



ABAC Adjudication Panel Final Determination No 29/21

Product: Shot Bucket
Company: Drink Craft Pty Limited
Media: Packaging
Date of decision: 28 April 2021
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”) arises from a complaint received on 5 March 2021. The complaint concerns the labelling and packaging by Drink Craft Pty Limited (“the Company”) of its Shot Bucket (“the Product”)
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 5 March 2021.
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 names and 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. Pre-vetting approval was not obtained for the product packaging.

The Marketing

10. This determination relates to the following labels and packaging:



The Complaint

11. The complainant has the following concerns about the labelling and packaging:

Recently Access Canberra's Fair Trading team acted on a complaint that a convenience store had placed their alcoholic shot buckets next to chips, lollies, etc. in reach of children.

Inspectors advised the store owner to move the product to a more appropriate area and he did so.

The concern (is) that it could be confused with a product intended for children.

Bright pink logo. Multicoloured foil lids on the shots themselves.

We noticed that the flavours of the alcoholic shots could be attractive to children and be confused for simply a yummy drink. For example, 'Jam Donut', 'Pink' and 'Ginger Kiss'.

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 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

14. The Company responded to the complaint by letter emailed on 26 March 2021. The principal points made by the Company were:

- This product has been in the market for about 10 years and was purchased by our business 7 years ago. It is not a new product and has not been changed in any material way over this time.
- The individual shots in their current format were submitted for pre-vetting and approved in July 2016 – see application 244/16. The pre-approval was for 5 different shots in exactly the same individual format plus a 4-pack holder. Flavours approved included Jam Donut, Salted Caramel and Chocchini flavours. The current range has been expanded slightly but uses the same shot vessels, foil lids and product description style.
- Each shot lid is clearly labelled as a Wine product and includes 13.9% alcohol labelling.
- Upon review against the ABAC guidelines, I would dispute that the product has strong or evident appeal to minors:
 - The translucent bucket has no qualities which make it strongly appealing to minors. It is plain, opaque (contents not clearly visible) and functional.
 - The label is brightly coloured to achieve stand out on shelf but beyond the colour, there is no imagery, design, motif or cartoon character which make the product look particularly appealing to minors.
 - The wording on the label does not use any language targeted at or appealing to minors. It is simple, direct and descriptive of the product.
 - The individual shots inside are sealed inside the bucket and are barely visible from the side (ie the usual customer view on shelf). If the bucket is taken off the shelf and looked from above, the foil lids are visible. However, like the bucket label, beyond the colour, the lids have no imagery, design, motif or cartoon character which make the product look particularly appealing to minors. They state the flavour, the fact that they are wine-based products and the alcohol %.
- In summary, the product is not designed to appeal to minors, has no wording or messaging to make it appealing to minors, has no imagery or

motifs to attract the eye of minors and is packaged in a functional opaque bucket which allows only limited visibility of the contents in a retail environment. We do not run any advertising for this product, so the only promotion is done by retailers within their alcohol retail environment.

The Panel's View

Introduction

15. Drink Craft is an independent producer and distributor of a range of alcohol products. One product in the Company's range is a 'Shot Bucket' which contains 16 separately packaged wine and cream blended alcoholic 'shots' contained in 30ml plastic containers. The Company advises that it has produced the product for the past seven years and prior to this, an earlier version of the product was marketed by another alcohol producer. This earlier version of the product was the subject of Panel Determination 112/11B dated 13 February 2012.
16. The complaint arises from a regulatory intervention by Access Canberra's Fair Trading team which is the ACT liquor licensing authority. The Fair-Trading team had responded to a complaint about the positioning of the Product within a mixed business operating as a licensed premise. In the ACT, mixed businesses such as supermarkets or convenience stores can sell alcoholic beverages but must do so consistently with Territory liquor licensing requirements. Fair Trading resolved the complaint raised with them about the positioning of the Product within the store but lodged the current complaint to the ABAC Scheme about the packaging of the product. The concerned raised about the product packaging is that the alcohol shots might be attractive to children and confused with confectionery or a soft drink.
17. On 13 April 2021 the Panel made a a provisional determination that the product packaging is in breach of Part 3 (b)(i) of the Code. 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. In response to the provisional determination the Company expressed respectful disagreement with the Panel's determination, provided feedback on the assessment process for internal consideration, but expressed support for the ABAC process and its independence and advised it would modify the product taking into consideration the concerns of the Panel.
18. Given the history of the product (or at least an earlier version of the product) with the ABAC Scheme and the role of Fair Trading in making the complaint, it is helpful to deal with the background context before turning to the substantive issue of the consistency of the product packaging with Part 3 (b)(i) of the Code.

