



ABAC Adjudication Panel Determination No 12/22

Product: Subtle Tea
Company: Casual Tea Pty Ltd
Media: Packaging and Facebook
Date of decision: 22 February 2022
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns a complaint received about the labelling and packaging of Subtle Tea (“the product”) and also Facebook advertising for the product by Casual Tea Pty Limited (“the Company”). It arises from a complaint received on 1 February 2022.
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 the 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 1 February 2022.
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.

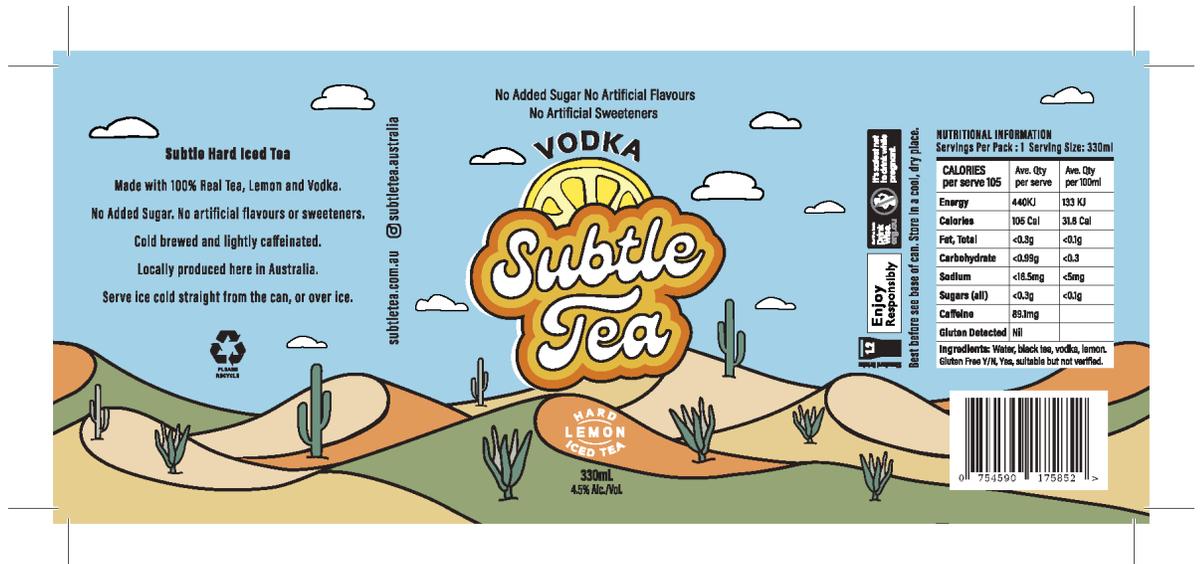
Pre-vetting Clearance

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. While Pre-vetting advice was obtained on the product packaging, formal approval was not obtained for the marketing communication.

