



ABAC Adjudication Panel Determination No 196/20

Product: Gin Filled Christmas Baubles Gift Pack
Company: Newy Distillery
Media: Packaging
Date of decision: 14 January 2021
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns Facebook marketing by Newy Distillery (the Company”) for their Gin Filled Christmas Baubles Gift Pack (“the Product”). It arises from a complaint received on 15 December 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 15 December 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 the Product packaging.

The Marketing

10. The complaint relates to the packaging of Newy Distillery's Gin Filled Christmas Baubles Gift Pack, as shown below:





The Complaint

11. The complainant objects to the packaging as follows:

The packaging of the gin baubles doesn't meet alcohol packaging standards. The box is a cake box. The box is not sealed. The pregnancy warning isn't lawful. There is no information on the product ribbon pertaining to the contents being alcohol. There are no warnings to keep out of reach of 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. Part 6 of the ABAC Code provides that:

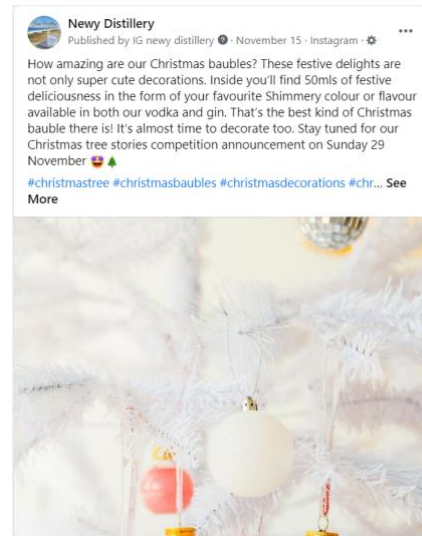
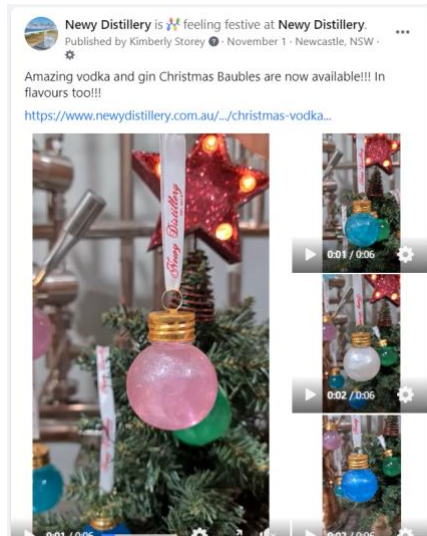
Strong or Evident Appeal to Minors means:

- (i) Likely to appeal strongly to Minors;
- (ii) Specifically targeted at Minors;
- (iii) Having 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.

Company Response

14. Newy Distillery responded to the complaint by email on 15 December 2020. The principal points made by Newy Distillery were:

- The packaging did not receive Alcohol Advertising Pre-vetting Service Approval on this occasion as we did not see any compliance issues with the Code and it was a limited release product with limited units available.
- The product was first offered for retail sale via a limited launch from 1 November 2020 and sold out within 3 weeks.
- Below are the screenshots of our advertising of this product:



- Christmas is a time celebrated and looked forward to by all, it is a significant event that every alcohol advertiser references. There is nothing in the Code to prohibit references to celebrations. Just because children celebrate this occasion as well should not mean that adult product providers are prohibited from referencing this celebration.
- Christmas trees are celebrated by all and so are their decorations. We do not encourage our products to be displayed in reach of children or where they can access them. We also draw attention to the string that holds them which clearly says “Newy Distillery” implying it is an alcohol product. This packaging is used by a lot of distilleries and is designed to safely contain alcohol.
- Not all the baubles are coloured, they are all encouraged to be kept out of reach of children.
- The box was actually designed for the purpose of displaying our baubles, it is a generic looking box with a window, it does not have any pictures only writing, plain red box with white writing and a few green logos, not designed to be enticing to children. The box has a large sticker saying “Gin” as well.
- The box is also not shown on any advertising other than being displayed on our website product listing. The images below are from our website listing.
- The box does not have any pictures only writing, plain red box with white writing, not designed to be enticing to children.
- Christmas is a time to be enjoyed by everyone, not specifically children. The packaging is not advertised, only displayed on our website product listing which is behind an age gate.
- The box has a large sticker saying “Gin” with our logo predominately displayed. On the back it has all of the alcohol packaging particulars including alcohol percentage, warning labels and description specifically says it contains

