



ABAC Adjudication Panel Determination No. 27/18

Product: Moon Dog
Company: Moon Dog Brewery
Media: Point of Sale
Complainant: Confidential
Date of decision: 22 March 2018
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns a point of sale promotion and giveaway by Moon Dog Brewery (“the Company”) and arises from a complaint received 19 February 2018.
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”) – 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 – 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, the content of alcohol 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, the Advertising Standards Bureau (ASB) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the ASB, 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 the ASB 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 ASB 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 19 February 2018.
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 determined within 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 point of sale promotion for a giveaway with purchase of Moon Dog beer at IGA Liquor, Northcote (refer image below). The promotion comprises a small blow up swimming pool with a blow up palm tree in the middle that is filled with Moon Dog branded aqua coloured frisbees on top of a stack of cartons containing cans of Moon Dog beer with a poster stating "Buy a beer can 10-pack", "Get a rad Frisbee for free", "\$27.99" together with an image of the carton, a can and a hand throwing a Frisbee.



The Complaints

11. The complainant objects to the marketing as the free Frisbee and the inflatable pool toy display is intended to appeal to children.

The ABAC Code

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

(b)(i) have Strong or Evident Appeal to Minors;

13. Definition in Part 5 of the ABAC provides:

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 Company's Response

14. The Company responded to the complaint by letter dated 4 March 2018. The principal points made by the Company were:

- a) Moon Dog is a craft beer brewer based in Abbotsford, Victoria. Moon Dog has grown from humble beginnings in around 2011 to a significant production brewery and retail hospitality business, employing over 40 staff throughout Australia and brewing in excess of 1.4 million litres of beer annually. We at Moon Dog understand and take seriously our responsibility to ensure the marketing of our beer to the public is undertaken in an appropriate and socially responsible way. The ABAC Responsible Alcohol Marketing Code (**Code**), and the opportunity for members of the public to make anonymous complaints in relation to perceived issues with alcohol marketing, and to have those complaints independently adjudicated against the standards set down by the Code, is an important mechanism to ensure that alcohol advertising and marketing meets with community standards and expectations.
- b) This notwithstanding, Moon Dog is not itself a signatory to the ABAC scheme. Moon Dog's willingness to voluntarily participate in this process

and provide a detailed response to the matters raised in the complaint should be taken as representative of Moon Dog's respect for the Code and the ABAC scheme generally. We at Moon Dog pride ourselves on being responsible participants in the alcohol industry.

- c) Since late 2017, Moon Dog has been running an in-store promotion at a number of licensed retail liquor premises, whereby each person who purchases a 10-pack of 'Beer Can' from those premises is able to receive a free Moon Dog-branded Frisbee (**the promotion**). The promotion is presented at the liquor retail premises by the use of an inflatable palm tree drink holder containing the promotional Frisbees, atop cases of Beer Can, and accompanied by a sign with words to the effect of 'Buy a Beer Can 10-pack, get a rad Frisbee free!'. Northcote IGA + Liquor, the premises from where the complaint originated, was one such liquor retailer that partnered with Moon Dog in respect of this promotion.
- d) It is accepted that the promotion constitutes a Marketing Communication as defined in the Code.
- e) Unfortunately, neither the complaint nor the question posed in your letter particularises which of the abovementioned features, which could give rise to 'Strong or Evident Appeal to Minors', is asserted as being present with respect to the promotion. We assume, however, that the concerns underpinning the complaint may relate to one or more of the use of a 'brightly coloured inflatable children's pool with palm tree', the Frisbee giveaway and the phrase 'get a rad Frisbee'.
- f) Assessment of the promotion's compliance with the Code must be undertaken by reference to the probable understanding of a reasonable person to whom the material is likely to be communicated, and taking its content as a whole. However, for convenience, we have addressed these three aspects of the promotion separately.
- g) 1. *'Brightly coloured inflatable children's pool with palm tree'* - The starting point is to consider the actual promotion. As you will note from the adjacent image, the promotion does not in fact incorporate an 'inflatable children's pool'. The inflatable component of the promotion is an *'Inflatable Palm Tree Cooler 66cm Tropical Hawaiian Luau Beach Party Decoration'* (https://www.alibaba.com/product-detail/Inflatable-Palm-Tree-Cooler-66cm-Tropical_60594622715.html). The use of a tropical drinks cooler is entirely consistent with the promotion being directed to adults of legal drinking age. While we would not accept any suggestion that the use of an inflatable children's pool could itself have caused the promotion to contravene the Code, there is in any case no such aspect to the promotion.
- h) 2. *The Frisbee giveaway* - It appears that underpinning the complaint is