Alcohol Marketing Regulation in the ACT

19. As alluded to in Paragraph 2, alcohol as a product and alcohol marketing falls within a shared regulatory domain with certain aspects regulated at:
 - the Federal level e.g., Food Standards labelling requirements and media regulation such as the amount of advertising permitted on free-to-air TV;
 - the State/Territory level e.g., liquor licensing laws;
 - the Local Government level e.g., delegated liquor licensing decisions such as whether alcohol is permitted to be consumed in public spaces such as a park; and
 - the industry level with regulatory schemes such as the ABAC creating standards of good marketing practice.
20. Within the ACT, the primary legislation governing alcohol use is the Liquor Act 2012. Under the Liquor Act, the Commissioner of Fair Trading is empowered to make guidelines with the Responsible Promotion of Liquor Guidelines aiding those involved in advertising alcohol to understand what appropriate alcohol promotion is. One guideline provides that liquor in any area where children are likely to be present must not be displayed in a manner reasonably expected to appeal to minors. The Guidelines contain examples of unacceptable practices which include:
 - displaying alcoholic beverages together with confectionery or snack food;
 - displaying alcoholic beverages in more than one area of an off-license premise that is also a supermarket; and
 - advertising liquor with cartoon characters that would appeal to children.
21. It was this guideline which presumably the Fair Trading team relied upon when resolving the complaint about the positioning of the Company's product in a Canberra store and reflects that the focus of State/Territory liquor licensing activity is on the way in which alcohol is sold/served/promoted within licensed premises. In contrast, the focus of the ABAC Scheme is not how liquor retailers promote or sell alcohol to the patrons of a liquor store or hotel, but how all alcohol marketers promote alcohol use to the wider community.
22. Given that both the State/Territory and the ABAC Scheme have broadly similar policy aims, it is not surprising that the standards of good practice embodied in instruments such as the ACT Promotion Guidelines and the ABAC canvass similar subject matter. Both instruments seek to have alcohol promotion occur in a

manner which does not attract or strongly appeal to minors. The complaint raised by Fair Trading is whether the Company's product packaging (independently of where it was found within a liquor licensed store in Canberra) offends the commonly shared expectation that alcohol marketing is not strongly appealing to under 18 year olds.

23. It should be noted that while State/Territory liquor licensing bodies and the ABAC Scheme operate co-operatively, complaints lodged to the respective processes of both bodies are decided independently applying the provisions of the applicable regulatory instrument. While the ABAC achieves almost universal compliance from alcohol industry participants to Panel Determinations, on occasions a marketing communication found in breach of an ABAC standard will be referred to a State/Territory liquor licensing authority for consideration and potential enforcement action under the licensing regime.

The 'Shot Bucket' and the ABAC Scheme

24. As mentioned, an earlier version of the packaging of the Shot Bucket product (when owned by another company) was the subject of a Panel decision in 2012. The decision canvassed, in part, whether the packaging of the Shot Bucket had strong or evident appeal to children or adolescents. The Panel concluded the standard was breached with regard had of a combination of:
- the translucent packaging of multiple products that enables a number of different colours to be displayed in combination;
 - the depiction on the label of the shots that look similar to multi-coloured ice-cream or yoghurt desserts or drinks that would have strong or evident appeal to children or adolescents; and
 - the names of the individual shots on both the label and the foil lids of the shots that describe foods and concepts that have strong appeal to children or adolescents namely Pancake, Choc Eclair, Choc Banana Split, Cowboy and Cowgirl.
25. The Company advised it acquired rights to the product in or about 2014. While the underlying physical product, i.e., the alcohol beverage itself, has not changed, there have been changes to the packaging of the product. Further, the current owners have engaged with the ABAC Scheme to some extent and obtained pre-vetting approval for some product names and packaging of individual 'shots'. Critically, however, pre-vetting approval was not obtained for the packaging of the Shot Bucket itself.
26. The Panel's process in assessing public complaints and the pre-vetting process are independent of each other. As a matter of policy, the ABAC Scheme aims to have consistent interpretation of Code standards by both the Panel and the pre-

vettors and statistically very few marketing communications which have been pre-vetted are subsequently found by the Panel to be in breach of a standard. However, on occasions the Panel will reach a different conclusion about the consistency of a marketing item with a standard than the view given in pre-vetting. Further, over time community attitudes about marketing messaging does evolve and the Scheme as a whole seeks to align itself with prevailing community expectations of good marketing practice.

Does the Product Packaging have strong appeal to minors?

27. An alcohol marketing communication (which includes product packaging) might have strong or evident appeal to minors if:
- it specifically targets minors;
 - it has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; and
 - it uses imagery, designs, motifs, animations, or cartoon characters that are likely to appeal strongly to minors or create confusion with confectionery or soft drink.
28. 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.
29. 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.
30. 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.
31. 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.
32. The Panel's Determination 112/11B found the earlier version of the packaging was in breach of the strong appeal to minor's standard. The current packaging is however substantially different. For instance :
- the front label is totally redesigned with the name 'Shot Bucket' being the only constant;
 - the names of the individual shots are different in most instances; and
 - the lids of the shots visible through the plastic bucket are different.

33. The Panel believes the current design of the packaging does breach the Part 3(b) standard. The Panel noted:
- the labelling fails to adequately identify the product as a whole as an alcoholic beverage and gives rise to potential confusion with confectionery;
 - the names of Jam Donut, Ginger Kiss, Salted Caramel and Butterscotch, given the overall lack of clarity as to the alcoholic nature of the product, give rise to potential confusion with a dessert or other confectionery;
 - the strapline 'A Party in every Bucket' has strong appeal to minors;
 - these elements combined lead to confusion with confectionery and would appeal strongly to minors.
34. Accordingly, the Panel makes a final determination that the product packaging is in breach of Part 3 (b)(i) of the Code.