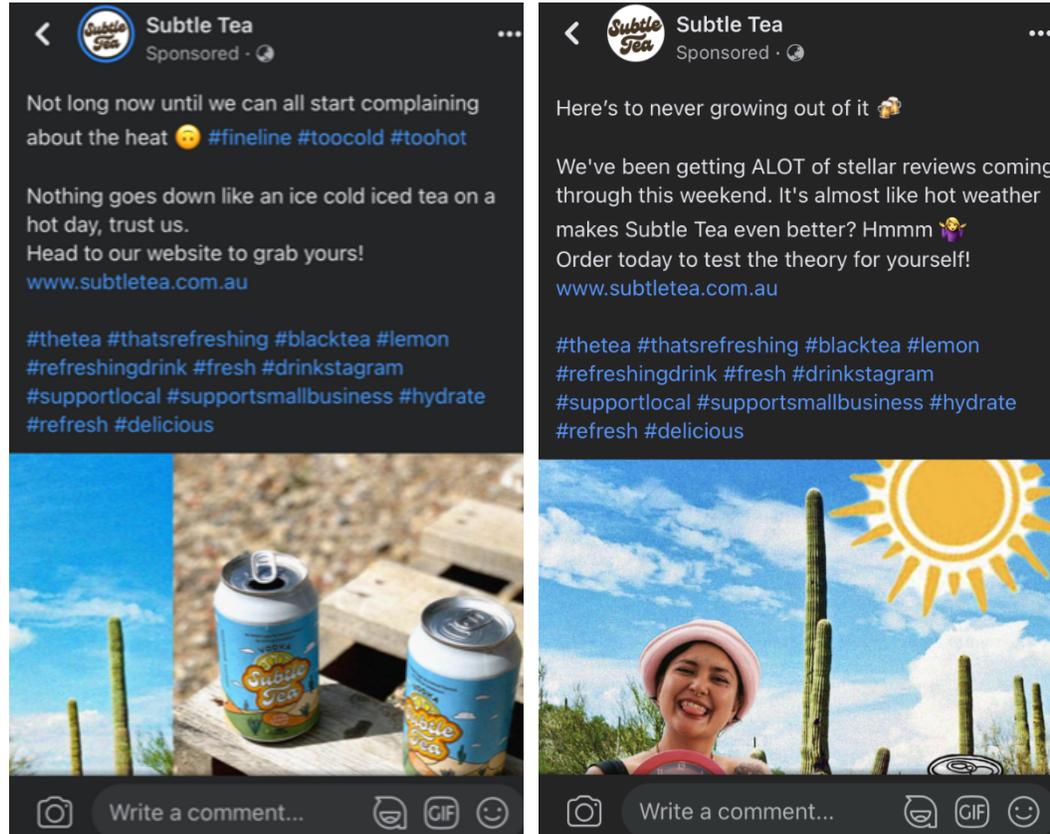
The Marketing

10. The complaint concerns the labelling and packaging of the product and also Facebook advertising for the product.

Label:



Facebook posts:



The Complaint

11. The complainant objects to the marketing as follows:
 - *We believe this labelling/packaging is in breach of Part 3 of the ABAC Responsible Marketing Code whereby a marketing communication and product must NOT:*
 - *(b)(i) have Strong or Evident Appeal to Minors*
 - *(c)(iv) suggest that the consumption of an Alcohol Beverage offers a therapeutic benefit or is a necessary aid to relaxation.*
 - *The advertisements could easily be interpreted as promoting non-alcoholic iced tea. There is no reference to alcohol within the supporting text, only a reference to iced tea. Use of hashtags such as #thetea #blacktea #lemon #refreshingdrink and #hydrate further reinforce the product as non-alcoholic iced tea and create confusion.*
 - *Use of hashtags such as #hydrate and #refreshingdrink create an illusion of therapeutic benefit as a result of consumption.*

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.
- (c)(iv) suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation.

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 confectionery 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 8 February 2022. Its principal comments were:

Alcohol Advertising Pre-Vetting Service Approval

- Yes, the alcohol marketing communications referred to in the complaint received Alcohol Advertising Pre-vetting Service Approval. The pre-vetter suggested I remove a slogan that was on the can and packaging, which I agreed to and removed before going to print.
- Nothing was mentioned about any appeal to minors in the pre-vetting process.
- ABAC application 685/21.

Packaging and labelling

- The product was introduced to the market on 14th December 2021.

Responsibility toward Minors

- The colour palette used in the labelling/packaging is an overall mature colour palette. Both the blue and orange are pastel shades, not bright or eye-catching. The muted pastel tones used are in clear reference to a Mod/70's/vintage feel which has no correlation to minors and they would not recognise it, especially considering they were not present in that era.
- The Panel's prior Determinations 84/19 Pirate Life Acai & Passionfruit, 97/20 Pirate Life Apple and Guava, 146/20 Brookvale Union Juicy Grapefruit, 31/21 Actual Vodka, and 253/21 Good Tides Seltzer clearly establish the acceptability of muted colours if the overall tone of the product is mature.
- The illustration on the packaging is of a barren desert wasteland with cactuses and clouds. Deserts are not commonly frequented by minors so I do not believe that we have depicted an environment that is relatable to minors.
- The label does not include any popular personalities or illustrations of cartoon characters or animals and there is no depiction of activities or products typically undertaken or used by minors. There is no reference to any characters or images that would have any appeal to minors beyond the general attractiveness to adults.
- The illustration of the lemon is in reference to the garnish of a lemon or other citrus fruit, which is a very popular and widely known garnish used for many alcoholic beverages including vodka lime soda, gin and tonic, and many more. It also is the flavouring ingredient of the drink itself which justifies the image being present on the packaging.
- Especially considering the large word 'Vodka' placed directly above the lemon (further detail below) the immediate correlation on seeing the lemon would be to associate it with an alcoholic beverage, not with lemonade.
- The word 'Subtle' is in reference to the flavour of the beverage having a subtle flavour. The words 'vodka' and 'hard', are used multiple times each on the packaging, both clearly reference the alcoholic nature of the beverage. The alcohol percentage is also clearly stated on the front of the packaging and includes the Standard Drink and Enjoy Responsibly stamps.

