internet-Social-Inst</b> |
| <b>5</b> | <b>Date of Determination</b>         | <b>26/09/2018</b>           |
| <b>6</b> | <b>DETERMINATION</b>                 | <b>Dismissed</b>            |

## ISSUES RAISED

2.7 - Native Advertising Advertising not clearly distinguishable

## DESCRIPTION OF THE ADVERTISEMENT

This Instagram post referred to features on the 'brisbanegirlsabroad' Instagram profile, and depicts two women having a picnic at the top of Mount Ngungun, each holding a bottle of XXXX Summer Bright Lager. The caption of the Instagram post is: "When you lug a picnic up the mountain only for it to pour rain as soon as you sit down. We've always wanted to picnic at the top of Ngungun... didn't quite turn out how we expected – have a look at our story to see what happened straight after this picture.....#sunshinecoast #sunnycoast #visitsunshinecoast #discoversunshinecoast #queensland #visitqueensland #discoverqueensland #travelqld #qld #visitqld #queenslandaustralia #australia #visitaustralia #discoveraustralia #wearerevelgirls #traveltheworld #ngungun #exploremore #travelblogger #travelphotography #summerbright #glasshousemountains #wanderlust #travel #sunshinecoasthinterland #brisbane #brisbaneblogger #visitbrisbane #travel #explorequeensland @sunshinecoast @sunshinecoastconnections @visitsunshinecoast @visitnoosa @visitbrisbane @dametraveler @ig\_discover\_australia @discoverqueensland @visitqueensland @travelqld @australia @visitaustraliaqld @sunshinecoastcouncil @sunshine\_coast\_social\_ @mysunshinecoast @queensland @queenland @qldparks @visitqldaustralia"



## THE COMPLAINT

A sample of comments which the complainant/s made regarding this advertisement included the following:

### *Breaches of clause 3(b)(iii)*

*At least one of the women in this post is suspected to be under the age of 25, again a suspected breach of clause 3(b)(iii) that “A marketing communication must not depict an Adult who is under 25 years of age and appears to be an adult”.*

*We think it is clear that this post constitutes marketing communications as they were “by or within the reasonable control of a marketer” for the purposes of the definition of Marketing Communication in clause 4 for the reasons set out below:*

- o A visually prominent woman drinking a bottle of XXXX Summer Bright Lager*
- o Another visually prominent woman holding a bottle of XXXX Summer Bright Lager.*

*In addition, and in any case, this post has not been placed in an Age Restricted Environment for the purpose of clause 3(b)(iii). This makes any argument for exemption from clause 3(b)(iii) irrelevant.*

*Breach of clause 3(b)(iv) This post also breaches clause 3(b)(iv) of the ABAC Code, which provides that “a Marketing Communication must not be directed to minors through any breach of the Placement Rules”.*

*Rule (ii) of the Placement Rules provides that if a media platform on which a Marketing Communication appears has age restriction controls available, the Marketer must utilise those age restriction controls to exclude Minors from the audience.*

*Instagram constitutes the media platform on which the Marketing Communication appears. Instagram does have age restriction controls available to marketers which they can use to exclude Minors from the audience for their sponsored posts.*

*This post did not utilise these age restriction controls that are available on Instagram to exclude minors in breach of rule (ii). These accounts have integrated subversive marketing communications for carcinogenic alcoholic beverages into their Instagram feed for their sizeable audiences. This means these accounts should be considered as official accounts that are subject to age restrictions controls where protects inappropriate for children are portrayed. There are no attempts to restrict minors from viewing this content, and the post can be viewed by anybody without requiring login credentials that could establish viewers’ ages.*

*In any case, rule (iii) of the Placement Rules provides that 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. Instagram users include young people aged 13-17 years. These minors would have directly received this post. As a result, there is no basis for a reasonable expectation that the audience of these Posts would comprise at least 75% adults.*

*Breaches of the AANA Code of Ethics In addition to the breaches of ABAC Code 3(b)(iii) and 3(b)(iv), this post offers no disclosure that clearly distinguishes the individuals may*



