



ABAC Adjudication Panel Determination No 39/22

Product: Mothers' Milk Stout
Company: Cronulla Beer Co
Media: Packaging
Date of decision: 5 July 2022
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Louisa Jorm
Ms Jeanne Strachan

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns an Instagram post for Mothers’ Milk Stout (“the Product”) by Cronulla Beer Co (“the Company”). It arises from a complaint received on 23 May 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 the 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

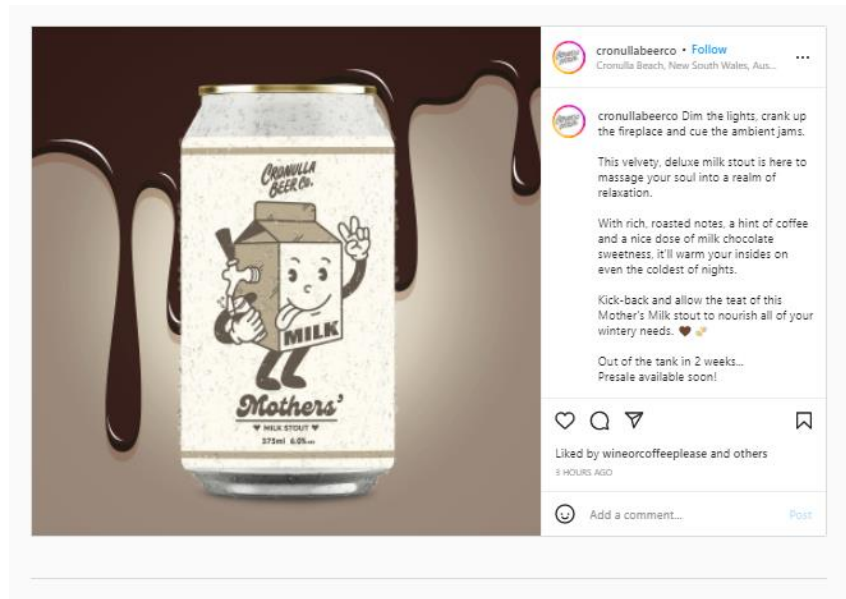
7. The complaint was received on 23 May 2022.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint 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 Instagram Post.

The Marketing Communication

10. The complaint relates to an Instagram Post by the Company as shown below:



The Complaint

11. The complainant objects to the marketing as follows:
 - *Illustration on a limited-edition beer - Cartoon-like, picture of a milk carton, name mother's milk.*
 - *I'm not offended by it, but it's just irresponsible and appealing to minors which is in contravention of the code.*

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 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's Response

14. The Company responded to the complaint by phone calls on 24 May 2022 and an email on 15 June 2022. The principal comments made by the Company were:
 - Since our conversation we made alterations to the final design removing the word "MILK" from the illustration.

- I remember you expressing concern that the resemblance or similarity to a normal milk carton could have been viewed as an issue.
- We were quick to amend.
- Removing this word then immediately takes the consumers' attention toward the style of product, being clearly labelled as a stout.
- While we do not totally agree with the nature of the complaint, we do feel obliged to take all feedback into consideration.
- Along with the dull monotone colour palette of the design, as well as being a "stout" - a most undesirable product for anyone underage, we are confident that this design would not be enticing to a younger audience, especially those under the age of 18 or children.
- We have also confirmed that we have an age restriction on all of our social media therefore ensuring no advertisement would be seen by minors.
- I appreciate you bringing the complaint to our attention, and this is guaranteed to force us to view all designs moving forward with a new set of eyes.

The Panel's View

Introduction and a jurisdiction issue

15. Cronulla Beer Co is a newly established independent brewery located in the Sutherland Shire, south of Sydney. Commencing operations in late 2020, the Company has a small range of core beers and occasional limited releases. In May 2022 the Company began marketing over social media the pending release of a 'Mother's Milk Stout' and it was an Instagram post for this product that attracted the complaint.
16. The Instagram post was dated 23 May 2022. It shows a picture of the front of the can of the product with accompanying descriptive text about the product's flavour characteristics. The image on the can is a drawn figure with the body of a milk carton. The figure's face is drawn on the front of the carton with a tap on one side showing liquid being poured into a glass. The word 'milk' is shown at the bottom of the figure's face.

17. The accompanying text advises that the product is 'Out of the tank in 2 weeks... Presales available soon!'. The Company advised that the design of the can in the Instagram post was a preliminary render of the intended package and that the actual can now released onto the market has been altered from that depicted in the post. The complainant nominated not only the Instagram post but the can as a matter of concern based upon likely appeal to minors.
18. The ABAC applies to alcohol marketing communications including digital communications such as Instagram posts and alcohol beverage product names and packaging. Clearly the Panel has jurisdiction to consider the Instagram post but the position regarding the packaging itself is slightly novel. At the time of the complaint, there was no actual product packaging i.e., the product was not yet on the market. Further, the image of the packaging shown in the post was not the same as the actual product packaging now released on the market.
19. The ABAC Scheme comprises two components. Firstly, a pre-vetting service which provides advice to marketers on intended marketing concepts and materials prior to the use of the materials in the public domain. Secondly, a public complaints process to enable complaints about marketing communications in the public domain to be considered against ABAC standards. The public complaints process and the role of the Panel is not to make decisions about marketing concepts but is confined to decisions on marketing communications actually being used.
20. While this may seem a tad technical and pedantic, the Panel is obliged to confine this determination to the Instagram post and not the product packaging as foreshadowed in the post. This is because:
 - there was at the time of the complaint no actual product packaging on the market and the image of the packaging in the post is not identical to the actual packaging now being used; and
 - the rules and procedures applying to determinations about product packaging are different to those applying to other marketing communications, in particular product packaging determinations involve a two-stage process requiring a preliminary determination before a final determination.

Is the Instagram post consistent with ABAC standards

21. The complainant is concerned that the Instagram post will attract minors to the product. This concern raises Part 3 (b) of the ABAC that provides that alcohol marketing communication must not appeal strongly to minors. The standard might be breached if the marketing:
 - 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.
22. 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.
23. 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.
24. 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.
25. The Company contends that a reasonable person would not believe the marketing has strong appeal to minors as it:
- has a dull monotone colour palette; and
 - clearly identifies the product as a “stout”, which would not appeal to under 18 year olds.
26. It should be noted that the ABAC does not regulate physical beverages, but is confined to the marketing of the alcohol. The Company’s contention that stout as a product type is unlikely to be appealing to minors might be fair comment, but it’s not relevant to assessing the marketing material as such. It cannot be assumed that minors will be familiar with the taste or other characteristics of stout, and the Panel’s assessment is based upon how the marketing would be probably understood.
27. On balance, the Panel believes that the Instagram post does breach the Part 3 (b) standard. In reaching this conclusion the Panel noted:
- the most prominent feature of the post is the depiction of a milk carton based figure. The image is drawn and in a style and colour tone reminiscent of 1930’s animation;
 - the milk carton figure would have appeal to minors although the overall style is retro rather than contemporary;

- the word 'milk' shown on the carton could raise some potential confusion about the nature of the product although the use of the company name and the word stout on the can image and the accompanying text makes it likely that a reasonable person would understand the post is about an alcohol product;
- the use of the dripping chocolate with the can image, together with the words 'milk' and 'mothers' raises an illusion of smooth transition from a non-alcoholic to alcoholic beverage; and
- taken as a whole a reasonable person would probably understand the post has a strong and evident appeal to minors.

28. The complaint is upheld.