- 'Tea' is not a beverage that is necessarily associated with minors, if anything it would be more associated with the adult and even elderly population rather than minors. The bitter flavour profile has no appeal to minors specifically, and the caffeine content widely known to be in tea means it is not recommended for consumption for minors.
- I ensured that I took out extensive research about the ABAC and their decisions before I printed my label and packaging, to ensure it would fit in the guidelines. Due to this research, I added the word 'VODKA' in large black letters to the front of the design. The black writing and uppercase font ensure the word stands out very clearly, and Vodka is a very well-known and recognised alcohol option so there is no confusion.
- Originally, I had only the word 'Hard' on the packaging, which is also a commonly understood term for beverages containing alcohol. But after my research, I chose to add 'Vodka' as well, so the packaging clearly states two separate terms just to be safe.
- The words 'vodka' and 'hard' are both used multiple times on the packaging design. On the front clearly, and then again in the description of the drink on the side of the can.

Facebook posts

Responsibility toward Minors

- Although Iced Tea is commonly recognised as a non-alcoholic beverage, the use of the words 'vodka' and 'hard' on my packaging clearly confirms this is an alcoholic beverage.
- I reference the use of the word 'hard' in the packaging of many seltzer brands. As a seltzer refers to a non-alcoholic carbonated drink – including the term 'hard' makes it clear that it is in fact alcoholic.
- I can recognise that in the two posts referenced, the images of my can are too small to read those words, and I have not stated the words anywhere on the posts. Therefore - I removed the posts right away and will ensure I include more detail of the alcoholic nature of the beverage in future marketing.
- Referencing the above – I can understand that without the use of terms that clearly reference that the drink is alcoholic, and without any imagery of my can in those specific posts, it could be confusing and not clear. However, in future posts, I believe that if I ensure to use those terms in the post as well – then the hashtags #thetea #blacktea #lemon #refreshingdrink will be okay to continue to use – as they just describe

the ingredients in the drink. However, I will discontinue the use of the hashtag #hydrate (see below).

Responsible depiction of the effects of alcohol

- The term 'refreshing' can be associated with many things, especially describing beverages, and I don't believe it creates an illusion of therapeutic benefit as it doesn't refer to altering the state of a person's body at all.
- However, I can understand that the term 'hydrate' is different, as it can refer to your body altering its state from being 'dehydrated' to 'hydrated'. I will discontinue using this hashtag in future.

The Panel's View

15. Subtle Tea is a vodka-based lemon iced tea that became available on the Australian market in December 2021. The Company uses social media channels to promote the product and this determination arises from the complainant's concerns about how the product was portrayed in two Facebook posts from January 2022. In addition, the complaint goes to the product packaging (can design). The concerns raised are that:
 - the marketing has strong appeal to minors; and
 - the Facebook posts suggest the product offers a therapeutic benefit.
16. Turning first to the product packaging, the complainant contends the labelling design on the product can does little to identify the product as being an alcoholic beverage and otherwise in design could be confused with a soft drink and have strong appeal to minors. This brings into play the ABAC standard in Part 3 (b) that provides that an alcohol marketing communication must not have strong or evident appeal to minors. This appeal could occur if the marketing:
 - specifically targets minors;
 - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult;
 - uses imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to minors or that create confusion with confectionery or soft drinks.
17. It should be noted that government regulation (as opposed to the ABAC Scheme) deals with matters such as:

- whether an alcohol iced tea is a product that should be permitted for sale, with the ABAC confined to how alcohol products are marketed;
- requirements on alcohol product packaging providing information on the alcohol content of a beverage are sourced in government Food Standards regulations and not the ABAC.

