



## **ABAC Adjudication Panel Determination No 24/22**

**Product:** Mind Ya Head - Non-Alc XPA  
**Company:** Hop Nation Brewing Co  
**Media:** Billboard  
**Date of decision:** 4 April 2022  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Professor Richard Mattick  
Ms Debra Richards

### **Introduction**

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns billboard advertising for Mind Ya Head - Non-Alc XPA (“the Product”) by Hop Nation Brewing Co (“the Company”). It arises from a complaint received on 23 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:
  - (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 23 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. Pre-vetting approval was not obtained for the marketing communication.

## The Marketing Communication

10. The complaint relates to an outdoor digital billboard seen at the corner of Hoddle and Johnston Streets, Collingwood, Victoria:



## The Complaint

11. The complainant objects to the marketing as follows:

- *The mention of the product being alcohol-free is not immediately obvious; one may construe that the advert promotes risky activities such as driving a motor vehicle or other high-concentration activities. The only mention of the product(s) being alcohol-free is on the picture of the can itself; there is no mention of it in the text block, nor any comparative statement (used such in Heineken 0.0 and Carlton Zero advertising).*

## The ABAC Code

12. Part 2 of the ABAC Code provides that:

The Code APPLIES to all Marketing Communications in Australia generated by or within the reasonable control of a Marketer, except as set out in Section 2(b). This includes, but is not limited to:

- brand advertising (including trade advertising)
- competitions
- digital communications (including in mobile and social media and user-generated content)
- Alcohol Beverage product names and packaging
- advertorials
- alcohol brand extensions to non-alcohol beverage products
- point of sale materials
- retailer advertising
- Marketing Collateral

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

- (d) show (visibly, audibly, or by direct implication) the consumption of an Alcohol Beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical coordination, such as the control of a motor vehicle, boat or machinery or swimming.

14. Part 6 of the ABAC Code provides that:

**Alcohol Beverage** means a beverage containing at least 0.5% alcohol by volume.

### **The Company's Response**

15. The Company responded on 18 March 2022 by email. The principal comments made by the Company were:
- The marketing communication does not show the consumption of an alcoholic beverage at all (let alone during any activity in which it would be unsafe to do so).
  - We have taken care to ensure the non-alcoholic nature of the product is clearly conveyed and feel that any reasonable person would understand the context.

### **The Panel's View**

#### **Introduction - Is the marketing captured by the ABAC**

16. Hop Nation commenced operations as a craft beer brewer in 2015 with the Company establishing a brewery in the Melbourne suburb of Footscray in July 2016. The Company now produces a core range of beers and limited release offerings. In November 2021, the Company launched a limited release non-alcoholic 'XPA' branded as 'Mind Ya Head' with a further run of the product occurring in January 2022. It is a digital billboard advertisement for this product that has drawn the complaint.
17. The ABAC applies to the marketing of alcohol beverages. 'Alcohol Beverage' is defined in the Code as meaning a beverage containing at least 0.5% alcohol by volume. 'Mind Ya Head' contains less than 0.5% alcohol and therefore is not an alcohol beverage for ABAC purposes. This means that marketing for the product is captured by the ABAC only if this marketing can be considered to be a 'brand extension' of the Company's alcohol beverage range.
18. To be a brand extension, the branding of the non-alcoholic product needs to adopt core branding attributes of the recognised alcohol beverage range. While each case needs to be assessed on its own facts, some factors indicating that non-alcohol product marketing is a brand extension include the use of the alcohol company name, logo, core design features and alcohol descriptors such as beer or ale.
19. The common branding used on the packaging (can) of Hop Nation (alcoholic) beers feature:

- a white background;
  - various illustrations in green and black;
  - black lettering and font;
  - the Hop Nation logo; and
  - the use of a craft beer style descriptor eg IPA or NEIPA.
20. It is clear that the Mind Ya Head product adopts the same stylistic and branding protocols as used on most of the Company's alcohol beverage range and accordingly the Panel believes the billboard which features a picture of the product is an example of brand extension marketing for ABAC purposes. This means that the billboard should be consistent with ABAC standards for responsible alcohol beverage marketing.

### **ABAC and Brand Extensions**

21. Brand extension marketing can typically arise in two ways. A 'line extension' is when a marketer extends existing branding to a new product within the same general category of product e.g. Diet Coke as an additional consumer choice to Coke. 'Category extension' is applying the branding known in one category of product to an entirely different type of product or service e.g. Virgin music branding extending to Virgin airlines.
22. The ABAC was framed to create standards of good practice to the marketing of alcohol beverages. Essentially it does this by adopting a policy goal that alcohol use by adults be modelled as occurring moderately and in a responsible fashion. This goal is not achieved if the standards in the Code are breached by a marketing communication having a message proscribed as unacceptable e.g. showing or encouraging excessive alcohol consumption or suggesting alcohol use leads to the achievement of success.
23. Over time the Panel has considered various brand extension marketing communications, although these amount to a very small proportion of the total number of Panel determinations. Examples have included both line and category brand extensions, notably:
- Determination 124/20 - VB category extension to a fragrance for men;
  - Determination 118/19- Bundaberg Rum category extension to Egg Nog;
  - Determination 67/19 - Heineken line extension to a zero-alcohol beer; and
  - Determination 207/20 -Carlton line extension to a zero-alcohol beer.