*have been paid for their services.*

*This is in contravention with Clause 2.7 of the AANA Code of Ethics, stating “Advertising or Marketing Communication shall be clearly distinguishable as such to the relevant audience”. As the AANA Code of ethics is “the overarching code setting out standards that apply to Advertising or Marketing Communications across any medium”, it is paramount that these clauses are strictly adhered to.*

*This contravention has real-world consequences. Failing to disclose a paid promotion as such may give the appearance that the marketing communication is an unpaid endorsement and increase the influence of posts made by a social media influencer. Adolescents and young people are particularly vulnerable to the effects of social media, owing to their early adoption and near ubiquitous use of different digital platforms, and being highly susceptible to peer influences including identity and self-esteem (links: <https://www.liebertpub.com/doi/10.1089/cpb.2008.0228> , <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1083-6101.2007.00367.x> , <http://journals.sagepub.com/doi/10.1177/2056305116641342> ).*

*In the case of alcohol marketing communications, prominently feature a young person or people, and in multiple posts of inappropriately young age in accordance with clause 3(b)(iii), alongside, holding, or drinking an alcoholic beverage, is likely to influence how the audience of that influencer engage with, positively perceive, and desire alcoholic beverages. Research has identified that adolescents who view alcohol-related content on their peers’ Facebook profiles find them to be believable and true sources of information (link: [https://www.jahonline.org/article/S1054-139X\(09\)00165-7/fulltext](https://www.jahonline.org/article/S1054-139X(09)00165-7/fulltext)), and that adolescents who perceive alcohol use as normative based on social media profiles are more likely to report interest in initiating alcohol consumption (links: <http://psycnet.apa.org/record/2011-11461-001>, <https://www.sciencedirect.com/science/article/abs/pii/S030646030000099X>). The non-disclosure of marketing communications as such reinforces this normative and harmful behaviour.*

*Request for action We ask that you request the advertiser to withdraw all posts depicting an adult under the age of 25 and to take steps to ensure that the advertiser does not engage social media influencers aged younger than 25 years, or who might have an audience comprising minors, to promote their products.*

*In any cases where the marketing communication was uploaded depicting a person under the age of 25, but who is over the age of 25 at the time of making or determining the complaint, we request these marketing communications are withdrawn as they breached clause 3(b)(iii) at the time of making the communication, and should never have been uploaded.*

*Given the harmful consequences of their multiple and repeated flouting of the ABAC code and irresponsible marketing of alcohol, we are concerned this complaint has not captured all examples where the advertiser and/or social media influencers have breached the ABAC code. We therefore strongly encourage additional action from ABAC to engage with the advertisers to encourage them to remove all other marketing communications that have depicted an adult under the age of 25 years of age.*



*We also ask that you request the advertisers and/or social media influencers to withdraw all posts where breaches of the AANA Code of Ethics are found to have occurred.*

## **THE ADVERTISER'S RESPONSE**

Comments which the advertiser made in response to the complainant/s regarding this advertisement include the following:

*RE: Ad Standards complaint 0409/18*

*I refer to your letter dated 11 September 2018, regarding a complaint received by Ad Standards about an Instagram post by Brisbane-based bloggers 'brisbanegirlsabroad' featuring Lion's brand XXXX Summer Bright Lager.*

*The complaint alleges that the post on the "brisbanegirlsabroad" Instagram profile breaches the AANA Advertiser Code of Ethics ("Code"). Ad Standards has requested that Lion respond to the complaint in relation to Section 2.7 of the Code as well as any other relevant advertising regulation.*

*The Instagram post referred to features on the 'brisbanegirlsabroad' Instagram profile, and depicts two women having a picnic at the top of Mount Ngungun, each holding a bottle of XXXX Summer Bright Lager. The caption of the Instagram post is: "When you lug a picnic up the mountain only for it to pour rain as soon as you sit down. We've always wanted to picnic at the top of Ngungun... didn't quite turn out how we expected – have a look at our story to see what happened straight after this picture".*

*Lion's response to the complaint regarding the brisbanegirlsabroad Instagram post is below for consideration by the Panel.*

