



ABAC Adjudication Panel Determination No. 10/20

Product: Mother's Milk Gin
Company: Mother's Milk Gin
Media: Name, Packaging & Digital (Website)
Date of decision: 17 February 2020
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 packaging and digital marketing by Mother's Milk Gin ("the Company") and arises from a complaint received 28 January 2020.
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 Code”) – 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 and Policies – which place 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 other codes as well as meeting the standards contained in the ABAC.
 4. For ease of public access, Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the Ad Standards, 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 Ad Standards 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 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 28 January 2020.
8. 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 was completed in 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 the product name, packaging and website (<https://www.mothersmilkgin.com.au/>) for Mother’s Milk Gin.



The Complaint

11. The complainant objects to the marketing as:
 - the product's name, Mother's Milk Gin, is inappropriate and irresponsible as it associates an alcohol product with breastfeeding and fails to positively support breastfeeding; and
 - there is no age gate or reference to liquor licence on the product's website.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (a)(ii) show (visibly, audibly or by direct implication) or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage
 - (b)(iv) be directed at Minors through a breach of any of the Placement Rules
13. Part 4 of the ABAC Code includes definitions including:

A breach of this Code that is reasonably unforeseeable by or outside the reasonable control of the Marketer or their agency will be classified as a no fault breach.
14. Part 6 of the ABAC Code provides:

Placement Rules means:

 - (i) A Marketing Communication must comply with codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Alcohol Guidelines).

- (ii) A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.
- (iii) 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 (based on reliable, up to date audience composition data, if such data is available).
- (iv) A Marketing Communication must not be placed with programs or content primarily aimed at Minors.
- (v) A Marketing Communication must not be sent to a Minor via electronic direct mail (except where the mail is sent to a Minor due to a Minor providing an incorrect date of birth or age).

The Company's Response

15. The Company responded to the complaint by email dated 4 February 2020. The principal points made by the Company were:
- a) When we created Mother's Milk Gin we engaged a Business Manager from The Craft and Co to assist us in not only developing our business model, but also meeting our obligations to trade. Our business name was approved and registered with ASIC and the Victorian Commission for Gambling and Liquor Regulation who approved our initial licence to trade. We were not aware of the pre-vetting service for content marketing and thus, did not seek it.
 - b) Mother's Milk was not sold before 2009. We launched in 2019.
 - c) We experienced a critical website failure on the 22nd of January which crashed our shopfront and, removed the age gate. The age gate has now been reinstated and is operational.
 - d) Our liquor licence appears on every product we sell. We also distill under licence at The Craft and Co which is a licenced premise. Our stock is stored in a licenced bonded warehouse also.
 - e) We named our business Mother's Milk Gin following the deaths of mine and Glenn's mothers. My mother was Irish and always said that gin went down 'like mother's milk'. In Irish culture, mother's milk is seen as the nectar of the gods which has a religious connotation meaning it is blessed.
 - f) At no point are we referring to breast milk or breast feeding - this business name is a tribute to our late mother's both of who used this phrase so as a result, we named the business as a tribute to their memories. We are also bound by strict liquor licencing regulations to not promote any unhealthy alcohol consumption activity either in sale or marketing and, we abide by these requirements at all times.

The Panel's View

Introduction

16. Mothers Milk Gin is the brand name of a boutique gin produced by the Company under license from the distillery operated by a second company, The Craft and Co. The Company advises that its product is new to the Australian market having been launched in 2019. Australian made specialty gins are having somewhat of a renaissance in recent years with a large number of new products entering the market.
17. The Company explains that it took advice as to its regulatory obligations from The Craft and Co and this advice does not seem to have captured the ABAC Scheme or at least the pre vetting of marketing communications against standards contained in the Code. The ABAC obligations are part of a relatively complex system of regulatory obligations operating in the alcohol industry in relation to marketing. While the Company is not a signatory to the ABAC Scheme, it has fully cooperated with the complaint process and has indicated its desire to trade consistently with good standards of marketing practice.
18. The complainant raises two concerns about the Company's marketing. Firstly, it is argued that the product name and labelling is inappropriate as 'mother's milk' is a colloquial term for breast feeding and having an alcoholic beverage of the same name is irresponsible. The second concern is that the Company's website failed to be age gated to restrict access by under 18 year olds. Each of these issues will be examined in turn.

