



ABAC Adjudication Panel Determination No 94/22

Product: Sungazer Fruity Beer
Company: Carlton & United Breweries
Media: Digital - YouTube
Date of decision: 8 December 2022
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 advertising for Sungazer Fruity Beer (“the Product”) by Carlton & United Breweries (“the Company”). It arises from a complaint received on 2 November 2022 that the advertisement was seen on YouTube before a video for the Royal Academy of Dance children’s ballet practice (“the Ballet Video”), which is commonly viewed by minors, with the advertisement itself also having strong or evident appeal to children.
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 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 content and placement of the advertisement.

The Marketing

10. The complaint relates to YouTube advertising for the Product, which can be viewed at the following link:

<https://www.youtube.com/watch?v=leny-pPNVqY>

Following is a brief description of the ad:

A shot of three cans of Product are shown in front of an ocean sunset scene, along with the Sungazer logo and the words "New Sungazer Fruity Beer Brimming with Fruity Flavour". The sound of the ocean and nearby birds can be heard.

Voice Over: *Introducing Sungazer Fruity Beer*



Brimming with Fruity Flavour.

[Voice speeds up and the following words also scroll across the bottom of the screen]

Sungazer Fruity Beer does not endorse gazing directly at the sun. There are many other things you can gaze at while drinking Sungazer, including flowers, the ocean, even small fluffy dogs. Just DO NOT gaze at the sun.

A hand reaches in and lifts up a can.

Voice Over: *Put that back.*

The hand puts the can back.



The Complaint

11. The complainant objects to the marketing as follows:

- *An ad for Sungrazers new fruity beer was seen prior to a YouTube video for the Royal Academy of Dance children's ballet practice. This is a video that is watched predominantly by people under the age of 18. The Grade 1 ballet exam is aimed at children between the ages of 7 and 10. (<https://www.youtube.com/watch?v=Qi8K-rQvNbQ>)*
- *The YouTube account was signed into the parent's account. The video is strictly for children wanting to practice their ballet. They should not be confronted with alcohol advertisements in order to do so.*
- *Alcohol ads should not be placed before children's content on YouTube, and in particular ads that are not skippable. Therefore, the ad is in breach of the following ABAC placement rules.*
 - *If a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, a Marketing Communication may only be placed where the audience is reasonably expected to*

comprise at least 75% Adults (based on reliable, up-to-date audience composition data, if such data is available).

- *A Marketing Communication must not be placed with programs or content primarily aimed at Minors.*
- *In conjunction with the ad appearing before a video predominantly watched by children, the ad and the product packaging is bright and colourful which would appeal to children.*

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;
- (b)(iv) be directed at Minors through a breach of any of the Placement Rules.

13. Part 4 of the ABAC Code provides that a breach of this Code that is reasonably unforeseeable by or outside the reasonable control of the Marketer or their agency will be classified as a no fault breach.

14. Part 6 of the ABAC Code provides that:

Placement Rules means:

- (i) A Marketing Communication must comply with codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy).
- (ii) A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.
- (iii) If a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, a Marketing Communication may only be placed where the audience is reasonably expected to comprise at least 75% Adults (based

on reliable, up-to-date audience composition data, if such data is available).

- (iv) A Marketing Communication must not be placed with programs or content primarily aimed at Minors.
- (v) A Marketing Communication must not be sent to a Minor via electronic direct mail (except where the mail is sent to a Minor due to a Minor providing an incorrect date of birth or age).

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 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 to the complaint by emailed letter on 14 November 2022. The principal points made by the Company were:

Alcohol Advertising Pre-vetting Service Approval

- The alcohol marketing communication referred to in the complaint did not receive Alcohol Advertising Pre-vetting Service Approval.

