



ABAC Adjudication Panel Determination No 209/21

Product: Amaro Cask Release Single Malt Whisky
Company: Lark Distilling Co
Media: Instagram
Date of decision: 7 October 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 Amaro Cask Release Single Malt Whisky (“the Product”) by Lark Distilling Co (“the Company”) and arises from a complaint received on 30 August 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 30 August 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 complaints were 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 Instagram post

The Marketing Communication

10. The complaint relates to a video posted to the Company's Instagram page, which can be viewed at the following link and is also described below:

https://www.instagram.com/p/CTG6t_xhSXF/



The animated video is accompanied throughout by music similar in style to folk music, with the dominant instrument sounding like an accordion. The video commences with a lark sitting on a gate post. The gate is holding back a pile of what appears to be citrus fruit.



The lark opens the gate to release the citrus fruit, which then rolls down a hill. The lark flies above the rolling fruit.



The fruit and lark reach a cask which is laying on its side. The cask rights itself and the lark stands on its tap, causing the tap to open and fill a bottle.



The lark then plugs the bottle with a cork.

11. The following text was included with the Instagram post:



The Complaint

12. The complainant objects to the marketing as follows:

- *Animated cartoon of whisky seemed inappropriate.*
- *Makes alcohol look kid friendly.*

The ABAC Code

13. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:

- (b)(i) have Strong or Evident Appeal to Minors.

14. Part 6 of the ABAC Code provides that:

Strong or Evident Appeal to Minors means:

- (i) likely to appeal to strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minors 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

15. The Company responded to the complaint email on 3 September 2021. The principal points made by the Company were:

Alcohol Advertising Pre-vetting Service Approval

- This ad did not receive Pre-vetting service approval. Last year Lark Distilling Co. released an animation to support the Chinotto Cask release (Similar to Amaro Cask Release) and chose to continue to animate series of the Lark bird to build excitement around the releases:

<https://www.instagram.com/p/CM6kt0YBSz7/>

- We were not aware of any complaints on last year's animation.

Responsibility toward Minors

- The animated asset was to be used as part of a paid promotion targeting male and female audiences over the age of 25+ years who have an interest in Whisky.
- The animation/link directs users to the Lark website. All users are required to confirm their age before entering the site so do not expect this to appear to minor:

<https://larkdistillery.com/products/amaro-cask-whisky>

<https://larkdistillery.com/>

- We recognise the Instagram post does include an animated cartoon. We chose to add bright colours in this animation to relate to the flavour profile of this release. (Citrus)
- The marketing department at Lark do not believe that the post has Strong or Evident appeal to Minors.
- This was a digital only advertisement and targeted audience above the age of 25+ years who have an interest in Whisky.
- The marketing material calls out Single Malt Whisky at the start of the animation. The fruits roll down a hill into a barrel which is predominately used for aging whisky. The ABV and standard drinks are also noticeable when the last frame appears on the left-hand side of the Amaro Cask Release label.

The Panel's View

16. Lark Distillery commenced operations in Tasmania in 1992 with its first commercial release of a single malt whisky occurring in 1998. The Company produces a range of whiskeys as well as gin and a whiskey liqueur. This determination concerns an animation for the Company's newly released Amaro single malt whiskey that was seen by the complainant on Instagram.
17. The animation shows the Company's logo- a lark bird- opening a gate and releasing oranges and lemons which run down a hill where they collide with a cask. The cask becomes upright, and a bottle appears. The lark sits on the cask's tap, and the bottle is filled. The bird then places a stopper into the neck of the bottle. The animation is in a simple style.
18. The complainant believes using animation for the marketing is inappropriate and makes alcohol look child friendly. The ABAC provides in Part 3 (b) that an alcohol marketing communication must not have strong or evident appeal to minors. This standard might be breached if the marketing:
 - is likely to appeal strongly to minors;
 - specifically targets minors;
 - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; or
 - uses imagery, designs, motifs, animations, or cartoon characters that are likely to appeal strongly to minors or create confusion with confectionery or soft drink.
19. 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 are 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.
20. 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;

- the 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.
21. It should be noted 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. It is the overall impact of the marketing communication rather than an individual element that shapes how a reasonable person will understand the item.
22. The Company argues the marketing video does not have a strong appeal to minors. It is contended the marketing is directed to over 25-year-olds, the use of colours is related to the flavour profile of the product and the use of the 'lark' in animated form has not previously attracted complaints.
23. Animation comes in many forms and styles. Some animations such as children cartoons are clearly drawn and illustrated in a way that children find relatable. Other styles are more adult in style, such as Japanese anime. The question is, how would a reasonable person view the current marketing video. On balance, the Panel does not believe the Part 3 (b) standard has been breached. The Panel noted:
- the style of animation is not particularly engaging for minors;
 - the 'storyline' of the video shows the lark, fruit, a cask and a bottle being filled, which is hardly engaging for minors familiar with popular cartoons; and
 - the accompanying text with the video provides product information and does not contain messaging which is appealing to minors.
24. The complaint is dismissed.