



ABAC Adjudication Panel Determination No 223/21

Products: Take-away cocktails
Company: Abermain Hotel
Media: Packaging, Facebook and Instagram
Date of decision: 28 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 the packaging of take-away cocktails (“the Products”) and the promotion of the cocktails on Facebook and Instagram by the Abermain Hotel (“the Company”). It arises from a complaint received on 16 September 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 meet 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 16 September 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

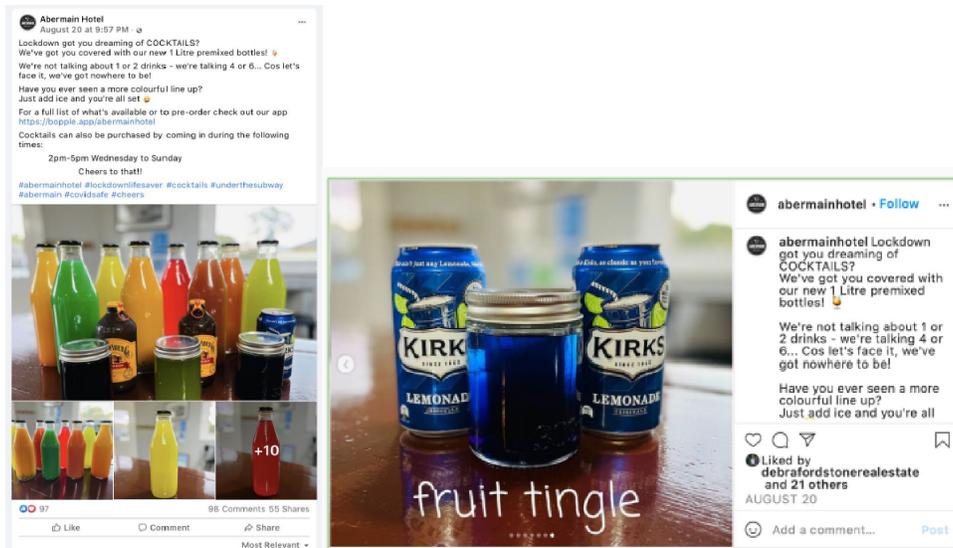
9. The quasi-regulatory system for alcohol beverage marketing features an independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for the marketing communications

The Marketing Communication

10. The complaint relates to Facebook and Instagram posts by the Company. Each post includes a number of photos, one being a group shot of the Products posed with soft drinks (Bundaberg Ginger Beer and Kirks Lemonade), with the other photos showcasing just one of the Products, in one instance posed alongside a can of Kirks Lemonade.

The Instagram post can be viewed at the following link:

<https://www.instagram.com/p/CSy6VrXpBqM/>



The Complaint

11. The complainant objects to the marketing as follows:

- *The absence of labelling on these takeaway cocktail products could lead to inadvertent excessive alcohol consumption.*
- *Excessive consumption is openly promoted via the phrase “We’re not talking about 1 or 2 drinks – we’re talking 4 or 6... cos let’s face it, we’ve got nowhere to be”. Given the product is a 1-litre pre-mixed cocktail beverage with alcohol content presumably above several standard drinks, encouraging customers to drink 4-6 of these is clearly encouraging excessive consumption.*
- *The absence of labelling may also lead to confusion for minors:*
 - *The clear plastic bottle gives prominence to the product’s bright colours and in a household refrigerator, it could easily be mistaken for a bottle of fresh juice.*
 - *Advertisement of the unlabelled cocktails with soft drinks directly behind creates an association with soft drinks and only furthers confusion about the content of the drink.*

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 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 confectionery or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

The Company Response

14. The Company responded to the complaint by letter emailed on 11 October 2021. The principal points made by the Company were:

- Thank you for the chance to respond to the complaint.
- I would first like to make it clear that we do not, nor do we ever aim to encourage excessive or underage drinking. Both myself and my staff take these issues very seriously and are very strict on RSA and underage drinking.
- At no point in time was it our intention for our ad or products to appeal to minors.
- We are a small family hotel in a close-knit community and would never ever promote or condone the consumption of alcohol by minors.
- We are heavily focused on food and functions and are frequented by families. We are typically closed by 9 pm to prevent any late-night excessive drinking.
- The post from the 20th of August was removed as soon as you brought the complaint to my attention. Not that I agree with the complaint, but I thought it was best to remove the post to save any of the so-called confusion with the drinks.
- A few points I would like to bring up.
 - The photos were taken and posted without the labels that we attach to the drinks when selling. I have attached an example of the labels that we attach to each and every drink we sell. These were screenshots from our Canva software where we make the labels. These labels are clear and easy to read and they contain the following details:

- The name of the drink.
 - They list the contents of the bottle including alcohol.
 - The label encourages responsible drinking
 - The label states that it is not suitable for children.
- As I said, these labels are attached to every drink that we sell. We hope these measures will deter any minors from consuming these drinks. We do understand that minors may be in contact with products once they are in people's fridges but surely this responsibility is also partly to do with the parents and guardians. If they wish to put them in their fridge then surely they must play some part and ensure these drinks are not taken by minors, as they do with any other alcoholic beverage in the fridge.



- We do not in any way encourage excessive drinking. As you can see, cocktails such as the fruit tingle and secret garden are sold with separate cans or bottles of soft drink. The whole reason for this is to ensure that the mixer does not go flat and there is no short period or time frame in which the drink must be consumed. It can be mixed and consumed over an extended period of time or over a number of days or drinks. The other cocktails are all mixed with juice therefore they can last a number of days, and do not need to be consumed all at once. We do not sell any shots, only drinks.
- In regards to our colourful drinks appealing to minors, this is not really a valid complaint. We did not make the drinks with the intention of appealing to minors. Cocktails are always bright in colour, as are premix drinks. I do not see how this is any different

to the likes of vodka cruisers or any other premix drinks that are bright in colour.

- Once again, we take responsible service of alcohol and underage drinking very seriously. If you have looked at our social media pages you will notice that we do not encourage drinking in any way. We have a strong focus on food, functions and family. I myself have a young family and would never ever put children in harm's way.

The Panel's View

15. The Abermain Hotel is located in the Hunter Valley wine region of New South Wales and operates from heritage premises that were built in 1905. It describes itself as a small hotel in a close-knit community, with a strong focus on food, functions and family. The Hotel offers accommodation, features a microbrewery and a cafe as well as public bars. The Hotel maintains a website and social media accounts.
16. In August 2021, the Hunter Valley went into lockdown as a result of government restrictions to deal with a wave of Covid cases. The Hotel was obliged to close for in-house patrons but consistently with the lockdown requirements, it could offer take-away alcohol sales. The complaint arises from social media posts promoting take-away cocktails.
17. The posts combine images of the cocktails in glass bottles and accompanying text. The text reads - Lockdown got you dreaming of COCKTAILS? We've got you covered with our new 1 Litre premixed bottles! We've not talking about 1 or 2 drinks - we're talking 4 or 6... Cos let's face it, we've got nowhere to be! Have you ever seen a more colourful line up? Just add ice and you're all set.
18. The complaint goes to the posts and the packaging of the cocktails. On the packaging, it is argued that the absence of labelling could lead to 'inadvertent' excessive alcohol consumption. Further it is argued the packaging gives prominence to the bright colours of the cocktails and without labelling could easily be confused with a soft drink or fruit juice. Some posts place the cocktails with branded soft drinks and this is contended to add to the risk of confusion. The social media posts are argued to encourage excessive consumption through the messaging in the text of the posts, and because of the use of the images of the cocktails, the posts are also contended as strongly appealing to minors.
19. The complaint raises issues of the interplay of the ABAC Scheme with government regulatory bodies with responsibilities for alcohol and alcohol marketing. Further, the unusual circumstances of the Covid pandemic on trading conditions for licensed premises has a bearing on this determination.