spirits/alcohol. The product has a band on it saying "Newy Distillery" indicating it is an alcohol product.

- If we do sell these again next year we can clearly write on the front of the packaging "PLEASE KEEP OUT OF REACH OF CHILDREN – CONTAINS ALCOHOL - NOT TO BE CONSUMED BY CHILDREN". If ABAC has any other suggestions we are happy to oblige.



The Panel's View

15. Newcastle is the home of Newy Distillery which since 2018 has produced a range of gin and vodka-based alcohol products. For Christmas 2020 the Company produced a limited edition 'Christmas bauble' container, holding 50ml of product. Each bauble was made of glass with most showing the colour of the alcohol beverage contained therein. The baubles were packaged in a Christmas themed box with each box housing four baubles. The complainant believes the packaging of the alcohol to be highly problematic with the concerns being:
 - the box containing the baubles was not sealed;
 - an 'unlawful' pregnancy warning was used on the box;
 - a ribbon attached to each bauble did not identify the product as being alcoholic; and
 - no warning to keep the product out of the reach of children was included on the packaging.

16. To a large extent the concerns expressed by the complainant do not raise matters within the jurisdiction of the ABAC Scheme. Safety issues regarding the box not being sealed or stipulations about product warnings are regulated directly by government. For instance, mandatory pregnancy warnings on packaged alcohol beverages came into effect on 31 July 2020 with alcohol companies being granted a three-year period to implement the new requirements. Responsibility, at a policy level, for this alcohol labelling regulatory obligation rests with Food Standards Australia and New Zealand. Enforcement of the requirement will rest with State and Territory governments.

17. The ABAC does contain a 'safety' standard in Part 3(d) of the Code. This standard goes to alcohol marketing modelling the responsible use of alcohol e.g., not showing alcohol use before or during the driving of a motor vehicle or any other activity requiring a high degree of alertness or co-ordination to be conducted safely. This ABAC standard does not however purport to impose packaging warnings about alcohol use or a requirement that alcohol packaging state that the product should be kept out of the reach of children.

18. The applicable ABAC standard raised by the nature of the complaint is Part 3 (b) which provides that an alcohol marketing communication (which includes product packaging) must not have strong or evident appeal to minors. This standard might be breached if the marketing material:
 - targeted minors;

