

ABAC Adjudication Panel Final Determination No. 116/19

Product: Poptails
Company: Honey and Cream Desserts
Media: Packaging
Date of decision: 24 December 2019
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Richard Mattick

Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) concerns marketing for Poptails by Honey and Cream Desserts (“the Company”) and arises from a complaint received 29 November 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 complaint was received on 29 November 2019. Generally, the Panel endeavours to make a decision within 30 business days of the receipt of a complaint but this timeline is not applicable due to the two-part process involved in determinations concerning product names and packaging.
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 not obtained for the marketing communication.

The Marketing Communication

9. The Facebook post referred to in the complaint together with another post that shows the product packaging are included below.



The Complaint

10. The complainant is concerned that these products can be made without alcohol and look the same as alcoholic ones. Having these at parties, engagements, weddings is problematic with children having access to alcohol products and not being able to tell which ones are safe for them to consume.

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:

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

13. The Company responded to the complaint by letter dated 13 December 2019. The principal points made by the Company were:
- My Poptails are genuine alcoholic frozen product and can be consumed as frozen or liquid form.
 - My Poptails do have similarity to Zooper Doopers but no more than a Bourbon and Coke has a similar look to Coke or a UDL Vodka Lemonade can to can of Lemonade.
 - Many things have bright colours. I am unable to change the colour of the products as each colour is based on the alcohol products and mixers that I have used.
 - I have attached a picture of the current packaging as well as a sketch up of the proposed labelling changes as listed below that I am suggesting I make to the packaging. I use a professional graphic designer for all of the design work and she is currently developing the changes.
 - Since this complaint came through, I have thought a lot about the packaging moving forward and I am more than happy to comply with the following improvements. All Alcoholic Poptails will have the following labelling on each icy pole, which are designed to be consumed in icy pole form or liquid form
 - 18+
 - How many standard drinks in each Poptail i.e 1 standard drink or ½ standard drink
 - The name of each cocktail
 - Non alcoholic Poptails will say Mocktail
 - I would also like to add that moving forward all Facebook and Instagram posts that feature advertisements of my alcoholic Poptails will now have at the beginning of each post - 18+ contains alcohol. When I boost these posts the age limit is already set to 18-65.

The Panel's View

14. Honey and Cream is the name of a Canberra based dessert shop which appears to make a range of desserts, homemade chocolates, cakes and similar items. The small business operates a Facebook page as a means of promoting its range of products. By a Facebook post dated 13 November 2019 the business announced that it had introduced 'Poptails' described as 'an exciting new range of frozen icy pop cocktails'. The post goes on to note Poptails can be made alcohol free.
15. The complainant is concerned about these new products. The main concern is that the non-alcoholic Poptails 'look completely the same as the alcoholic ones' and if a mixture of products are at a private home then children won't be 'able to tell which ones are safe to consume.'

16. It might be surmised that this is the business's first venture into producing and marketing an alcohol product. The Facebook post notes the business has obtained a liquor licence to produce the Poptails, but the regulatory regime around the marketing of alcohol in Australia is a little complex. The business is directly regulated by the Fair Trading Commission in Canberra as the government regulator of liquor licensees while the ABAC scheme applies to the marketing of the Poptails.
17. Through the contact the ABAC Executive Officer has had with the business during the complaint process, it is clear the business wants to act properly and market its alcohol product consistently with good practice standards.
18. On 23 December 2019 the Panel made a provisional determination that the product packaging was in breach of Part 3 (b) of the Code and consistent with the rules and procedures applying to decisions concerning product packaging, the Company was afforded an opportunity to seek a rehearing of the provisional determination by making further submissions. The Company has accepted the Panel's decision and the Panel has proceeded to make a final determination of the complaint.
19. The concern with the Poptails essentially goes to its packaging with the potential for there to be confusion between the non-alcoholic and alcoholic versions of the product. In terms of the ABAC the issue is whether the marketing of the Poptails (inclusive of its name and packaging):
 - has strong or evident appeal to minors (under 18 year olds); and
 - specifically, whether the packaging is employing imagery and designs that are likely to appeal strongly to minors or create confusion with confectionary or soft drinks.
20. The business owner has advised that in light of the complaint the packaging will be remodelled to make clear alcoholic Poptails by clear identification of the type of cocktail, they are only for adults and the alcohol volume to content by reference to standard drinks. The non-alcoholic versions will be labelled as a Mocktail.
21. It is implicit that the business accepts that the original design could be appealing to minors by creating confusion with a confectionery. Certainly, the representation of the products in the Facebook post did resemble icy poles which are a sweet associated with and reasonably taken to be consumed heavily by children.
22. While the willingness of the business to be responsive and make changes to the packaging is welcomed, the Panel's task is to assess the packaging as currently promoted. On the available information it does seem the product packaging would be inconsistent with Part 3 (b)(i) of the Code through:
 - the packaging being similar to that commonly used for icy poles popular with children;
 - the failure of the packaging to identify the products are alcoholic; and
 - the name, Poptail, which combined with the packaging features would add to the potential confusion with a product appealing to minors.

23. The Panel makes a final determination that the product packaging is in breach of Part 3 (b) of the Code.