



## ABAC Adjudication Panel Final Determination No. 169/20

**Product:** Baileys Original Irish Cream Liqueur Milk Glass Gift Pack  
**Company:** Diageo  
**Media:** Packaging  
**Date of decision:** 8 January 2020  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Jeanne Strachan  
Professor Richard Mattick

### Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) concerns the packaging of Baileys Original Irish Cream Liqueur Milk Glass Gift Pack (“the Product”) by Diageo (“the Company”) and arises from a complaint received on 19 November 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 19 November 2020.
8. 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 packaging.

## 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. ABAC pre-vetting approval was obtained for the Product's packaging (Approval Number 18008)

## The Marketing Communication

10. The following product packaging is referred to in the complaint.





## The Complaint

11. The complainant objects to the marketing as follows:
  - The Bailey's Christmas gift box seems to appeal to minors via 'dessert' illustrations, and the usage of mini milk bottles and paper straws.
  - The reference to milk, with images of candy and dessert sweets heavily appeals to minors, coupled with aesthetic illustrations such as sprinkles and cream. The word 'YUM' is also prominently displayed on the front of packaging.

## 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. Definitions in Part 6 of the ABAC provide:

**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 emailed on 27 November 2020 and also provided additional submissions in response to a provisional determination on 7 January 2020. The principal points made by the Company across both submissions were:

- Thank you for inviting us to provide comments for the Panel's consideration in determining this complaint. Diageo takes an industry leading approach to alcohol advertising, which complies with both local and global policies and practices. We wish to confirm our longstanding support and commitment to upholding the ABAC Responsible Alcohol Marketing Code (ABAC), as well as our best-practice global marketing standards, the Diageo Marketing Code (DMC).
- Baileys is a known alcohol brand that has always been a champion of playful modern, indulgent and delicious adult treating. Baileys highlights various serves and moments that build a world of treating. The brand is known for flavour innovation, limited edition offerings, gift packs and partnerships to demonstrate the versatile treating moments that Baileys can offer.
- The Baileys product range is developed following strict adherence to the Diageo Marketing Code, whereby our product design and packaging development is underpinned by the commitment to always design and direct

our products to adults over the Legal Purchasing Age (LPA). The Baileys Original Irish Cream Liqueur Milk Glass Gift Pack – 700ml is a special Baileys Christmas Pack, intended to be gifted as the perfect adult treat.

- The packaging of Baileys Original Irish Cream Liqueur Milk Glass Gift Pack - 700ml received ABAC pre-vetting approval on 15 December 2019. The approval number is 18008. The Baileys Milk Bottle Gift Packs were made available for order in Australia by retailers on 1 October 2020.
- The gift pack is intended to be gifted as an adult treat. Included in the pack is two milk bottles (glassware) and six paper straws. These are included as the gift with the bottle of Baileys Original Irish Cream Liqueur.
- We would like to outline the design rationale behind the Baileys Milk Glasses Gift Pack, highlighting the choice of specific language, colours and iconography which is designed to convey a playful attitude to adult consumers, signalling treating and indulgence to adults over the LPA, which is what Baileys is known for.
- The playful and energetic attitude on pack, illustrated through various bright and pastel colours matches our core consumer who are characterful, live in the moment and enjoy each day to the full. The use of particular colours or shades of colours cannot be said by a reasonable person to have strong or evident appeal to minors.
- In totality, the design embraces the semiotic codes of real adult treating, delivering premium cues with the quality finishes and gold foil. The sprinkles are inspired by classic dessert toppings, and these have then been abstracted to create a graphic pattern.
- The focus of the gift pack design is to communicate the versatility of the Baileys liquid, and the fact that there are a multitude of ways to consume and customize it. Desserts are one of the key serves for Baileys, enjoyed by masses globally, which is why they are depicted on the pack alongside drinks to communicate the product's versatility - from hot chocolate to a classic serve on ice, to milkshakes and ice creams. The general dessert items depicted cannot be said to be consumed primarily by minors. Rather they are desserts that are enjoyed by the general public.
- The word 'YUM' is used as a signifier of the pleasure of consuming, or at the prospect of consuming food or liquid that tastes good, in this case the deliciousness of the Baileys liquid, and to represent the informality of the Baileys tone of voice. It cannot be said that the word is more commonly used by minors than adults.