Responsibility toward Minors

- The bright colours on the packaging are not eye-catching and appealing to Minors. Consistent with other ABAC decisions significant care has been taken to balance the use of bright colours with positive alcohol identifiers, such as:
 - The words 'FRUITY BEER' are highlighted on a contrasting white background directly underneath the name of the product, on both the images of the cans and occupying the left-hand side of the advertisement.
 - The ABV signifier '4.2% ALC/VOL' is prominently positioned in large text on the can.
 - The repetition of 'fruity beer' throughout the advertisement.
 - The cans are also positioned against an image of the sun setting over the ocean, which is not an image that holds strong or evident appeal to minors.
- Notwithstanding this specific advertisement has not received AAPS approval, due to the nature of the product and the bright colour of the packaging, our innovation team worked closely with AAPS to ensure the packaging was compliant with Part 3(b)(i) of the Code. Approval of the packaging design was granted under Application No. 1046/21 on 4 March 2022 with Approval No. 20854. Furthermore, approval of a similar, and indeed more colourful, static OOH asset was granted under Application No. 828-2022 on 29 September 2022 with Approval No. 3705.
- We are confident that the alcoholic nature of this product is clear from the advertisement, and that the colours used are consistent with the product's

brand proposition (fruity flavor) while taking care to avoid inadvertently appealing to minors.

- Prominent use of the word “Fruity” and the flavour descriptions of raspberry, mango and watermelon would not potentially create confusion with a soft drink or provide the illusion of a smooth transition for Minors to alcohol. As I have indicated, the use of the word ‘fruity’ is exclusively in the context of this product being a beer that has a fruity flavour. We want adult consumers to be aware that this product retains the characteristics of a beer while utilising innovative fruit flavours to provide a slightly different experience to traditional beer.
- Moreover, the raspberry, mango and watermelon flavours have been depicted on the can in an extremely abstract manner, utilising the imagery of a sun setting over water. Extensive care has been taken to ensure that the cans do not resemble any existing non-alcoholic soft drink in market, and the use of the 300ml slimline can conveys that this is a premium, adult beverage.

Placement Rules

- Available Age Restriction controls were utilised to exclude Minors from viewing the Marketing Communication on YouTube. Our YouTube advertising buys are only served to people who are signed in and have indicated they are aged 18+, as well as ensuring we actively exclude all inappropriate categories, including content for children. I can confirm that these exclusions were in place for the Sungazer campaign.
- However, these exclusions rely on the content being tagged/categorised correctly by content creators and by YouTube in order for them to be accurate. It appears in this case that this content has not been categorised as children’s content when it clearly should be.
- We have flagged this miscategorised content with YouTube and would also recommend that 18+ users sign out of their accounts if children are using the platform, as this will exclude alcohol advertisements.

Audience composition

- We do not have audience composition data for this video; we agree that the content is for minors and that an alcohol advertisement should not have appeared before the video.

No Fault Breach

- Carlton & United Breweries, like all advertisers on the YouTube platform, relies on content to be correctly categorised for targeted advertising to be effective. It is never our intention to promote our products to minors, and we thank the complainant and ABAC for bringing this to our attention. If this is considered by the Panel to be a breach, we would submit that it is a No Fault Breach as the placement of the advertisement is dependent on content creators and the YouTube platform correctly categorising content.

Concluding comment

- Carlton & United Breweries is committed to ensuring our promotional and marketing material does not promote or encourage any irresponsible consumption of alcohol. 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. This determination arises from a complaint relating to an advertisement for Sungazer Fruity Beer seen on YouTube before a video for the Royal Academy of Dance Grade 1 Ballet (the 'Ballet Video'). The complainant contends that alcohol advertising should not be shown before the Ballet Video because it is predominately watched by minors. Further, it is argued that the ad and the product packaging is bright and colourful which would appeal to children.
17. The ABAC contains standards of good practice for alcohol marketing. A key standard is that alcohol marketing should not be strongly appealing to under 18-year-olds. To achieve this policy goal, the ABAC contains both a standard going to the content of alcohol marketing and a set of rules which aim to have alcohol marketing (irrespective of its content) directed towards adult audiences and to the extent possible away from minors. This means the issues for consideration for this determination is whether:
 - the placement of the advertisement with the Ballet Video breaches the ABAC Placement Rules; and
 - the content of the advertisement has strong or evident appeal to minors in breach of the ABAC content standard

