



ABAC Adjudication Panel Determination No 123/22

Product: Rum Nation Director's Batch and Collectors Edition
Company: CAVU Distilling Pty Ltd
Media: Digital - Facebook and Instagram
Date of decision: 9 January 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Jeanne Strachan

Introduction

1. This determination by the ABAC Adjudication Panel ("the Panel") arises from a complaint received on 19 December 2022 and concerns a video posted to One Nation's Facebook and Instagram pages promoting the sale of Rum Nation Director's Batch and Collectors Edition Rum ("the products"), which are produced by CAVU Distilling Pty Ltd ("the Company") and retailed on its Nil Desperandum website.
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 19 December 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.

The Marketing Communication

10. The complaint relates to a video marketing Rum Nation Director's Batch and Collectors Edition, which was posted to Pauline Hanson's Please Explain Facebook page and Pauline Hanson's Instagram page:

<https://www.facebook.com/PaulineHansonAu/videos/1255753268333893>

<https://www.instagram.com/p/CmPIThshN-T/>

The video includes the following scenes:

A scene where the characters pour alcohol into a glass for consumption.



A scene where the "Jacqui" character moves across the screen in front of the "Pauline" character, holding a bottle of alcohol.

Jacqui – And I tell you what, it's not a bad drop either.

Pauline – Jacqui, no! Put the bottle down.



The Complaint

11. The complainant objects to the marketing as follows:
- There are responsible serving issues.
 - It breaches Part 3 of the ABAC Code which provides that a Marketing Communication must NOT show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines.
 - It uses cartoon characters that children like, as demonstrated in the Facebook comment's section under this video advertisement.

The ABAC Code

12. Part 2 (a) 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)...

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

(a)(i) show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines;

(b)(i) have Strong or Evident Appeal to Minors.

14. Part 6 of the ABAC Code provides that:

Marketer means a producer, distributor or retailer of Alcohol Beverages.

Marketing Communications means marketing communications in Australia generated by or within the reasonable control of a Marketer (apart from the exceptions listed in Section 2(b)), including but not limited to brand advertising (including trade advertising), competitions, digital communications (including in mobile and social media), product names and packaging, advertorials, alcohol brand extensions to non-alcohol beverage products, point of sale materials, retailer advertising and Marketing Collateral.

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

15. The Company responded to the complaint by letter emailed on 3 January 2023. The principal comments made by the Company were:

Nature of relationship with One Nation

- CAVU Distilling Pty Ltd ('CAVU') is an independent distiller that provides on wholly commercial terms the opportunity for a wide range of third parties, including One Nation Queensland Division Inc. ABN 53 975 273 862 ('One Nation'), to undertake fundraising through the online sale of spirits produced and packaged by CAVU under both the Nil Desperandum and Sunshine & Sons brands. Recent fund raising collaborations include the Woodford Folk Festival, STEPS Charity, Raelene Boyle, Paul Kelly, Noosa Festival of Surfing, Australia's Funniest Festival, the Queensland Greens, the Federal Member for Fairfax and Kherson Liberation Gin. The One Nation spirits are branded to the specification of One Nation and are promoted by One Nation.
- Online links from those promotions direct sales from age gated <https://www.rumnation.com.au/> to age gated <https://www.nildesperandum.com.au/product-category/rum-nation/>.
- Payments of all orders are to CAVU's merchant facility and orders are fulfilled by CAVU. A previous edition of limited edition Pauline Hanson Please Explain Gin was undertaken by identical means and without complaint, with similar cartoon branding featuring many of the same prominent politicians.

Control over marketing complained about

- The company was not aware of the promotional video and did not have any control over how the product would be portrayed. Note we are not the advertiser or marketer, and the promotional video or any promotion related to the One Nation spirits has not featured on any CAVU channels or media.

- With regards to whether the Company has any ability to have the video modified in relation to the portrayal of alcohol use, and whether it is able to request that the video be deleted – note we are not the advertiser or marketer and requests regarding the One Nation video should be directed to One Nation.

Responsible and moderate portrayal of Alcohol Beverages

- Noting we are not the advertiser or marketer we do not consider the video packaging breaches Part 3 (a)(i) of the Code. We note the relatively short elapsed time of the pour is, in our opinion, consistent with a standard drink or less of a 38% ABV spirit. The liquid is splashing in the glass and does not settle at any point in the animation sequence so as to allow a determination of an approximate level the glass has been filled to. Each of the three characters state “little tippie” in regards to the serve highlighting moderation. No consumption of alcohol is depicted in the video.
- The bottle held by the “Jacqui” character is full and unopened. No consumption of alcohol is depicted. The exaggerated and male voice that speaks as the “Jacqui” character is clearly humorous and is clear, concise and is, in our opinion, not indicative of inebriation. The nature of the stop motion animation is that all characters in the video move in a non-natural manner and as such this is not indicative of inebriation of a single character. The likeness to the politician who is clearly the inspiration of the “Jacqui” character is recognisable including the hair style.

