



ABAC Adjudication Panel Determination No 254/21

Product: Balter Brewing Company
Company: Balter Beer
Media: TV
Date of decision: 4 December 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 a television advertisement for Balter Beer (“the Product”) by Balter Brewing Co (“the Company”). It arises from a complaint received on 2 November 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:
 - 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;

- 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 2 November 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 obtained for the content of the marketing communication (Approval Number 19443).

The Marketing

10. The complaint concerns a television advertisement for Balter Beer, which can be viewed at the following link:

<https://vimeo.com/555034622>

11. The following is a brief description of the advertisement:

A man is shown returning from a bar, carrying a tray of four beers to where his companions are sitting.



As he walks, he sings (solo):

*"Happy Beerthday to you,
Happy Beerthday, 'cause when
you're hanging out with Ben,
Nick and Luke, it's a pretty
bloody special day"*



As he reaches the table, the rest of the patrons in the bar, as well as his companions, join in to conclude the song:

“Happy Beerthday to you.”



The advertisement concludes with a shot of the four companions at their table, with the words “Happy Beerthdays.” superimposed, followed by a picture of a can of Balter XPA, next to a full glass, with the words “With enjoyment” and the Balter logo superimposed.



The Complaint

12. The complainant objects to the television advertisement as follows:

Every child knows the tune to "Happy Birthday". My 3-year-old granddaughter does.

These young children will hear this [person] singing the tune and then ask their parents..."Mum, Dad....what is Happy Beer day? I thought it was Happy Birthday". I for one do not want to have to explain, or even try to explain, the meaning of this...advertisement to a three-year-old person. Do we want our 3-year-olds knowing what beer (alcohol) is?

I might add that I am not a wowser and enjoy a beer but I find this advertisement totally offensive on a number of levels.

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 by letter emailed on 11 November 2021. Its principal comments were:

Alcohol Advertising Pre-vetting Service Approval

- The alcohol marketing communication referred to in the complaint received Alcohol Advertising Pre-vetting Service approval. The advertisements were submitted under Application 166/21 and were approved on 1 April with approval number 19443.

Responsibility toward Minors

- The advertisement does not breach Part 3 (b)(i) of the Code by having a Strong or Evident Appeal to Minors. The ABAC defines strong or evident appeal to minors as:
 - (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 confectionery or soft drinks; or
 - (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.
- It is a common cultural practice to sing 'Happy Birthday' to people of all ages celebrating a birthday, indeed one of the most iconic performances of the popular tune could be said to be Marilyn Monroe's [decidedly mature rendition](#) addressed to President Kennedy in 1962. We reject therefore the interpretation that singing Happy Birthday, or some variation thereof, has some specific attractiveness to minors beyond the general appeal to adults.
- The advertisement also clearly shows a group of adult mates in a pub setting, which holds no inherent appeal for minors and is self-evidently not targeted at minors. There is no imagery or brand identification that could create confusion for minors; the premise of the ad is very clearly articulated as a celebration of the occasion of hanging out with friends.
- Balter is committed to ensuring our promotional and marketing material does not appeal to children. Our goal is for consumers to enjoy our products responsibly and in moderation, and to uphold community standards when it comes to the placement and content of our advertising.

The Panel's View

16. The complaint raises a concern that a TV advertisement for Balter Beer appeals to children by characters singing a “Happy Beerthday” song to the tune of “Happy Birthday”.
17. This concern brings into play Part 3 (b)(i) of the ABAC which provides that an alcohol marketing communication (which includes product labels and packaging) must not have strong or evident appeal to minors. This standard might be breached if the branding:
 - specifically targets minors;
 - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; and
 - uses imagery, designs, motifs, animations, or cartoon characters that are likely to appeal strongly to minors or create confusion with confectionery or soft drink.
18. 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.
19. 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.
20. 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 that shapes how a reasonable person will understand the item.
21. The Company argues that the television advertisement does not breach the ABAC standard. It is submitted:
- the advertisement does not breach Part 3 (b)(i) of the Code by having Strong or Evident Appeal to Minors;
 - people of all ages sing “Happy Birthday” when celebrating a birthday;
 - singing “Happy Birthday” does not have attractiveness to minors beyond the general appeal to adults;
 - the advertisement shows a group of adults in a pub setting, which holds no inherent appeal for minors and is not targeted at minors; and
 - there is no imagery or brand identification that could create confusion for minors.
22. ‘Happy Birthday’ is reputedly the most well-recognised song and tune in the English language and the complainant’s contention that the tune used on the TV ad will be recognised by minors can be accepted. The question is whether the ad inclusive of the song/tune has a strong appeal to minors. On balance the Panel believes that the marketing is consistent with the Part 3 (b)(i) standard, noting that:
- the main characters in the ad are middle-aged men and the ad is set in a bar that is unlikely to appeal to minors;
 - the play on the ‘happy birthday’ song would be recognisable to minors as well as adults;

- the scene created in the ad is not reminiscent of a birthday party for children or adolescents, nor does it include any other imagery that would appeal strongly to minors; and
- taken as a whole, the ad is directed towards adults and any appeal to minors would be incidental rather than strong or evident.

23. The complaint is dismissed.