The Ballet Video and the ABAC Placement Rules

18. According to its Australian website the Royal Academy of Dance (RAD) was formed in the United Kingdom in 1920 and traces its Australian operations to 1935. It was created primarily to advance the professionalism of classical dance teachers rather than to teach dance to students as such. It seems the RAD maintains a dedicated YouTube channel on which numerous videos are posted. From a quick review of this YouTube channel, the videos contain content aimed at different audiences extending from child dance students to adult dancers at various levels of proficiency. Other videos are not teaching materials but go to social and administrative activities of RAD.
19. The complainant states that the advertisement was placed before a video entitled 'RAD Grade 1 Ballet'. This video shows four young female dancers (aged under 10) undertaking a dance class from a studio in York, England. It is argued that it is inappropriate for alcohol advertising to be shown with the Ballet Video as it is predominantly watched by minors.
20. It is noted by the complainant that the video was accessed on a device that was 'signed into the parent's account'. That is, the advertisement was not served directly to a device or a YouTube account held in the name of a minor.
21. It is common ground between the complainant and the Company that it is inappropriate that alcohol advertising should be shown with the Ballet Video, given that the content of the video was aimed at children interested in or undertaking dance classes. It is little more involved to determine whether the ABAC Placement Rules have been breached, and if so, whether a 'no fault' breach finding can be made as requested by the Company.
22. The ABAC Placement rules establish a series of interrelated requirements that endeavour to limit and if technically feasible exclude minors from the audience of alcohol marketing. In the case of marketing transmitted by way of digital channels, there are three placement rules that can come into play, namely:
 - Rule 2 - utilise available age restriction controls to exclude minors from viewing marketing;
 - Rule 3 - if age restriction controls cannot be used, then alcohol marketing can only be placed where the audience is reasonably expected to comprise at least 75% adults; and

- Rule 4 - alcohol marketing cannot be placed with programs or content primarily aimed at minors.
23. YouTube does have age restriction controls that an alcohol company can apply so that alcohol ads are not served to minors. The Company advises it applied these controls in relation to its ads for the Sungazer product. The controls are quite effective as they are based both on the date of birth a person enters when opening an account and a range of other analytic data from a person's use of the site. In other words, the concern that a minor might enter a false date of birth to access more adult focused content (and by knock effect be served with alcohol ads) is mitigated by the 'deemed age' of the account holder based on data collected by the platform.
 24. Of course, the value of the age restriction controls is muted if a minor uses the device and account of a parent or other adult. Equally, age restriction does not help with co-viewing (adults and minors) of content delivered over an account held by an adult. Hence age restriction controls on digital TV apps e.g. 7Plus etc tend not to be an effective exclusion control due to co-viewing of programming on a TV in the family home from an account held in an adult's name.
 25. In these circumstances, Placement Rules 3 and 4 do more work. Rule 3 is based on the 'reasonably expected audience' of a program with which the alcohol ad has been placed. Often (but not always) a reasonable expectation of an audience age spread can be gained from robust data sources such the ratings system for broadcast programs or audience demographics derived from the data collected on digital media platforms.
 26. Rule 4 applies irrespective of the actual audience of a program and requires that alcohol ads not be placed with content primarily aimed at minors. At either end of the spectrum it is evident if a program is 'primarily aimed' at minors based on its themes, storylines and characters and elements such as language and the treatment of sex and sexuality etc. There are some programs however which are more difficult to assess.
 27. The Company states that it does not have audience data on who has actually watched the Ballet Video, but it concedes the video contains content for minors and that the advertisement should not have been shown with it. For its part, the Panel believes the Ballet Video was not directed solely towards minors but to parents and dance teachers of child dancers as well as the dancers themselves. It was instructional material with a specific purpose and wasn't a children's entertainment program.

