



ABAC Adjudication Panel Determination No 155/23

Product: Various
Company: Billson's Beechworth
Media: Point of Sale Display
Date of decision: 25 October 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 28 September 2023 in relation to a point of sale display by Billson's Beechworth ("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 28 September 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

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

10. The complaint relates to a point of sale display for Billson's products:



Complaint

11. The complainant objects to the marketing as follows:
 - The marketing campaign was combining already borderline childishly branded alcohol with the company's brand or cordials. All packaged in classically childlike shopping traditions.
 - The campaign clearly uses a combination of adolescent colours, flavours, and setup to appeal to the youngest consumer possible.

The ABAC Code

12. On 1 August 2023 an updated version of the ABAC Code came into effect. As the complaint relates to display units first placed in mid September, it will be assessed 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 dated 10 October 2023. The principal comments made by the Company were:
 - These display units were first placed in market mid-September. Regretfully, they did not receive pre-vetting. This was the first foray into POS and not having them pre-vetted was an oversight. We've been super diligent with packaging however will ensure POS is pre-vetted moving forward.

- Our company had reasonable control over these stands. We designed/purchased them, and our sales team delivered and helped construct them. They were only designed to store premixed spirit cans.
- The unit is a replica of our brewery and factory in Beechworth. The unique and distinct building is Australia's oldest 'tower brewery' built in 1871. The venue is visited by a few hundred thousand people per year, has won best tourism venue in Victoria and has several hundred million impressions on social media. We chose this structure because we believed it was recognisable as our brewery/factory.



- The Pick and Mix mechanic is based upon providing consumers flexibility to tailor a selection of premixed spirits at a set price point, thus the unit was not designed to include cordial. We believe this is standard retail language, as is mix and match etc.
- We believe all the products contained within the display are clearly labelled, adult and premium in nature plus within a high control environment only being displayed in bottle shops.
- These units were designed to store premixed spirit cans only. Having seen many photographic examples sent through from our sales team, the overwhelming majority only display premixed alcohol. They have been instructed to display cans only. In any case, we believe the difference in format, glass 700ml bottle v 355ml cans, ready to drink versus a concentrate, and clear labels in liquor stores environment means consumers view these as two entirely different propositions.

The Panel's View

15. Billson's are a Victorian based craft beverage producer of both alcohol and non-alcoholic beverages. As part of its marketing strategy the Company has made and supplied to various alcohol retailers stocking Billson products a cardboard point of sale display modelled on the Company's brewery. As explained by the Company, the intent was that retailers would use the display to promote Billson's pre-mixed alcohol products packaged in cans.
16. The complainant came across the display in a liquor store. In this particular store the display was used to show not only Billson's RTD can products but also the Company's non-alcoholic cordials packaged in 700ml glass bottles. The complainant argued that the point of sale display appeals to children due to the adolescent colours and flavours of the products included in the display and the combination of alcohol and non-alcoholic beverages.
17. While the complaint is straightforward, it does raise a technical issue as to the applicable regulatory regime applying to the display. This is because as a general proposition 'point of sale' marketing by an alcohol retailer is not regulated by the ABAC Code but rather by the relevant State/Territory Liquor Licensing Authority. Part 2 of the ABAC deals with the application of the ABAC Code. Part 2 (b)(iv) states the Code does not apply to:
 - point of sale marketing initiated by alcohol retailers (as these are regulated by liquor licensing legislation) provided that a producer or distributor of alcohol has no reasonable control over the point of sale marketing.
18. In this case, the physical cardboard display was created by Billson's and therefore the design and messaging of the display itself is the responsibility of the Company. This responsibility also reasonably encompasses putting the display to the purpose intended by the Company i.e. the showing and promotion of Billson's alcohol RTD cans. It becomes less clear cut, if an individual retail outlet uses the display in a manner not intended by the Company. For example, using the display for non-Billson's products or potentially promoting the non-alcoholic product range of the Company.
19. For the purposes of this determination, the Panel believes it is clearly within the remit of the ABAC to assess:
 - the design of the display; and
 - the display populated with the products intended to be shown, i.e. the Company's RTD cans.
20. The choice of the individual alcohol retailer to then use the display to stock the non-alcoholic products was clearly not expressly endorsed by the Company. That said, it is hardly a huge leap to envisage that a retailer might easily use a Billson's

display to stock Billson's products of all types that 'fit' within the spaces for products created by the display. Further it is reasonable to assume that the Company has a measure of control over the use of its branded merchandise by an entity that Billson's has a commercial relationship with, such as the liquor store. On balance the Panel believes the display as seen by the complainant, including the stocking of the non-alcoholic cordials can be assessed against the ABAC standard.

21. The complainant's concerns raise the ABAC standard contained in Part 3 (b)(i) of the Code. This standard requires that an alcohol marketing communication (which includes a point of sale display under the reasonable control of an alcohol producer) must not have strong or evident appeal to minors. This might occur if the product packaging:
 - 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; or
 - creates confusion with confectionery, soft drinks or similar products, such that the marketing communication is likely to appeal strongly to minors.
22. 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.
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. In response to the complaint, the Company argued that:
- the unit is a replica of the Company's historic and well-known tower brewery and would be readily recognised as such;
 - the Pick and Mix mechanic is based on providing consumers with flexibility to tailor a selection of pre-mixed spirits at a set price point, and is standard retail language;
 - The unit was not designed to include cordial and stores were instructed to display premix cans only, however the clear difference in the alcoholic and non-alcoholic format, ie 700ml bottle v can and concentrate v ready to drink means that consumers view these products as entirely different propositions; and
 - all products displayed are clearly labelled, adult and premium in nature and the display is only located in bottle shops, which is a high control environment.
26. The complainant raised a point about the 'adolescent' flavour profile of the products and childish packaging design of the cans. It should be noted that the ABAC does not regulate physical beverages and hence does not go to the taste profile of a product. Further the Panel has previously considered the packaging of a large number of Billson's RTD in Determinations 118/22 and 24/23 and this aspect has already been fully considered. Accordingly, the Panel is reviewing the display as stocked with products as a whole, rather than the appearance of an individual can.
27. The Panel does not believe that the display breaches the Part 3 (b)(i) standard. In reaching this conclusion the Panel noted:

- the display stocks products which would otherwise be stocked on shelves within the store;
- the design of the display is modelled on a brick building (whether recognised as drawn from the Company's brewery or not) and does not resemble the colour or features of a child's toy such as a dollhouse;
- the prominent messaging on the display of 'Billson's Pick and Mix' would not have any evident appeal to minors;
- the display also stores bags to place products, which again would not have any inherent appeal to minors as such;
- while the Company's products are packaged in bright colours, the overall impact is not materially different from the same products being on the shelves of the store; and
- while the 'novelty' aspect of the display would draw the attention of persons in the store including minors, taken as a whole any appeal to minors would be incidental rather than strong or evident.

28. The complaint is dismissed.