



## ABAC Adjudication Panel Determination No. 118/19

**Product:** Bundaberg Rum  
**Company:** Diageo  
**Media:** Packaging/Brand Extension  
**Date of decision:** 20 December 2019  
**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 Bundaberg Rum branding on Pauls Egg Nog by Diageo (“the Company”) and arises from a complaint received 4 December 2019.
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 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 the other codes as well as meeting the standards contained in the ABAC.
  4. For ease of public access, Ad Standards (AS) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by AS, 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 AS 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 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 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 has been determined within this timeframe.
8. 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 obtained for the packaging.

## The Marketing Communication

### 9. An image of the Bundaberg Rum branded Egg Nog.



## The Complaint

### 10. The complainant is concerned that:

- egg nog is a flavoured milk, which is a soft drink that appeals significantly to minors;
- Paul's has many lines specifically for minors;
- the placement of Bundaberg Rum's brand advertising within this category could be seen by minors and create an appeal to minors; and
- I don't think Bundaberg should be advertising their rum on soft drink packaging.

## The ABAC Code

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

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

12. Definition in Part 6 of the ABAC provides:

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

**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.

## The Company's Response

13. The Company responded to the complaint by letter dated 13 December 2019. The principal points made by the Company were:

- We wish to confirm our longstanding support for and commitment to upholding the ABAC Code as well as our best practice global marketing standards, the Diageo Marketing Code (DMC).
- Paul's Bundaberg Rum Egg Nog is the classic Paul's egg nog recipe, flavoured with Bundaberg Rum. This product is a decadent and rich egg nog designed for adults as a premium Christmas dessert. The product comes in a 1000ml carton.
- Paul's Bundaberg Rum Egg Nog was originally released nationally in December 2018 for a limited time, as part of a premium adult dessert range for the festive season. The larger range also included a Pauls Bundaberg Rum Premium Rumball Custard and Pauls Bundaberg Rum Premium Vanilla Rum Custard, which were both available in 600g pots. Lactalis and Bundaberg Rum have rereleased both the Egg Nog and Vanilla Rum Custard products for the 2019 Christmas Season. These products are currently available nationally in Woolworths, Coles and independent grocers.
- Lactalis have confirmed to Diageo that the product contains 0.185% alcohol per 1000ml; affirming it contains no more than 0.5% alcohol by volume, in compliance with the Australia New Zealand Food Standard Code and the State and Territory based legislation. The packaging on the product contains

a clearly visible statement calling this out. To put this in perspective, you would need to consume 7 litres of the egg nog to register one standard drink.

- The Bundaberg Rum branding on the product was authorised by Diageo. The relationship is managed by licensing agency, Asembl. Diageo and Lactilis entered into a licensing agreement whereby Diageo (Licensor) gave Lactilis (Licensee) permission to use the BUNDABERG, BUNDABERG RUM, BEAR DEVICE AND BUNDABERG BEAR & RUM DEVICE trademarks to create this product in exchange for a Royalty fee. The concept, packaging and key visual were all developed in partnership between Diageo and Lactilis and internally approved by both parties.
- Diageo does not believe that the product in question breaches Part 3(b)(i) of the Code as the product was not developed for or targeted to consumers under the legal purchasing age. This product has been designed as an adult dessert treat. Whilst the product is considered a flavoured milk, it is consumed in a similar way to other thick, rich desserts products such as the Baileys iced coffee. The primary consumer targets of Pauls Bundaberg Rum Egg Nog are 50-64 year olds, with the secondary consumer target being 30-49 year olds. This is aligned with Diageo's marketing code, which requires we only target consumers over the legal purchasing age. The product, key visual and packaging have all been designed for an adult market through the creation of a clean and premium packaging and supporting POS. The packaging has been designed using plain colouring and predominately features the beige/cream liquid to appeal to the older egg nog drinking demographic. The flavour profile is rich and decadent, which is appealing to an adult palate.
- The profile of the eggnog shopper is mature singles, empty nesters and retired couples. Whilst the product is available from locations where minors can purchase it, we do not consider this product appeals to minors.
- Diageo would like to reiterate that it takes the use of its trademarks very seriously, ensuring only we only enter into product collaborations that are developed for the adult market.

### **The Panel's View**

14. Egg nog is a drink which reputedly can be traced back to the 14th century English drink of posset which consisted of hot milk curdled with ale. Over time it seems that fresh eggs were added to the recipe with contemporary egg nog made with milk, cream, sugar whipped egg whites and egg yolks. The drink is commonly combined with a spirit such as brandy or rum.
15. In Australia the drink was imported along with the other various traditions of an English Christmas. In the northern hemisphere the drink is associated with winter however in Australia the drink becomes more popular in the period leading up to Christmas and hence summer. This determination concerns a version of eggnog marketed by the milk producer Pauls which features branding from the rum producer Bundaberg Rum.
16. The complainant contends that egg nog is a soft drink which appeals significantly to minors and that the placement of Bundaberg Rum logos on the packaging of a Pauls' variant of egg nog is a breach of the ABAC. The relevant ABAC provision is that alcohol marketing material must not have strong or evident appeal to minors.

17. As a starting point it should be noted that Pauls egg nog is not an alcohol beverage for the purposes of the ABAC. This is because the product does not contain the requisite amount of alcohol to volume to be regarded as an alcohol beverage. The reason the ABAC has any application to the product is because the Code takes a broad view of alcohol marketing and captures 'brand extensions' i.e. the use of alcohol product branding on non-alcohol products.
18. As has been noted previously, reaching sensible outcomes when applying the ABAC standards to branding on non-alcoholic products can be problematic given that the standards were self-evidently designed to deal with the marketing of alcoholic drinks either directly or by retailers selling alcohol.
19. It is difficult to be certain as to the appeal of egg nog as a drink as there is no readily available data as to who consumes the beverage. The Company argues that the product is designed for a target audience of 50 to 64 year olds, with a secondary market being 30 to 49 year olds. Australian Bureau Statistics data indicates that flavoured milk and milkshakes are consumed somewhat more by minors than older age groups.
20. The Panel does not believe however that the brand extension can fairly be said to have strong or evident appeal to minors. In reaching this conclusion the Panel has noted:
  - Egg nog is by tradition a product quite commonly served with a spirit such as rum and it would not be regarded as out of the ordinary by a reasonable person that a rum flavoured eggnog product is on the market;
  - while a flavoured milk product such as a chocolate milk might be reasonably regarded as having strong appeal to minors, egg nog is not considered a drink which would have a particular attraction to minors and would more likely appeal to older adults;
  - the packaging adopts a sedate mature and traditional design and does not have eye catching features regarded as strongly appealing to minors; and
  - the alcohol branding comprises the addition of the Bundaberg Rum logo to the egg nog container and no other representations which are targeting or appealing to minors
21. The complaint is dismissed.