28. That said, and without the benefit of actual audience data, it is likely that the 'reasonably expected' audience of the program would exceed 25% minors and hence the placement of the ad with the Ballet Video was a breach of Placement Rule 3. It is a more marginal judgment as to whether the content of the video was primarily aimed at minors. In any event, as accepted by the Company, the video was not appropriate content for an alcohol ad to be placed and the Panel finds that Placement Rule 4 has also been breached.

Sungazer Fruity Beer advertisement and Strong Appeal to Minors

29. Beyond the question of the placement of the ad with the Ballet Video, the complainant also argued that the content of the ad drew the attention of children. The relevant ABAC content standard is contained in Part 3 (b)(i) of the Code and provides that an alcohol ad must not have strong or evident appeal to minors. This might be breached if the ad:
- specifically targets minors;
 - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; or
 - uses imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to minors.
30. The benchmark applied when assessing if an ABAC standard has been satisfied is the 'reasonable person' test. This means the Panel puts itself in the shoes of a person who has the life experiences, opinions and values commonly held by most Australians, and assesses how this reasonable person would probably understand the marketing communication.
31. The Company submitted that the ad was consistent with ABAC standards arguing that:
- the bright colours on the packaging are not eye-catching and appealing to minors;
 - the packaging clearly identifies that the product contains alcohol;
 - the words 'fruity beer' are repeated throughout the advertisement; and
 - the imagery used would not have strong or evident appeal to minors.

32. The Panel has considered the factors that might give rise to a strong or evident appeal to minors on previous 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. 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.
34. The Panel does not believe the ad breaches the ABAC standard. It was noted:
- the ad does not show a significant amount of movement, and does not have characters that would engage minors;
 - the ad establishes the product is alcoholic through a combination of verbal references and text superimposed on the ad as well as on the product packaging;

- while the cans shown in the ad are brightly coloured, this factor needs to be understood within the context of the ad as a whole;
- the voiceover narrative is playful but does not contain themes likely to appeal to minors; and
- taken as a whole, any appeal to minors is incidental and not strong or evident.

No Fault Breach

35. The Company requested that the Panel consider the breach of the Placement Rules to be a 'no fault' breach of the Code as:
- the Company requested that Available Age Restriction controls be utilised, namely that the marketing only be shown to signed in users who have indicated they are 18 years or older, and also not during inappropriate categories, such as content for children;
 - the effective operation of the Available Age Restriction controls is dependent on the proper categorisation of video content; however
 - the content was not tagged/categorised correctly by the content creators and YouTube, leading to a breach of the ABAC Placement Rules.
36. A no fault breach ruling can be made if the Company is able to demonstrate that it acted properly to market consistently with ABAC obligations but a breach occurred which was not foreseeable or was outside its reasonable control. A no fault finding does not diminish that the breach occurred and that the complainant's concern has been fully vindicated. But it does recognise that the Company took steps that could be expected of it to meet its responsible marketing obligations.
37. It can be accepted that the Company did not make a conscious decision to place its advertising with the Ballet Video. In fact, it is quite typical for ad placements to be done 'programmatically' which sees ads placed across a range of media platforms and content meeting a variety of pre-set criteria and without the exercise of deliberate choice about individual programs. That said, the lack of intention to place an ad with inappropriate content does not justify a no fault ruling as alcohol marketers must apply due and proper diligence as to best ensure their marketing is placed consistently with the ABAC obligations.

38. In this case the 'fault' arose due to the categorisation of the video by YouTube as being content suitable for alcohol advertising. Marketers (not only for alcohol products) do rely on media platforms to categorise content accurately. This categorisation process, like much of what occurs back of house in global platforms like Google (the owners of YouTube) is not always transparent.
39. However, it does appear that the Company applied available age restriction controls, gave instructions as to where its ads should be placed, and if the instructions had been followed by YouTube in correctly categorising the Ballet Video, the breach would not have occurred. In these circumstances it is appropriate to make a no fault ruling.
40. Accordingly, the complaint is dismissed in relation to Part 3 (b)(i) of the Code and upheld in relation to Part 3 (b)(iv). Further a no fault ruling is made in relation to the breach.