### *Section 2.7 of the Code*

*Section 2.7 of the Code requires that Advertising or Marketing Communications shall be clearly distinguishable as such to the relevant audience.*

*When assessing whether there has been a breach of section 2.7, the first issue to consider is whether the content is, in fact, an "advertising or marketing communication". This requires consideration of:*

- a) the extent to which the marketer has a reasonable degree of control over the material; and*
- b) whether the material draws the attention of the public in a manner calculated to promote a product or service.*

*While Lion provided Hannah Lueders and Jai Dwyer ("brisbanegirlsabroad") with free*



*XXXX Summer Bright Lager product, this was not done with any stipulation or requirement that they must post comments or other content about XXXX Summer Bright Lager on their social media pages. Importantly, the content posted on the 'brisbanegirlsabroad' Instagram page was created independently by brisbanegirlsabroad and posted without Lion's knowledge, authority or approval.*

*Unlike in previous cases considered by Ad Standards, the product was not provided with any request to write a review. Instead, the product was provided to brisbanegirlsabroad with a request for them to "send us 1-2 photos of our beer for us to post on our social channels and we will tag you as the content creators". At most, Lion was hopeful that brisbanegirlsabroad would take photos featuring the product and send those photos to Lion for use on its own social media channels. Lion had no control over the content that was ultimately posted by brisbanegirlsabroad.*

*Importantly, Lion never re-posted the content (which is a further distinguishing feature from past decisions of Ad Standards concerning section 2.7).*

*The AANA Clearly Distinguishable Advertising - Best Practice Guideline provides the following example of what would not be considered an "advertising or marketing communication" for the purpose of section 2.7:*

*"FabFaces sends a celebrity a set of make-up brushes for free without any stipulation that she must post comments about the products on social media.*

*Where there is no control by FabFaces over any statements the celebrity may make then any resulting communication is not considered to be advertising or marketing material."*

*We believe the above example is consistent with the facts currently under consideration and therefore the content cannot reasonably be considered an "advertising or marketing communication" for the purpose of section 2.7.*

*Further, unlike previous cases considered by Ad Standards in the context of section 2.7, the XXXX Summer Bright Lager product is not the focus of the content. It is clear from the caption, associated hashtags and Instagram handles that the post is tourism-related. The focus of the content is scenery from a mountain in Queensland and the overall message is to encourage tourism to that particular region in Queensland. There is nothing in the caption that expressly refers to XXXX Summer Bright Lager or which otherwise draws attention to XXXX Summer Bright Lager in a manner calculated to promote it.*

*If, notwithstanding the above, the Board considers that the content is an "advertising or marketing communication", we believe the brisbanegirlsabroad post is clearly distinguishable as advertising for the following reasons:*



- the caption of the post, extracted above, reads as a piece of advertising;
- many other third party brands, including "@visitbrisbane, @visitnoosa" and "@visitqueensland" are tagged in the post. These are official tourism accounts of the cities of Brisbane and Noosa, and the state of Queensland, respectively; and
- Lion's own Instagram handle is tagged in the photograph of the post itself (@SummerBrightLager).

*For completeness, and in relation to the complainant's allegations that at least one of the girls in the content is under the age of 25 in breach of the ABAC Code, we note that both girls are aged 25 years or over. Lion does not believe that the the content posted on the 'brisbanegirlsabroad' Instagram page breaches the ABAC Code and is addressing this with the ABAC Board separately.*

*In view of the above, we consider the complaint should be dismissed. Lion continues to take its responsibilities as an advertiser, and compliance with the Code, very seriously.*

*Thank you for taking the time to consider our response. We look forward to receiving Ad Standards' comments in relation to this matter.*

## **THE DETERMINATION**

The Ad Standards Community Panel (the Panel) considered whether this advertisement breaches Section 2 of the AANA Code of Ethics (the Code).

The Panel noted the complainant's concerns that the advertisement is not clearly identified as advertising material and is therefore misleading.

The Panel viewed the advertisement and noted the advertiser's response.