18. The Company submits that the product packaging is consistent with ABAC standards. It is argued:

- a muted and mature colour palette is used that is not bright and eye-catching to minors;
- the design referencing a desert scene would not have particular appeal to minors;
- the packaging establishes the product is alcoholic in nature through the front of the label using the recognised alcohol descriptor of vodka and the term 'hard';
- the design was pre-vetted and adjusted to reflect advice received.

19. The assessment of the consistency of a marketing communication with ABAC standards is from the probable understanding of the marketing by a reasonable person. The 'reasonable person' test is sourced from the common law system and means the life experiences, values and opinions held by most people in the community is the benchmark.

20. The Panel does not believe the product packaging breaches the Part 3 (b) standard. It was noted:

- while tea as a beverage is more associated with non-alcoholic products, the labelling does clearly use the term 'vodka' and this with other cues about alcohol content means a reasonable person would likely understand the product is an alcohol beverage;
- the design does not resemble well recognised soft drinks eg bold block colours are not used, and it is unlikely the packaging would be confused with a soft drink;
- the packaging adopts a design that depicts a scene not likely to resonate particularly with minors;
- the colours used are not bright or likely to be eye-catching to minors;
- taken as a whole a reasonable person would not consider the packaging as having strong appeal to minors.

21. The concern regarding the Facebook posts was also about potential strong appeal to minors as well as whether the posts are suggesting the product offers a health benefit. The complainant contends:
- the posts could easily be taken as promoting a non-alcoholic iced tea; and
 - some hashtags included with the posts suggest the product offers a therapeutic benefit.
22. Part 3 (c) (iv) of the Code provides that alcohol marketing must not suggest that the consumption of an alcohol beverage offers any therapeutic benefit. The hashtags pointed to by the complainant are #hydrate, #refreshingdrink.
23. The Company accepts that the text of the posts do not clearly reference the product being alcoholic and that while the design of the packaging does do this, the pictures in the posts are too small to pick this up. The Company also accepts the use of the hashtag #hydrate was unwise. The posts have been deleted.
24. There is no ABAC requirement that alcohol marketing unambiguously identify the marketed beverage as being alcoholic as such. As noted in paragraph 17, there is direct government regulation via the Australia New Zealand Food Standards Code that the labels on alcohol beverages such as the Company's product, contain information regarding the alcohol to volume content of the beverage. This requirement however is directed towards the labels of the alcohol beverage itself, and not a marketing communication such as an ad or social media post for the beverage.
25. The relevant ABAC standard goes to the appeal of the marketing communication to minors. A failure to clearly establish a beverage is alcohol might contribute to the appeal of the marketing to minors by causing confusion with a soft drink. But the salient issue is not whether a reasonable person would understand the marketing is for an alcohol beverage, but whether the reasonable person would probably understand the marketing strongly appeals to minors.
26. The posts consist of a combination of text and images of the product, with one post also showing a photo of the Company's founder Ms Griggs. While the posts do not identify the product as being about an alcohol beverage and a reasonable assumption would be that they are referring to non-alcoholic tea, it is a different question as to whether this means the posts have strong appeal to minors.
27. The Panel does not believe the posts breach the Part 3 (b) standard. The posts refer to hot weather being a good occasion to drink the product and provide a link to the Company's website from where the products can be ordered. Neither the subject matter of the posts, nor the images seem likely to be strongly attractive to minors.

28. Further, it is marginal as to whether a reasonable person viewing the posts as a whole, would take a message that the consumption of the product offers a benefit to a consumer's health. The posts seek to establish the product as a good choice on a hot day, which is not of itself a message inconsistent with the Code requirement. However, given that a reasonable person would probably believe the posts were referring to a non-alcoholic iced tea and the use of the hydrate hashtag implies the drink will provide the benefit of hydration, on balance the Panel finds the posts are in breach of the Part 3 (c)(iv) standard.
29. Accordingly, the Panel upholds the complaint in relation to the two Facebook posts against Part 3 (c)(iv) and dismisses the complaint in relation to the product packaging and the Facebook posts in terms of Part 3 (b).