



ABAC Adjudication Panel Determination No 137/23

Product: Tawny Grogmouth
Company: Bucketty's Brewing Co
Media: Digital – Instagram
Date of decision: 3 September 2023
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”) arises from a complaint received on 21 August 2023 in relation to Instagram marketing for Tawny Grogmouth (“the product”) by Bucketty's Brewing Co (“the Company”).
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 21 August 2023.
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

- 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 of the marketing.

The Marketing

- The complaint relates to an Instagram video post showing a 360-degree view of the concept packaging for Tawny Grogmouth:



buckettys • Follow
Original audio

buckettys 🦎 Tawny Grogmouth 3.0 can reveal! 🦎

Tawny Grogmouth is on again and to kick-off our annual beer fundraiser, we're revealing the can artwork! This year the goal is to celebrate our natural environment and create an Aussie bush scene loaded with Tawny Frogmouths and pastel earthy tones with all proceeds donated to the amazing volunteers at [@sydneywildliferescue](#).

If you love the can artwork, we'd really appreciate a vote in the [@gabsfestival](#) Can Design Awards, head to the link in bio and search for 'Tawny' to find our can and checkout all the other awesome art. Cheers to [@artofbrentos](#) and [@thetawnyfrogmouth](#) for making this happen again! We're psyched to share more about this special beer with you soon...watch this space!

Complaint

- The complainant objects to the marketing as follows:
 - Can't easily identify from the front of the can that it is a beer. No clear labels it is alcoholic, apart from saying 'drink beer save wildlife'. In a fridge a kid could easily mistake this for being non-alcoholic.*
 - The anthropomorphism of some of the animal depictions brings to mind children's cartoons and characters in stories directed at children.*
 - The overall impression of the packaging through the graphic design creates an illusion of a smooth transition from a non- alcoholic to an alcoholic beverage.*

The ABAC Code

12. On 1 August 2023 an updated version of the ABAC Code came into effect. As the complaint relates to an Instagram marketing communication that entered the market after 31 July 2023 it will be considered against the revised Code. References in this determination are therefore to Code standards as contained in the revised Code.
13. Part 3 of the revised ABAC Code provides that a Marketing Communication must NOT:
 - (b)(i) have Strong or Evident Appeal to Minors, in particular;
 - (A) specifically target Minors;
 - (B) have a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
 - (C) use imagery, designs, motifs, language, activities, interactive games, animations or cartoon characters that are likely to appeal strongly to Minors;
 - (D) create confusion with confectionery, soft drinks or other similar products, such that the marketing communication is likely to appeal strongly to Minors; or
 - (E) use brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

The Company Response

14. The Company responded to the complaint by email on 25 August 2023. The principal comments made by the Company were:
 - When I designed the can I took feedback from the previous year's complaint and familiarised myself with ABAC's standards, in order to minimise any push back from a complaint or ABAC.

Alcohol Advertising Pre-vetting Service Approval

- The marketing communication was not submitted for pre-vetting approval, but since the packaging doesn't exist, we could still use this service.
- The product has never been for sale, and the physical packaging doesn't exist. It only exists as a design concept.

Responsibility toward Minors

- I made efforts to ensure the characters were generic and would not have strong or evident appeal to minors, but rather appeal to a broad range of people. I also added techniques (such as the ring eyes on the two big tawny frogmouths) to create additional distance for having any strong appeal to minors.
- 'Drink beer. Save wildlife' is clearly written on the FRONT of the can. 'Beer!' is also included in the label description. 'Grogmouth' assumes additional reference to the drink being an alcoholic beverage.
- I strategically used a limited colour palette of army greens and browns (as opposed to rainbow colours) to make the can design less appealing to minors and more appealing to adults. I mean, have you seen some of the other entries? Did they complain about them too? The fairy floss beer? The ice cream beer? The chocolate donut beer?
- 'Drink beer. Save wildlife' is quite large, clear and identifies the product as beer, as well as the name itself (Grogmouth). The product is also labelled beer on the side label. (If need be, we can include 'Beer' more prominently near the title.)
- I made a conscious effort NOT to include any form of anthropomorphism in this design. All the animals are in their natural environment with natural animalistic, non-human behaviours. There are no birds drinking beer or hinting at drinking beer, or otherwise animals doing human-like activities or behaviours. There is no anthropomorphism in this design.
- As earlier stated, I went to efforts to ensure the packaging would not have strong or evident appeal to minors and that included using a limited colour palette of army greens and browns (as opposed to rainbow colours), stylising the eyes of the big tawny characters to make them more appealing to adults (scary/non appealing to minors), and avoided any use of anthropomorphism.

The Panel's View

Introduction

15. Bucketty's Brewing Co is located in Brookvale, Sydney, where it has a taproom and offers meals. Consistent with the past two years, it is planning to once again brew and sell its Tawny Frogmouth product for the purpose of raising funds for Sydney Wildlife Rescue. On 9 August 2023 it launched its fundraising initiative for the current year by posting a 360-degree view video of its concept packaging on Instagram and inviting its followers to vote for it in the GABS Can Design Awards.
16. While it is this Instagram post that has given rise to the complaint, the concerns expressed by the complainant are in relation to the image of the concept packaging

rather than the post as such. It is contended that the concept packaging will have strong or evident appeal to minors.