an assumption that Frisbees are toys for use primarily by Minors, and that the use of the Moon Dog logo on the Frisbees can therefore be said to contravene the Code. We consider that assumption to be incorrect. In 1957, the first commercialised versions of the aerodynamic plastic disc products that we now know as the Frisbee went into production as the 'Flying Saucer'. The term 'Frisbee' can be traced back to the Frisbie Pie Company and the practice of university students throwing Frisbie Pie Company's empty pie tins to each other, 'yelling "Frisbie!" as they let go'. (<http://www.history.co.uk/this-day-in-history/23-january/first-frisbees-produced>). Since those beginnings, Frisbee has grown to become immensely popular, spawning a range of games and sports enjoyed by people of all ages. 'Ultimate Frisbee' is a recognised professional sport, with an international governing body, WFDF, representing 59 member associations in 56 countries, and which is played by an estimated 7 million people around the world. It is considered to be one of the fastest growing team sports in the USA. (<https://www.usultimate.org/about/ultimate/>). Australia is ranked by WFDF amongst the top five countries worldwide in pro-Ultimate Frisbee. Other popular flying disc-based sports include Goaltimate, Hot box, Mini ultimate, D-Hoops, Schtick disc, Kan-jam, Disc golf, Urban disc golf, Freestyle, Guts frisbee, Double Disc Court and Canine Disc (https://en.wikipedia.org/wiki/Flying_disc_games). It is uncontroversial that Minors play with Frisbees. Minors also kick AFL footballs and soccer balls in the park, play cricket and tennis, do athletics and otherwise participate in a wide range of recreational games and sports. Minors might even be said to participate in recreational sports at a higher rate than adults. That does not mean that sporting paraphernalia associated with those sports is 'for use primarily by Minors'. It is also notable that the specific Frisbees given away as part of the promotion have no characteristics which would make them particularly attractive to Minors. In particular, there are no 'animations or cartoon characters' featured in the design.

- i) 3. *The phrase 'get a rad Frisbee'* - The use of the descriptor 'rad' (short for 'radical'), when applied to the promotional Frisbee, is not intended to, and it is submitted would not, appeal to Minors. Most people under the age of 18 would not associate, positively or otherwise, with the rather dated 1990s term 'rad' (see also: 'fly', 'dope', 'da bomb', 'psych', 'cowabunga'). Anyone of an age that would allow them to recall when 'rad' was a cool and popular word is now well over 18. It would also, we submit, be dangerous to characterise (without evidence) certain descriptive words as themselves being particularly attractive to, or specifically targeted at, Minors, with the effect that the use of a particular word might cause an advertisement to infringe section 3(b) of the Code.

- j) In addition to the above matters, the context of the promotion is that it takes place entirely within the separate licensed section of the IGA premises, where unaccompanied Minors are not permitted. Further, and importantly, the only way to acquire one of the promotional Frisbees is to purchase a 10-pack of Beer Can. Only adults of lawful drinking age are therefore able to participate in the promotion and procure the Frisbees.
- k) While acknowledging that the actual intention behind the promotion is not material to consideration of whether the promotion is consistent with the requirements of the Code, it should be made abundantly clear that there was no intention whatsoever on Moon Dog's behalf for the promotion to target, or be particularly attractive to, persons under the age of 18. The use of an inflatable drink holder (not children's pool) and palm tree to hold the promotional Frisbees is part of a broader Moon Dog campaign associating Moon Dog with tropical themes, summer, swimming, beaches and related activities. Previous promotional giveaways have included Moon Dog branded thongs, and the Moon Dog brewery bar in Abbotsford itself has from time to time been filled with sand (and inflatable pools) as part of a tropical/summer theme. The Moon Dog brewery bar features actual palm trees. The promotion is consistent with this thematic branding, rather than being targeted at Minors. There is in any case no evidence that Minors are more particularly attracted to palm trees or inflatable drink holders than any other age group.
- l) Frisbees are recreational and sporting items commonly used by persons of all ages, not only (or even particularly) persons aged under 18 years old. A Frisbee is not an item 'for use primarily by minors', nor does it have 'a particular attractiveness for a minor beyond the general attractiveness it has for an adult' The promotional Frisbee itself is simply printed with the Moon Dog logo. It does not have any associated imagery (such as cartoon characters) that could be said to have a strong or evident appeal to Minors. Use of the phrase 'rad frisbee' is not intended to be attractive to Minors, nor would a reasonable person consider it to appeal strongly, or have a particular attractiveness, to Minors.
- m) The promotion is situated solely on licensed retail liquor premises, where one would not expect to find minors. Certainly, this would not be the location one would choose for a promotion specifically targeted at Minors. The situational context in which the promotion took place makes it unlikely to appeal strongly to Minors.

