



## ABAC Adjudication Panel Determination No 70/21

**Product:** Milo Imperial Brown Ale  
**Company:** Brisbane Brewing Co  
**Media:** Instagram  
**Date of decision:** 6 May 2021  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Debra Richards  
Professor Richard Mattick

### Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns an Instagram post for Milo Imperial Brown Ale (“the Product”) by Brisbane Brewing Co (“the Company”). It arises from a complaint received on 6 April 2021.
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 6 April 2021.
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 poster.

## The Marketing

10. This determination relates to the following Instagram post:



## The Complaint

11. The complainant has the following concerns about the marketing:

*The image contains branding elements of Milo, including the name, the colour scheme and references to graphic elements. It mimics the Milo branding.*

*This could appeal to minors by referencing the branding of Milo, a powdered drink aimed at 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 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 15 April 2021. The principal points made by the Company were:

- The alcohol marketing communication referred to in the complaint (the Instagram post) did not receive Alcohol Advertising Pre-vetting Service Approval.
- The post uses the name Milo. We cannot definitively say if this would have a strong appeal to minors or not. All of our social media accounts are restricted to users which are 18 years of age or older.
- When marketing our products, we take our role in the community seriously. While the product itself was only available for a few hours on tap in our venue, we understand that the advertisement of it on Instagram is what the complaint is about.
- The post in question has been removed.

## The Panel's View

15. Brisbane Brewing Co is a family owned microbrewery founded in 2005 and is one of the oldest independent breweries in Brisbane. The complaint relates to a post

on the Company Instagram account promoting its small batch Imperial Brown Ale, made with Milo.

16. The complainant is concerned that the visual references in the Instagram post to Milo, a powdered drink aimed at children, could appeal to minors
17. Milo is a product familiar to most Australians. The Panel has previously considered a branded alcohol beverage in Determination 70/20, that drew on Milo branding elements, and found that while Milo would be consumed across age groups, its primary market is children, noting:
  - The website for Milo clearly indicates the focus of the product with references such as 'Since 1934 Milo has been giving active kids what they need to get the most out of every day.'
  - The website also details the relationship the brand has with children's sports.
  - Consumption data was not placed on the website, but other sources indicated the largest consumer group for the product is children aged 8 to 14. The Australian Health Survey published by the Australian Bureau of Statistics lends further weight to the conclusion that Milo is heavily consumed by minors. The Survey shows flavoured milk is used most extensively in the 9 to 13 and 14 to 18 age segments.
18. The Instagram post clearly draws on the Milo brand. The Company has used similar colour schemes, fonts and layouts. There are differences between the image on the post and the Milo design, but these differences do not distract from the overall impression that the Company's post is a play on the Milo packaging. The issue is whether this association can be concluded to give the Company's post strong or evident appeal to minors.
19. The Company advises that the product was only available for a few hours on tap in their venue and that their social media accounts are all age restricted to over 18 year olds. The ABAC requires that content restrictions are met for alcohol marketing regardless of its placement.
20. 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.
17. 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.
18. 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.

19. 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
20. The Panel believes the Instagram post is inconsistent with the Part 3(b)(i) standard. In reaching this conclusion the Panel noted:
- the post is clearly modelled on the non-alcoholic product, Milo, and clearly states that the beer is made with this product;
  - Milo is a product used to flavour milk and is consumed more heavily and appeals directly to minors;
  - the post raises a strong inference of an alcoholic product that could be similar to chocolate milk creating a strong appeal to minors;
  - while the term 'ale' would be recognised by beer drinkers, the most prominent reference is the 'Milo' logo and colour scheme and the overall impression created by the packaging is not of an alcohol beverage and may create confusion with a soft drink; and
  - taken as a whole a reasonable person would probably understand the post as having a strong or evident appeal to minors.
21. Accordingly, the complaint is upheld.