Responsibility toward Minors

- Noting we are not the advertiser or marketer we do not consider the video breaches Part 3 (b)(i) of the Code by having Strong or Evident Appeal to Minors by adopting a cartoon format that will be familiar and relatable to minors. The video features readily identifiable caricatures of prominent politicians that have featured extensively in a previous series of cartoons that discuss subjects related to and including politics. Given the subject matter and the prominent politicians caricatured the video in our opinion does not have Strong or Evident Appeal to Minors specifically that the video is not:
 - likely to appeal strongly to Minors;
 - specifically targeted at Minors;
 - having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult
 - using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors.

The Panel's View

Background

16. This is an unusual case involving the fundraising activities of the political party Pauline Hanson's One Nation (One Nation). In outline:
- in 2022 One Nation produced an animated political commentary/satire series entitled 'Please Explain' distributed via One Nation accounts on social media platforms (Instagram/Facebook) and the video streaming platform YouTube;
 - the party intends to renew the series and is undertaking fundraising activities to meet the costs of production;
 - one fundraising activity being undertaken by the party, under the banner of 'Rum Nation', involves the sale of two rum products both branded in One Nation livery;
 - The Collectors Edition of 15,000 units and
 - The Director's Batch of 5,000 units
 - the products have been commissioned by One Nation from the Company pursuant to a commercial agreement;
 - the availability of the rum products and their fundraising purpose has been promoted by a short video in the style of the animated series distributed via the One Nation social media channels;
 - links attached to the video take potential purchasers to the web page 'rumnation.com.au' that appears to be a One Nation page;
 - the 'Rum Nation' page contains information about the Please Explain series, the fundraising and the products. Also included is a 'buy now' button. A note under the button reads - 'Note: Purchases will be directed to the Nil Desperandum online store';
 - the buy now link from the 'Rum Nation' page goes to a page on the Company's website;
 - from the Company website, the Company then accepts the orders, arranges dispatch of purchased products and receives payment; and
 - the proceeds are divided between the Company and One Nation as per the agreement between the parties.
17. The complainant objects to how alcohol use is portrayed in the fundraising video. It is contended that excessive alcohol consumption is encouraged and that as an animation, the video and hence alcohol use will be appealing to minors.

18. While the complainant's concerns potentially raise ABAC issues regarding responsible alcohol marketing, there is a threshold question as to whether the 'Please Explain' fundraising video is an 'alcohol marketing communication' for ABAC purposes.'

Do the ABAC standards apply to the video

19. There would be many thousands of references made about alcohol over social media channels every day. For a communication containing a reference to alcohol to fall within the scope of the ABAC Scheme, the communication must be 'marketing' about a specific branded alcohol beverage and this marketing must have been generated by or be within the reasonable control of an Australian alcohol beverage producer, distributor or retailer.
20. The video was created by One Nation for its fundraising purposes. Clearly One Nation is not an 'alcohol retailer' within the ordinary meaning of that term for the ABAC Scheme. The term 'retailer' is not defined in the Code and over time the Panel has recognised a variety of different business types and activities as falling within the reasonably intended scope of the term. Most usually a 'retailer' for ABAC purposes has been a specialist liquor outlet but it also includes hotels and clubs and licensed restaurants.
21. In the current circumstances, it is reasonably apparent that the retailer is the Company and not One Nation as such. The Company:
- produces the rum products;
 - has entered into the agreement with One Nation for the provision of the rum products under One Nation branding;
 - receives the orders and arranges the delivery of the ordered products from customers; and
 - is paid directly by the customer with the agreed amount per unit sold passed on to One Nation.
22. The question is then the relationship of the Company to the video. In short, did the Company either 'generate' the video or does it have reasonable control over the video so that that the video can be regarded as a marketing communication of the Company that must meet the ABAC standards.
23. On this question, the Company advises that it did not create the video and it is clear the video was created by (or at least commissioned by) One Nation. The Company states it was not aware of the video in advance and was not asked to give any approval to the video. It denies that it has any right to have the video removed or modified.
24. More generally the Company advises that it is part of its business model to produce specially branded products for fundraising activities. It has no relationship with One Nation beyond the commercial agreement and states it

has also produced products branded for the Queensland Greens and the LNP Federal Member for the electorate of Fairfax.

25. Drawing this together, the Panel believes that the video cannot be held to a marketing communication of the Company. The Company did not have prior knowledge of the video, it did not create the video and it apparently has no entitlement to have the video removed or modified. As the video cannot be regarded as a marketing communication of the Company, the ABAC standards do not apply to the video.

Conclusion

26. As the video does not fall within the remit of the ABAC Scheme, the Panel has no jurisdiction to make a finding on whether the video portrayed alcohol use in a manner consistent with ABAC standards. It is recognised that this will be a disappointing outcome for the complainant who raised a genuine concern about the video messages regarding alcohol use.
27. More generally, it is recommended that the Company reflect on its business model regarding producing and retailing specially brand products for fundraising. The actual model is perfectly legitimate. However, the Company should at a minimum provide its commercial partners with advice on good practice regarding alcohol promotion. Preferably it should include in its commercial terms an obligation that its counterparty in the fundraising endeavours promote alcohol products consistently with ABAC standards.
28. Accordingly, the complaint is dismissed on jurisdiction grounds.