- n) The promotional Frisbee was not in fact made available to Minors. Frisbees were given away only in conjunction with the purchase of a 10-pack of Beer Can by a person over the age of 18. We do not understand there to be any allegation that the operator of the licensed premises has breached its obligations with respect to the sale of liquor to minors, which we note would be a very serious allegation that should not be made lightly or in the absence of supporting evidence.

The Panel's View

Introduction

- 15. Moon Dog Brewery is a producer of craft beers located in Abbotsford, Melbourne. Established by two brothers and a third partner in 2011, the Company produces a range of what might be called experimental beers. The Company's products feature names and labels with a quirky distinctive style.
- 16. The Company explains that since late 2017, it has been operating a promotional activity with participating alcohol retailers including the IGA store in Northcote Victoria. The promotional activity features an inflatable palm tree drink cooler and a product branded Frisbee. It is this promotional material that the complainant contends has appeal to children in breach of an ABAC standard.
- 17. Moon Dog is not a signatory to the ABAC scheme and hence is not contractually bound to comply with Panel determinations. That said, the Company has stated its commitment to good practice in alcohol marketing and has fully cooperated with the Panel's processes to enable the determination to be made.
- 18. The promotional activity consists of the point of sale installation of the inflatable palm tree, with Frisbees sitting in the drink cooler section of the installation. The issue is whether the installation can be said to have strong or evident appeal to under 18 year olds.

Strong or evident appeal to minors

- 19. Section 3(b) of the Code provides that a marketing communication must not have strong or evident appeal to minors. This term is further defined to mean:
 - a) Likely to appeal strongly to minors;
 - b) Specifically targeted at minors;
 - c) Having a particular attractiveness for a minor beyond the general attractiveness it has for an adult;
 - d) Using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to minors; or

- e) Using brand identification, including logos, on clothing, toys or other merchandise for use primarily by minors.
20. In assessing if a marketing item has breached an ABAC standard, the Panel is to have regard to the probable understanding of the item by a reasonable person. The reference to a reasonable person means that the benchmark is the life experiences, opinions, attitudes and values held commonly in a majority of the community.
21. The point of sale installation consisted of an inflatable palm tree drink cooler resting on cartons of the Company's 'beer can' product. In the cooler section of the installation are a number of the product branded Frisbes. The installation is accompanied with a sign identifying that a 'rad Frisbee' was 'free' with the purchase of a carton of the product.
22. The Company contends that the installation is not strongly or evidently appealing to under 18 year olds. It is argued that the promotion associates the brand with tropical themes of summer, swimming, beaches and related activities. It is pointed out that the installation was within a separate licensed section of the IGA store where unaccompanied minors are not permitted. Further, it is argued that a Frisbee is not a child's toy, but sports equipment used more by adults than minors.
23. The Panel believes that the installation is in breach of the section 3(b) standard. In reaching this decision, the Panel has noted:
- a) The intent of the marketer in its promotion is not the test but rather how the promotion would be understood by a reasonable person;
 - b) The inflatable palm tree is reminiscent of children's toys and would very likely attract the attention of children;
 - c) It is brightly coloured and eye-catching in a manner likely to appeal to children;
 - d) While such items would not only be used for children's parties, they would often be used as a party novelty and the novelty value of the item could reasonably be expected to be appealing to children;
 - e) The type of Frisbee used in the installation is not the style of Frisbee used in sport such as 'Extreme Frisbee';
 - f) The placement of the Frisbee within the installation would add to the appeal to children; and
 - g) While no one of these elements alone would mean that the installation was strongly or evidently appealing to children, the combination of all of the

elements means that a reasonable person would likely conclude that the installation was in breach of the ABAC standard.

24. Accordingly, the complaint is upheld.