- had a particular attractiveness for a minor beyond the general attractiveness it has for an adult;
 - uses imagery, designs, motifs, animations, or cartoon characters that are likely to appeal strongly to minors or that create confusion with confectionary or soft drinks.
19. The Company contends the packaging is consistent with the ABAC standard. It is argued:
- Christmas is significant across age groups and is commonly referenced in marketing, including by alcohol producers;
 - Christmas tree decorations have a general and not child specific appeal;
 - the box displays the baubles and is not designed to be enticing to minors - it has a large sticker advising the product is gin;
 - the box also has other advice about the alcoholic nature of the product;
 - some baubles are not coloured but those which are, are not strongly appealing to minors; and
 - the band attached to the baubles states 'Newy Distillery' indicating the product is alcoholic.
20. Assessment of the consistency of a marketing communication with an ABAC standard is from the probable understanding of a reasonable person. This means that the life experiences, values and opinions held by a majority of the community is to be the benchmark. A person who interprets a marketing message in a different way is not 'unreasonable' but possibly their understanding would not be shared by most people.
21. The Panel has considered the Part 3(b) standard on many past occasions. While each marketing communication must always be assessed individually, some characteristics within marketing material which may make it strongly appealing to minors include:
- 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 current appeal to minors);
 - style of humour relating to the stage of life of a minor (as opposed to humour more probably appealing to adults); and
 - use of a music genre and artists featuring in youth culture.
22. It should be noted that only some of these characteristics are likely to be present in a specific marketing communication and 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. It is the overall impact of the marketing communication rather than an individual element which shapes how a reasonable person will understand the item.
23. Product packaging can give rise to strong appeal to minors if it creates confusion with confectionary or a soft drink. Confusion with a soft drink might occur if:
- the packaging fails to clearly identify the product as an alcohol beverage through use of an alcohol term like beer, ale, vodka, style of wine etc or reliance is made of more subtle alcohol references or terms understood by regular adult drinkers but less likely to be understood by minors e.g., IPA, NEIPA;
 - the packaging has a visual design that resembles a soft drink such as the display of fruit images, bright block colours and the use of a font style or iconography found typically on soft drinks or fruit juices;
 - the use of terms commonly associated with a soft drink or fruit juice e.g., orange, lemon, blueberry, pop, smash etc; and
 - the type of physical package used and whether this is like that used by soft drinks or fruit juices e.g., prima style juice box.
24. The packaging needs to be considered in two parts namely the box containing the baubles and the baubles themselves. The box is red in colour with 'Merry Christmas' written in white appearing multiple times. There are also multiple small green Christmas tree motifs on the box. The top of the box has a cut-out section covered with clear plastic which enables the four baubles inside the box to be seen. The rear of the box contains product information, and this combined with stickers on the front of the box identify the contents as containing alcohol.

25. As noted earlier, the ABAC does not contain requirements for alcohol packaging warnings for the issues raised by the complainant. The Panel's remit is to assess the probable appeal of the box to minors and in this regard the Panel does not believe the ABAC standard has been breached. In reaching this conclusion the Panel noted:
- the box is of a standard Christmas themed packaging design;
 - identifies the contents as containing alcohol particularly through the 'gin' sticker on the front of the box; and
 - its appeal would be across the board and is not stronger to minors than it would be to adults
26. The more finely balanced decision concerns the baubles as alcohol packaging. Here the question is whether packaging alcohol in a container which can double as a Christmas tree decoration has strong or evident appeal to under 18-year olds. The baubles are mostly clear glass which enables the colour of the physical beverage to be seen and hence gives the baubles a similar look as standard Christmas tree baubles. While the ABAC does not regulate the appearance of physical alcohol beverages, the highlighting of the colour of the beverage in non-standard containers is a factor in assessing the packaging compliance with a Code standard.
27. On balance the Panel does not believe the bauble packaging breaches the ABAC standard. It is noted:
- a Christmas tree bauble is not a children's toy or novelty item but a traditional type of Christmas decoration;
 - the bauble invokes Christmas, but cannot be said to be a Christmas item which is directed specifically at children or adolescents as opposed to Christmas as a celebration;
 - the baubles are simple in design and do not include imagery or motifs that would likely appeal to minors;
 - it's unlikely the packaging would be confused with a soft drink or confectionery, as such products don't come packaged in a Christmas bauble. If it was noticed the bauble contained liquid, it would be likely taken as a non-consumable design element; and
 - taken as a whole, the appeal of the packaging is general rather than specific to minors and any appeal to minors is not strong or evident but more residual or incidental.
28. In dismissing the complaint, the Panel does acknowledge the safety concerns raised by the complainant and notes the Company's willingness to explore additional information on the packaging to address these concerns. While not a

matter for the ABAC standard in terms of encouraging underage alcohol consumption, the product could be eye-catching to small children and being made of glass, pose a safety issue. Attention to this concern by the Company would be welcomed.