Brand Name and Packaging

19. Part 3 a(ii) of the Code provides that an alcohol marketing communication (which includes a product name and packaging) must not encourage irresponsible or offensive behaviour that is related to alcohol use. It should be noted that this is not a freestanding requirement about offensive marketing such as the generic standards contained in AANA Code of Ethics but relates to the encouraging of offensive or irresponsible behaviour related to alcohol e.g. encouraging loutish drunken behaviour.
20. The complainant takes the product name to be a play on breast feeding. The Company denies there was any intention to do this and explains that the name relates to the mothers of both founders of the Company who apparently used the reference to mother's milk when referring to gin.
21. Interestingly there is a historical linkage to gin and its consumption by 'mothers'. Gin was a very popular beverage in England from the time of the Glorious Revolution to about 1750. Along with beer, gin was consumed in great quantities by the poor of England at a time when water supply was often highly polluted and alcohol was considered a safer and sterile fluid to drink. This led to gin being dubbed 'mother's ruin' due to the number of women believed to be intoxicated by the beverage. The devastating impact of gin consumption on the supposed morality and welfare of women being popularised through the artwork of William Hogarth of London's infamous Gin Lane.

22. While this background is a passing side note, the test to be applied by the Panel in assessing the consistency of a marketing communication with a Code standard is the probable understanding of the marketing item by a reasonable person. This means that the life experiences, values and opinions common in a majority of the community is the benchmark.
23. The Panel does not believe the product name or packaging is in breach of the Part 3 a (ii) standard. The Panel noted:
- while mother's milk literally means breast milk, the expression 'mother's milk' has a wider colloquial usage which depends on context, for instance the name is used in a diverse range of settings such as:
 - the name of a coffee shop in Adelaide;
 - a character name in an Amazon TV series 'The Boys';
 - a record album name from the band Red Hot Chili Peppers; and
 - the line "Gin was mother's milk to her" used in George Bernard Shaw's Pygmalion (Act 3, Eliza about her aunt) and the movie adaptation, My Fair Lady;
 - more broadly it can be taken to mean something that is absolutely necessary;
 - the use of the name on the product is clearly established as relating to a type of gin and wouldn't be reasonably confused with breast milk or the practice of breast feeding; and
 - a reasonable person would not take the packaging as either demeaning the practice of breast feeding or encouraging irresponsible behaviour such as consuming alcohol while breast feeding.

Age Gating on the Company Website

24. The ABAC contains rules relating to the placement of alcohol marketing which aim to direct marketing towards adults and away from minors. Placement Rule 2 requires alcohol companies to apply available age restriction controls when conveying marketing materials via digital and online platforms. This means an alcohol company website is required to use age restriction controls pursuant to Placement Rule 2.
25. It appears the Company accepts that at the time the complainant accessed its site, age restriction controls were not operating. The Company explains this was because 'a critical website failure' occurred and an age gate on the site was removed. The age gate is now in place.
26. Clearly the complainant's argument that there was no age restriction control is therefore established. The question is whether this breach should be regarded as a 'no fault breach' because of the 'critical website failure'.
27. The finding of a no fault breach does not invalidate the finding that a complaint is upheld nor the obligation of a company to act to comply with the Code requirement.

The onus of establishing that the breach was unforeseeable or outside the reasonable control of the marketer rests with the marketer. This requires more than merely asserting a technical issue arose with the Company website. Some evidence of the occurrence of the fault will be needed. In the absence of any further information, the Panel does not believe it can make a no fault ruling in this case.

28. Accordingly, the complaint is dismissed in relation to the product name and packaging and upheld in relation to the application of age restriction controls on the Company website as at the time of the complaint.