- The milk glasses are single serve portions. They are versatile in the fact that consumers can drink straight from the milk glasses (using a straw) or use them to aid the serve by pouring Baileys into a coffee, hot chocolate or over a dessert or ice cream. The serve illustrations also help to show the adult consumer how they can use the milk glasses, as it is only possible to drink from them directly through a straw. It is important to note that serve illustrations are a key element of the Baileys visual identity, which have been featured on other primary and secondary packs in the Australian market, such as Baileys Limited Edition Flavour products and labels and case shipper designs.
- In 2017, Diageo committed to phasing out the use of plastic straws and stirrers from all our offices, events, promotions, advertising and marketing globally. As a result of this policy, Diageo only uses reusable, compostable or biodegradable alternatives – of which paper straws are most common. It cannot be said by a reasonable person that the use of glassware and paper straws would appeal strongly to minors, nor would they strongly appeal as a gift. Along with the Baileys branding, it is unlikely that the packaging could create confusion with confectionary or soft drinks.
- The hero of the packaging is the Baileys Original 700mL bottle, which is featured on the front of pack, visible through a cut out in the same shape as the bottle. The words “Baileys Original” appear on the front of pack and each side contains the Baileys Original logo. Baileys has the strongest brand equity of any spirit in the market. Baileys brand equity is particularly strong regarding saliency (being recognisable by consumers) and distinctiveness (making it unlikely to be mistaken for something else). This is important as it means that the likelihood of someone seeing or purchasing this product and not realising it contains alcohol is very small.
- In summary, the Baileys Milk Glass Gift Pack design is underpinned by Baileys ongoing commitment to market our products to adults over the LPA, whilst simultaneously using specific iconography to showcase the product versatility, the multitude of well-known adult serve options for consumers and the Baileys trademark branding, importantly signifying to consumers that this is an alcoholic product.
- The packaging was not designed to appeal strongly to minors or specifically target minors. The packaging design rationale demonstrates that the specific design elements were selected to be attractive to the adult Baileys consumer. The brand equity makes it highly unlikely that this product could create confusion with confectionary or soft drinks. There is also no use of design elements that are primarily used by minors. Therefore, we do not believe the packaging of Baileys Milk Glass Gift Pack to have strong or event appeal to minors.

## The Panel's View

### Introduction

15. On 17 December 2020 the Panel made a provisional determination that the packaging of the Baileys Original Irish Cream Liqueur Milk Glass Gift Pack was in breach of Part 3(b)(i) of the ABAC. On 7 January the Company sought a rehearing of this decision as provided under the Rules and Procedures applying to the ABAC Scheme when product packaging is found to be inconsistent with a Code standard. A rehearing means the Panel looks at the complaint afresh and makes a new decision taking into the account the complaint, the packaging and the arguments advanced, both initially and on requesting the rehearing, by the Company.
16. Baileys Irish Cream is a cream liqueur which has been marketed globally since its development in Ireland in the early 1970's. It is the most popular of the liqueurs sold in Australia with a 2016 Morgan's research report noting that its sales were three times the second most popular liqueur. Over time a range of flavour variants of the original product have been introduced with the Company explaining that the marketing of the product features 'limited edition offerings, gift packs and partnerships to demonstrate the versatile treating moments that Baileys can offer.' It is the design of a Christmas gift pack of the original product flavour which has attracted the complaint.
17. The gift pack consists of 700ml bottle of the product, two mini glass milk bottles and six paper straws. The Company states that the intent is for consumers to be able to consume the beverage out of the glassware (with the straws) or use them to aid the serve by pouring Baileys into a coffee, hot chocolate or over a dessert or ice cream. The packaging is in the form of a cardboard box with a cut-out that makes the bottle of the product visible. The background colouring of both the Baileys bottle and the packaging is black. The front of the packaging features images of two Baileys branded mini milk bottles and drawings of various desserts such as a cupcake, and cream topped cake slice. The rear of the packaging shows several milkshakes and desserts as well as a panel which describes potential uses of the product. The uses include adding the product to a brownie, hot chocolate or latte and a cocktail or milkshake. Collectively, the addition of Baileys is described as 'the perfect indulgent ingredient to yum up your treats'.
18. The side of the packaging also shows images of milk-based drinks - a cappuccino and milkshake - with the largest section containing Baileys branding and Company information, the contents of the pack, and details as to the alcohol to volume of the product in standard drink terms.
19. The complainant contends that the packaging has appeal to minors arising from illustrations of desserts and candy and the use of mini milk bottles and paper

straws. The inclusion of sprinkles and cream on the desserts is argued to add to the appeal as is the word 'yum'. Part 3(b) of the ABAC provides that an alcohol beverage marketing communication (which includes product packaging) must not have strong or evident appeal to minors. 'Strong or evident appeal' is expanded upon in the Code definitions to mean:

- likely to appeal strongly to minors;
- specifically targeted at minors;
- having a particular attractiveness for a minor beyond the general attractiveness it has for an adult;
- 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
- using brand identification, including logos, on clothing, toys, or other merchandise for use primarily by minors.