20. Panel Determination 221/21 dealt with similar issues and provided a detailed explanation of how the ABAC Scheme operates within the shared regulatory space applying to alcohol marketing. This detail will not be repeated, but in short:
- the Hotel is licensed under the Liquor Act 2007 (NSW) with the responsible regulatory body being Liquor and Gaming NSW;
 - as a Covid relief measure for businesses impacted by lockdowns, Liquor and Gaming has expressly permitted the sale of take-away cocktails by licensed premises even when the underlying liquor license held by an alcohol retailer may not have allowed such sales of alcohol;
 - the requirement for alcohol beverages to contain on the product packaging information as to the alc/vol percentage of the alcohol product is found in the national Food Standards Code; and
 - the Food Standards Code does not require a cocktail prepared on the premises of a retailer like the Hotel to be accompanied with a label containing alc/vol percentage information.

The packaging of the take-away cocktails

21. The complainant not unreasonably assumed based on the photographs used in the social media posts that the cocktails were packaged in glass bottles without labels. The Company, however, advised that while the particular posts showed the products without labels, in fact each take-away cocktail is given a label when sold. Examples of the labels were supplied by the Company and the information included is:
- the cocktail name;
 - its ingredients;
 - the number of serves eg 'Serves 6'; and
 - 'drink responsibly' and 'not suitable for children' message.
22. Under the Food Standards Code, it is not required for the cocktails to have the alc/vol % advice on the packaging. The Panel does not believe the packaging encourages excessive consumption as argued by the complainant. The Panel noted:
- the ABAC standard on excessive consumption cannot be used as an indirect means to require information on product packaging which government regulation in the Food Standards Code expressly states is not required;

- the label employed by the Company states the number of serves in the bottle which would be probably understood as advising the number of cocktails able to be made from the content of bottle; and
 - simply having sufficient quantity in a bottle to make several cocktails does not mean that the cocktails will be consumed excessively, or at once or by a single person.
23. The complaint also raised a concern that the packaging of the take-away cocktails could have strong or evident appeal to minors because of the lack of any labelling and the bright colours of the cocktails could cause confusion with soft drinks. The Company contended that cocktails by their nature are often brightly coloured and the bottles did actually come with labels.
24. The Panel does not believe the packaging of the cocktails has strong appeal to minors. While the bottles do show the bright colours of the cocktails and this would be eye-catching to minors, this needs to be balanced up against:
- the labels attached with the products identify the contents of the bottle as being alcohol; and
 - the colour of a product is relevant to assessing the overall impact of product packaging, however strong appeal to minors will involve colour in combination with other design elements of the packaging.

The social media posts

25. The complaint raised the same issues about the encouragement of excessive consumption and strong appeal to minors in relation to the messaging of the social media posts. On excessive consumption, the complainant pointed to the text of the posts which read- *"We're not talking about 1 or 2 drinks - we're talking 4 or 6... Cos let's face it, we've got nowhere to be!"?*
26. The complainant believes this message is irresponsible. It is argued that:
- the absence of labelling on these takeaway cocktail products could lead to inadvertent excessive alcohol consumption; and
 - given the product is a 1 litre pre-mixed cocktail beverage, with alcohol content presumably above several standard drinks, encouraging customers to drink 4-6 of these is clearly encouraging excessive consumption.
27. The Company has explained that it takes its responsibilities not to encourage excessive or rapid alcohol consumption very seriously, that the Product offerings

are designed to be consumed over a period of days and that the photos were taken and posted without the labels that are attached to the drinks when selling.

