

ABAC

ABAC Complaints Panel Determination No: 60 & 63/14

Complaints by Amelia de Bie Product: Jelly Shots Marketer: Jelly Time

Professor The Hon Michael Lavarch – Chief Adjudicator
Debra Richards – Member
Professor Richard Mattick – Member

18 September 2014

Introduction

1. This determination by the ABAC Adjudication Panel (“The Panel”) concerns marketing communications for Jelly Shots produced on behalf of Jelly Time (“the Marketer”) and arises from two complaints received on 25 August and 1 September 2014 from a single complainant.

The Quasi-Regulatory System

2. Alcohol marketing in Australia is subject to an amalgam of laws and codes of practice which regulate and guide the content and, to some extent, the placement of marketing communications. 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 generic code (the AANA Advertiser Code of Ethics) with a corresponding public complaint mechanism operated by the Advertising Standards Bureau (ASB);
 - an alcohol specific code (the ABAC Responsible Alcohol Marketing Code “ABAC Code”) and complaints mechanism established under the ABAC Scheme;
 - certain broadcast codes, notably the Commercial Television Industry Code of Practice (CTICP) which restricts when direct advertisements for alcoholic drinks may be broadcast; and
 - The Outdoor Media Association Code of Ethics which includes provisions about Billboard advertising.
3. The complaints systems operated under the ABAC scheme and the ASB are separate but inter-related in some respects. Firstly, for ease of public access, the ASB provides a common entry point for complaints about alcohol marketing. Upon receipt, the ASB forwards a copy of the complaint to the Chief Adjudicator of the ABAC Panel.

4. The Chief Adjudicator and the ASB independently assess the complaint as to whether the complaint raises issues under the ABAC Code, AANA Code of Ethics or both Codes. If the Chief Adjudicator decides that the complaint raises solely issues under the Code of Ethics, then it is not dealt with by the ABAC Panel. If the complaint raises issues under the ABAC Code, it will be dealt with by the ABAC Panel. If the complaint raises issues under both the ABAC Code and the Code of Ethics, then the ABAC Panel will deal with the complaint in relation to the ABAC issues, while the ASB will deal with the Code of Ethics issues.
5. The complaints raise concerns under the ABAC Code and accordingly are within the Panel's jurisdiction.

The Complaint Timeline

6. The complaints were received by the ABAC Scheme on 25 August and 1 September 2014.
7. 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 complaints have been determined within the 30 day timeframe.

Pre-vetting Clearance

8. The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed marketing communications against the ABAC prior to publication or broadcast. The Marketer is not a signatory to the ABAC Scheme and pre-vetting approval was not obtained for the advertisement.

The Marketing Communications

Outdoor

9. The marketing communication was a poster affixed to the door of a bottle shop. It features an image of a young woman with long blonde hair holding two of the red jelly shot products in her right hand. She is shown smiling and with a red jelly shot in her mouth.
10. To the right of the image is the product logo which includes the words "Jelly Shots" in a stylized red bubble style print.
11. Below the image is the text "NOW AVAILABLE!", a drawn tear drop shape and an image of three red jelly shots above the text "JELLY TIME TM JELLYTIME.COM.AU"

Digital

12. The home page of the website "jellytime.com.au" features an image of the same young blonde woman featured on the outdoor poster. In this picture she is holding a red jelly shot in her left hand and has a red jelly shot in her partly open mouth. The product logo described in paragraph 10 is superimposed on the bottom right side of the image.

The Complaints

13. The complainant is concerned that the outdoor and digital marketing communications are targeting people under the age of 18 and in particular:
- The young woman in the poster and on the website appears to be much younger than 18 and both marketing communications are targeting young people;
 - It is unclear in the poster that it is an alcohol product being marketed and could be mistaken for confectionary as there is nothing on the poster to make it clear that the product is only for those 18 years and older.

The Code

14. Part 3 of the ABAC Responsible Alcohol Marketing Code (“Code”) provides that:
- (b) A Marketing Communication must NOT:
- (i) have Strong or Evident Appeal to Minors;
 - (ii) depict a person who is or appears to be a Minor unless they are shown in an incidental role in a natural situation (for example, a family socialising responsibly) and where there is no implication they will consume or serve alcohol; *or*
 - (iii) depict an Adult who is under 25 years of Age and appears to be an Adult unless:
 - A they are not visually prominent; *or*
 - B they are not a paid model or actor and are shown in a Marketing Communication that has been placed within an Age Restricted Environment.
15. A Definition in Part 5 of the ABAC provides that Strong or Evident Appeal to Minors means:
- (i) likely to appeal strongly to Minors;
 - (ii) specifically targeted at Minors;
 - (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
 - (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; *or*

- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

A 'minor' means a person who is under 18 years of age and therefore not legally permitted to purchase an alcohol beverage in Australia

The Marketer's Comments

16. The Marketer responded to the first complaint and questions posed by the Panel on 1 September 2014 advising that the advertisement has now been removed and will not be used in the future in an effort to comply.
17. The Marketer responded to the second complaint and questions posed by the Panel on 5 September 2014 advising that the image would be removed from the website that day.

The Panel's View

18. This complaint relates primarily to an image of a young female used in outdoor and digital marketing communications for an alcoholic jelly product. The complainant is concerned that the female appears to be much younger than 18 and that the marketing is therefore targeting minors. In addition the complainant is concerned that the outdoor poster does not make it clear that the product is alcoholic and only for those over 18 years of age and accordingly the product could be mistaken for confectionary.
19. A combination of the Code provisions and definitions mean that for current purposes a marketing communication must not:
- depict a minor under the age of 18; or
 - depict an adult under the age of 25; or
 - depict an adult 25 years or older if that adult does not appear to be an adult.
20. The Marketer was asked explicitly by the Panel whether the woman featured on both the poster and the website was a minor or, if not under the age of 18 was under the age of 25. The only response of the Marketer was to advise that the poster and the website image was being removed. Hence, the Panel does not have before it information on the actual age of the model used in the marketing.
21. In these circumstances, the Panel can only make an assessment based on the apparent age of the model. In the Panel's opinion, the model certainly appears to be under the age of 25 and the complainant's view that the model may be under the age of 18 is also quite conceivable.
22. Over and above the issue of the age of the model, the marketing communications, and in particular the poster uses images which are likely to create confusion with confectionary, in breach of Part 3 (b) of the Code dealing with strong or evident appeal to minors.

23. It is noted that the Marketer has withdrawn the images featuring the young woman. While this is welcomed, it would be a better outcome if the images had not been used in the first place. The Panel strongly recommends that the Marketer becomes a signatory to the ABAC Scheme and accesses the pre-vetting service to test its marketing communications against Code standards prior to their use.
24. Accordingly, the complaints are upheld.