The Panel noted that this Instagram post appeared on the account of 'brisbanegirlsabroad' and depicts two women having a picnic each holding a bottle of XXXX Summer Bright Lager. The post used a number of hashtags including '#summerbright' and the account '@SummerBrightLager' is tagged in the photo itself.

The Panel considered whether the advertisement complied with Section 2.7 of the Code which requires that "Advertising or Marketing Communications shall be clearly distinguishable as such to the relevant audience."

The Panel noted that it must consider two matters:

- Does the material constitute an 'advertising or marketing communication', and if so
- Is the advertising material clearly distinguishable as such to the relevant audience?

With respect to the first question, the Panel noted the definition of advertising in the



Code means:

“any material which is published or broadcast using any Medium or any activity which is undertaken by, or on behalf of an advertiser or marketer,

- over which the advertiser or marketer has a reasonable degree of control, and
- that draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct”.

With regards to whether or not the post was promoting a product, the Panel considered the advertiser’s response that the focus of the post was not on their brand, and that it was clearly a post that focussed on travel. The Panel considered however that the clear placement of the product in the advertisement and the tagging of the brand in the image did amount to an image which would draw the attention of the public in a manner designed to promote Summer Bright Lager.

The Panel then considered whether the material was published ‘on behalf of an advertiser; and whether the advertiser ‘had a reasonable degree of control’ over the published material.

The Panel noted the advertiser’s response that “While Lion provided Hannah Lueders and Jai Dwyer (“brisbanegirlsabroad”) with free XXXX Summer Bright lager product, this was not done with any stipulation or requirement that they must post comments or other content about XXXX Summer Bright Lager on their social media pages. Importantly, the content posted on the 'brisbanegirlsabroad' Instagram page was created independently by brisbanegirlsabroad and posted without Lion's knowledge, authority or approval.”

The advertiser further commented that the product was provided to brisbanegirlsabroad with a request for them to “send us 1-2 photos of our beer for us to post on our social channels and we will tag you as the content creators. At most, Lion was hopeful that brisbanegirlsabroad would take photos featuring the product and send those photos to Lion for use on its own social media channels. Lion had no control over the content that was ultimately posted by brisbanegirlsabroad.”

The Panel considered that the material complained about was created by the brisbanegirlsabroad and published by brisbanegirlsabroad, and unlike previous cases considered by Ad Standards (such as 0193/18), the product was not provided with any request to write a review. ‘

The Panel considered that in the current post, there was no formal agreement in place between the advertiser and the influencers and it was unclear if the advertiser would have the power to ask the influencers to remove the post.

The Panel noted that in the Guidance Note for Section 2.7 there is the following ‘Fab Faces’ example:





“Scenario: FabFaces sends a celebrity a set of make-up brushes for free without any stipulation that she must post comments about the products on social media.

Guidance: Where there is no control by FabFaces over any statements the celebrity may make then any resulting communication is unlikely to be considered advertising or marketing communication”

The minority of the Panel considered that the provision of the product and interaction between the influencers and the brand specifically requesting the publisher to send photos for posting by the brand was sufficient to strongly influence the messages posted by the influencers and amounted to a ‘reasonable degree of control’ over the material.

The majority of the Panel however considered that the example identified above from the Guidance Note provides an indication of the intention behind the provision of the Code.

The majority of the Panel considered that the interaction of the advertiser supplying product and asking for photos for posting is an indication that the advertiser would like promotion of the product. However in the current case, the brisbanegirlsabroad unilaterally posting images did not amount to control by the advertiser of the material published. The majority of the Panel considered that this particular interaction did not demonstrate that Lion has reasonable control over whether any material would be published or over the content of that material.

The majority of the Panel considered that while the advertiser did have some influence over the creation of the content as it supplied the product and suggested images could be taken, the material published in this instance did not amount to material that the advertiser had a reasonable degree of control over.

In the Panel’s view the advertisement does not meet the criteria of advertising and marketing communications, and therefore Section 2.7 of the Code is not applicable.

Determining that the Code is not applicable, the Panel dismissed the complaint.