24. The ABAC, as a whole, is self-evidently designed to deal with alcohol beverage marketing and as a result it is somewhat problematic to apply the standards to the marketing of a non-alcohol product. As a touchstone the Panel applies a common-sense and 'spirit and intent' approach to the applicable standard when assessing a brand extension marketing communication. The test might be expressed as follows - would a reasonable person understand that the brand extension marketing communication is promoting alcohol use inconsistently with ABAC standards.
25. The current case deals with a line extension, namely the extension of Hop Nation's craft alcohol beer branding to a non-alcoholic beverage product. In such a case, the assessment of the marketing communication can usefully involve answering the following questions:
- Does the marketing communication clearly identify the marketed product as a non-alcoholic beverage?
  - If not and a reasonable person could readily mistake the marketing as referring to an alcohol beverage, then the ABAC standards are applied as if the marketing was for an alcohol beverage.
  - If a reasonable person would understand the marketed product was not an alcohol beverage, the question is whether the marketing is suggesting the use of alcohol in a way inconsistent with the applicable ABAC standard.

#### **Does the billboard breach the ABAC standard**

26. The billboard depicts a large image of the front of a can of the product accompanied with text reading - 'DODGE HAZARDS with a CLEAR HEAD'. The Hop Nation logo is depicted as well as the Company's website address. The can design shows two magpies and a bike cyclist's helmet fitted with cable ties used by riders to protect against magpie strikes. The can also has several bird images circling above the helmet and a large 'O' in the background behind the two magpies. The Company logo is visible on the can and in smaller font the descriptor 'NON-ALC XPA'
27. The complainant argues that it is not immediately obvious from the billboard that the product is alcohol free and that the overall messaging promotes alcohol use with risky activities. The Company contends that the non-alcoholic nature of the product is clearly conveyed and in any event the billboard does not show alcohol consumption.
28. In assessing the consistency of a marketing communication with an ABAC standard the Panel is to adopt the probable understanding of the marketing by a reasonable person. In the case of a billboard on a busy road, most people will gain their understanding of the marketing from a quick scan and often from a moving

vehicle. A reasonable person cannot be expected to study the advertisement closely and this means the principal imagery and large font messaging will be most influential.

29. The Panel does not have the advantage of seeing the billboard in situ, but based on the layout of the advertising and a photograph of the site, the Panel believes a reasonable person would readily take in:
  - that the product marketed is a 'beer' (the can and Hop Nation logo being cues to this understanding);
  - the 'dodge hazards' and 'clear head' messaging; and
  - the principal imagery from the can, namely the magpies and quite possibly the bike helmet and product name.
30. It is more marginal as to whether a viewer from a passing vehicle would take in the cues of the beer being non-alcoholic. There are three potential cues, namely the 'non-alc' term and background '0' on the image of the can. Thirdly, the 'clear head' reference could be taken as suggesting a non-alcoholic beer.
31. The green '0' is presumably a subtle allusion to zero alcohol but this cue might be taken simply as a design element and the colour also means it is easily lost against the helmet and the green bird images. The 'non-alc' descriptor uses the smallest font employed on the billboard. And 'clear head', even if understood as referring to alcohol content could allude to a low alcohol or even mid strength product. On balance, the Panel concludes that a reasonable person may not have absorbed that the product being marketed is a non-alcoholic beer and this means the billboard needs to be assessed against the ABAC standard as if it was an alcohol beverage.
32. The nature of the complainant's concern about the billboard raises Part 3 (d) of the Code. This standard provides that an alcohol marketing communication must not show (including by direct implication) the consumption of an alcohol beverage before or during any activity that for safety reasons requires a high degree of alertness or physical coordination.
33. The intended message of the ad is to position the product as a preferred choice when a person wishes to consume a 'beer' but it is important to avoid any intoxicating effects of alcoholic beer in order to 'dodge hazards'. As noted, the Panel believes the billboard fails to unambiguously establish the product as non-alcoholic, but it doesn't automatically follow that the billboard is in breach of the Part 3 (d) standard.
34. This is because the standard does not preclude outright the association of alcohol beverages with activities that have an element of risk. Rather the provision

prohibits the showing of alcohol consumption prior to or during the potentially dangerous activity. For example, swimming in the ocean is an activity that has a potential safety risk and needs to be performed by a person who has not consumed alcohol. An alcohol ad that shows someone drinking alcohol and then going for a swim is in breach of the standard. But this does not preclude showing alcohol use near the ocean if the context of the ad makes clear that no swimming is going to occur by, say the time of day and that the person consuming is fully clothed.

35. The can design uses imagery of the dreaded Australian risk of being swooped by a magpie. A bike helmet is shown with cable ties used to protect a rider from a magpie swoop together with two magpies. The billboard features an image of the can but does not show alcohol consumption. The issue is then whether a reasonable person would imply from the context of the ad that alcohol consumption will occur prior to bike riding.
36. While it is possible to construe the imagery and messaging on the billboard as evoking cycling, the Panel believes in the few seconds most passers-by will spend looking at the billboard, a direct implication of alcohol consumption occurring before embarking on a bike ride cannot reasonably be assumed to be formed. As a result, the advertising does not meet the requirements to be considered a breach of the Part 3 (d) standard.

## **Conclusion**

37. The Panel has concluded that the billboard is not in breach of Part 3 (d) of the Code. While the billboard does not unambiguously establish that the product is a non-alcoholic beer, the advertising cannot reasonably be taken as directly implying the consumption of alcohol prior to cycling.
38. It should be noted:
  - the ABAC does not regulate physical beverages and there is no ABAC restraint on the Company producing a non-alcoholic beer; and
  - the determination goes only to the ad as present on the digital billboard and not to the packaging of the product as such.
39. Extending established alcohol beverage branding to non-alcoholic beverages such as zero alcohol beer does raise some novel issues. It is important that marketers place close attention not only to the letter of the ABAC but its spirit and intent in devising marketing communications for such products.
40. The complaint is dismissed.