20. The Company argues, in its original submission and second submission seeking a rehearing of the provisional determination, that the packaging does not breach the ABAC standard. It is submitted:

- the gift pack is intended for adult consumers consistent with the brand's marketing of Baileys as a 'versatile liquid that can be used in a multitude of adult treating occasions as depicted in the (packaging) iconography';
- desserts are one of the key serves for Baileys, enjoyed by masses globally, which is why they are depicted on the pack alongside drinks to communicate the product's versatility - from hot chocolate to a classic serve on ice, to milkshakes and ice creams;
- the dessert items depicted are not consumed primarily by minors but are enjoyed by the general public;
- the contents of mini milk bottles and paper straws provide versatile serving options and are not of themselves strongly appealing to minors and such items would not appeal to minors as a gift;
- the display of the Baileys brand, with its strong brand equity, means the packaging would not create confusion with a soft drink or confectionery;
- the packaging design and use of bright and pastel colours 'matches our core (adult) customers' and signal treating and indulgence and do not have strong appeal to minors;

- the sprinkles are inspired by classic dessert toppings, and these have then been abstracted to create a graphic pattern;
- the word 'yum' represents the informality of the 'Baileys' tone of voice and is an expression of pleasure in consuming food or liquid with no usage with minors beyond its general use; and
- the design elements were selected to be attractive to the adult Baileys consumer, embracing the symbols of real adult treating, and in totality, delivering premium cues with the quality finishes and gold foil.

Does the packaging have strong or evident appeal to minors?

21. In assessing if an alcohol marketing communication is consistent with a Code standard the Panel is to adopt the probable understanding of the marketing material by a reasonable person taking its content as a whole. This means that the life experience, values, and opinions common in a majority of the community is to be the benchmark. If the message to be derived from the marketing item can be understood in several ways, then it is the most probable interpretation which is to be preferred over a possible but less likely interpretation.
22. The Panel has considered the 'strong or evident appeal' standard in numerous past determinations. Further, in 2020 the ABAC Scheme commissioned Youth Insight (the research arm of Student Edge) to advise on themes, designs and imagery which youths aged 13 to 17 find strongly appealing and unappealing in marketing. Based on these two sources, some characteristics within a marketing communication which may make it strongly appealing to minors include but are not limited to:
  - the use of bright, playful, and contrasting colours;
  - aspirational themes that appeal to minors wishing to feel older or fit into an older group;
  - illusion of a smooth transition from non-alcoholic to alcoholic beverages;
  - creation of a relatable environment by use of images and surroundings commonly frequented by minors;
  - depiction of activities or products typically undertaken or used by minors;
  - language and methods of expression used more by minors than adults;
  - inclusion of popular personalities of evident appeal to minors at the time of the marketing (personalities popular to the youth of previous generations will generally not have strong appeal to minors);

- style of humour relating to the stage of life of a minor (as opposed to humour more appealing to adults); and
  - use of a music genre and artists featuring in youth culture.
23. It should be noted that only some of these characteristics are likely to be present in a particular marketing communication and that the presence of one or even more of the characteristics does not necessarily mean that the marketing item will have strong or evident appeal to minors. Each case must be assessed on its own merits and it is the overall impact of the marketing communication rather than an individual element which shapes how a reasonable person will understand the item.
24. It is noted that the Company has obtained pre-vetting approval for the gift packaging. This represents the Company following best practice and approval is taken into account by the Panel if a subsequent complaint is received. Statistically, a marketing communication which has been pre-vetted is unlikely to be found in breach of a Code provision if a subsequent public complaint is received about the marketing item. That said, the complaints process is independent of the pre-vetting process and the Panel must always reach its own conclusion on the marketing communication and its consistency with the relevant Code provision raised by the nature of the complaint received.
25. On balance, the Panel believes the packaging does have strong and evident appeal to minors. While it is accepted that the intention of the Company was to direct the gift pack to adult consumers by featuring the versatile uses of the product as 'an indulgent treat', these uses, represented extensively on the packaging, by means of showing desserts and milkshakes are styled in a way that makes the imagery relatable to minors and creates an illusion of a smooth transition from non-alcoholic to alcoholic beverages. Specifically, the Panel noted:
- the style of desserts depicted would resonate strongly with minors i.e. strawberry iced cupcakes, creamy milkshakes, or ice-cream soda like drinks;
  - the desserts are depicted on the pack in striped and spotted glasses, jars and cups, with sprinkles, and accompaniments such as pastel striped straws, likely to be highly familiar to minors;
  - bright and contrasting colours are used as well as other illustrations – stars, hearts and sprinkles - which link the images of the drinks and desserts in a manner which is reminiscent of depictions directed at minors e.g., an invitation to a birthday party;
  - the rear panel contains serving suggestions including the addition of the product to hot chocolate and milkshakes - while such beverages are

consumed across age groups and not only minors, the context created by the depictions of the childlike desserts and milk-based drinks means the serving suggestion is highly relatable to minors; and

- while no element on its own would make the packaging strongly appealing to minors, the combination of elements creates a probable understanding in a reasonable person that the marketing is strongly or evidently appealing to minors.

26. Accordingly, the Panel makes a final determination that the product packaging is in breach of Part 3(b)(i) of the Code.