28. The question is how the message in the posts would be understood by a reasonable person. If the posts would be most likely interpreted as encouraging a consumer to consume all of the cocktails which can be made from the 1 litre bottle in a single session, then the standard will be breached. Alternatively, if the posts would be more likely taken as saying - 'you can make 4 to 6 cocktails with this 1 litre bottle of cocktail mix ' but no implication is drawn about the rate of consumption, then excessive consumption is not being encouraged.
29. On balance, the Panel believes the posts would most likely be understood as suggesting excessive consumption or consumption beyond Australian Alcohol Guidelines. The phrase - "... Cos let's face it, we've got nowhere to be!"?" raises an implication that since a consumer can't leave home, then more heavy consumption than normal is ok. The Panel accepts that this messaging was not the Company's intention, however the test is not what was intended, but how the message would be most probably understood by a reasonable person.
30. The second issue is whether the posts have a strong or evident appeal to minors. The complainant contends that the Facebook and Instagram posts strongly appeal to minors as:
 - the clear bottles give prominence to the product's bright colours and could easily be mistaken for a bottle of fresh juice; and
 - advertising the unlabelled cocktails with soft drink creates an association with soft drink and only furthers confusion about the content of the drink.
31. The Facebook and Instagram posts show the brightly coloured cocktails without any labelling as to the alcohol content. Some photos pose the cocktails with Kirks Lemonade and Bundaberg Ginger Beer and include the names of the cocktails, specifically Midori Belle, Secret Garden and Fruit Tingle.
32. The Panel has considered the strong appeal to minors standard on 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.

33. The Company replied to the complaint by explaining that:

- it was not its intention for the Facebook and Instagram posts to appeal to minors;
- the photos were taken and posted without the labels that are attached to the drinks when selling; and
- cocktails are always bright in colour, as are pre mix drinks. The products are no different to the likes of vodka cruisers or any other premix drinks that are bright in colour.

34. It should be noted that the ABAC Scheme is concerned with the marketing of alcohol beverages and does not regulate physical alcoholic beverages themselves. This means that the alcohol content of a product, or properties such as its taste or colour or viscosity do not fall within the remit of the ABAC. Accordingly, the fact that a beverage is brightly coloured and is visible because of a clear container will not as a general proposition mean that the packaging is in breach of the ABAC standards. It is conceivable, however, that the colour of the beverage when assessed in combination with the other features of the marketing communication might lead a reasonable person to conclude that the advertisement as a whole is in breach of a Code standard.

35. The Panel believes the Facebook and Instagram posts do breach the Part 3 (b) standard. It is noted the images of the cocktails raise potential confusion with a soft drink and have potential strong appeal to minors, due to a combination of the following factors:

- the shape, colour and style of the bottle not immediately being recognisable as one that would ordinarily contain alcoholic beverages;
- the failure of the accompanying text to unambiguously identify the cocktails as being alcoholic; and
- the posing of the products with Bundaberg Ginger Beer and Kirks Lemonade along with the use of the words “fruit tingle” (a well known confectionery item) creates a relatable image for minors.

Conclusion

36. The Company like many businesses in NSW has had to deal with very challenging conditions brought about by the Covid pandemic and the accompanying government restrictions to protect the community. The NSW government has given licensed premises the temporary entitlement to sell take-away cocktails even when the underlying liquor license held by a business may not have included this right. Further, the Food Standards Code did not require specific alc/vol % to be included on the packaging of the take-away cocktails.
37. This means the Company was entitled to sell its take-away cocktail range, and the Panel has found that there is no breach of ABAC standards in the way in which the Company has packaged its cocktail products. The Company is entitled to use social media to promote the availability of the cocktails and this marketing should be conducted consistently with the standards of good practice contained in the ABAC.
38. The Panel has found the social media posts did breach the ABAC standards in Part 3 (a)(i) and (b). While finding the posts in breach of the Code standard, the Panel does acknowledge the Company’s strong assertion that it had no intention to promote irresponsible alcohol use and any breach arises from a lack of precision in messaging.