17. In response to the complaint, the Company has advised that the image shown was of concept packaging only and that the product is not yet available for purchase. This information invites further consideration of ABAC's jurisdiction in relation to this complaint.

ABAC jurisdiction

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.
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 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.

Does the Instagram post have strong or evident appeal to minors?

21. The Instagram post includes a 360-degree video image of the concept packaging, along with the following text:



buckettys • Follow

Original audio



buckettys 🍷 Tawny Grogmouth 3.0 can reveal! 🍷

Tawny Grogmouth is on again and to kick-off our annual beer fundraiser, we're revealing the can artwork! This year the goal is to celebrate our natural environment and create an Aussie bush scene loaded with Tawny Frogmouths and pastel earthy tones with all proceeds donated to the amazing volunteers at [@sydneywildliferescue](#).

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22. The image shown in the video is of the concept can design. The can shows a bush scene with two prominent drawn tawny frogmouth owls on the front of the can and other owls in other areas. The words 'Drink beer. Save wildlife.' are shown at the top of the can, and at the bottom of the can are the words 'Bucketty's Tawny Grogmouth'. The rear and sides of the can contain product information. The background colour scheme is pale green with brown images.
23. The complainant believes that the image of the can shown in the post, has strong or evident appeal to minors due to:
 - the lack of clear alcohol labels, which could result in a minor confusing it with a non-alcoholic drink;
 - the anthropomorphism of some of the animal depictions bringing to mind children's cartoons and characters in stories directed at children; and
 - the overall impression of the packaging creating an illusion of a smooth transition from a non- alcoholic to an alcoholic beverage.

24. The complainant's concerns raise Part 3 (b) of the ABAC. This standard provides that an alcohol marketing communication must not have strong or evident appeal 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;
 - uses imagery, designs, motifs, language, activities, interactive games, animations or cartoon characters that are likely to appeal strongly to Minors; and
 - creates confusion with confectionery, soft drinks or other similar products, such that the marketing communication is likely to appeal strongly to Minors.
25. 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.
26. 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.

27. 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.

The Company's submissions

28. In response to the complaint, the Company advised that when devising the concept packaging it took into consideration ABAC Determination 68/22, where its 2022 Tawny Grogmouth packaging was found to breach the Part 3 (b)(i) standard. Specifically, the Company contended that, in relation to the concept packaging image:
- the characters are generic and would appeal to a broad range of people;
 - 'Drink beer. Save wildlife' is clearly written on the front of the can, indicating that the product is beer, and the word 'Grogmouth' provides additional cues that the drink is an alcoholic beverage;
 - the product is also labelled beer on the side label;
 - the colour palette is limited and subdued making the can design less appealing to minors and more appealing to adults;
 - There is no anthropomorphism in the design. All the animals are in their natural environment with natural animalistic, non-human behaviours. There are no birds drinking beer or hinting at drinking beer, or otherwise animals doing human-like activities or behaviours.
29. While the Panel's determination relates to the Instagram post it recognises that the image of the concept packaging is the dominant feature of the marketing. Having said that, the marketing communication needs to be considered as whole, including the text accompanying the post.
30. It would be fair to say that the image of the front of the can does not instantly identify the product as a beer. The words 'Drink Beer. Save Wildlife' are used but this cue is a subsidiary feature compared to the bush scene and depictions of the owls. Given the can is shown in the full 360 degrees in the video, the alcohol cues on the side and back of the can are seen and as a result are more influential than if the image was simply a static shot of the front of the can.
31. Further the can design does not resemble any well-known soft drink brand and it seems unlikely that the can image shown would be readily confused with a soft drink. The video is also contextualised by the accompanying text and the description does clearly establish that the product is an alcohol beverage.

32. In Determination 68/22 the Panel found a can design from the Company in breach of the strong appeal to minors standard. There are notable similarities between the design considered in this earlier determination and the concept design used in the Instagram post. That said, there are important distinctions between the earlier design and the concept and each marketing communication must be assessed on its own merits.
33. The Panel does not believe that the Instagram post breaches the Part 3 (b) standard. In reaching this conclusion the Panel noted:
- the text accompanying the post establishes that a beer is being promoted and the 360 degree video of the can also displays cues as to the alcohol content not instantly apparent from the front of the can alone;
 - the colours used in the concept can image are subdued and not bright and contrasting; and
 - the concept can does not use anthropomorphism and hence a human character is not given to the owl depictions.

Concluding comments

34. It must be again stressed that the Panel is not making a ruling about the concept can design. It is the role of the pre-vetting service and not the Panel to give opinions on marketing concepts. The Panel decision goes to the totality of the Instagram post inclusive of the video feature which shows the sides and rear of the can concept, and provides a text description of the proposed product.
35. The Company has advised that it will consider using the ABAC pre-vetting service, and that there is a potential to amend the concept. The Panel encourages the Company to adopt best practice and work with the pre-vetting service in the development of its product range branding.
36. The complaint is dismissed.