



ABAC Adjudication Panel Determination No 187/23

Products:	Frosty Fruit Cocktails, Milky Bar Milo Espresso Martinis and Strawberries & Cream Shots
Company:	Milky Lane
Media:	Digital – Instagram and Facebook
Date of decision:	12 January 2024
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 30 November 2023 in relation to the social media promotion of three products by Milky Lane (“the Company”), specifically Frosty Fruit Cocktails, Milky Bar Milo Espresso Martinis and Strawberries & Cream Shots (“the products”).
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 30 November 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 content of the marketing.

The Marketing

10. The complaint relates to social media posts made by the Company to promote Frosty Fruit Cocktails, Milky Bar Milo Espresso Martinis and Strawberries & Cream Shots:



Image 1: https://www.instagram.com/p/CzBFz6pPyfN/?img_index=1



Image 2: https://www.instagram.com/p/CySpy2bPc4j/?img_index=2



Image 3: https://www.instagram.com/p/CwzZ9eovMTy/?img_index=1

Complaint

11. The complainant objects to the marketing as follows:

- We submit that the product is likely to appeal to minors through use of:
 - *A popular children's confectionery namely Strawberry and Cream lollies, Milo milk powder, Milky Bar chocolate and Frosty Fruit ice block.*
 - *The naming of these products to include and resemble these popular and well-known confectionaries will have strong appeal to minors.*
 - *The photos used for the advertisement include real versions of the original confectionary products alongside the new alcoholic versions designed by Milky Lane. The placement of original versions of candy, chocolate and ice blocks alongside alcoholic versions will have strong appeal to minors as well as an obvious association with the children's confectionery product.*
 - *These products are also featured on the menus.*

The ABAC Code

12. Part 3 (b) of the new Code provides that a marketing communication must NOT:

- 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

13. The Company responded to the complaint by letter emailed on 8 January 2023. The principal comments made by the Company were:

- The notice is directed at the promotion of certain cocktails sold and promoted by Milky Lane. The products in question are themed in name and appearance around a range of confectionary and popular retail items.
- In response to the complaint we confirm:
 - The marketing communication referred to did not receive Alcohol Advertising Pre-vetting Service Approval offered by ABAC.
 - The products were named after confectionaries, however it is arguable if they have strong or evident appeal to minors, which will be detailed below in our comments.
 - Images/Branding were included alongside two of the communications that have been issued a complaint.

The use of confectionary theming is common in alcoholic beverages

- The use of confectionary theming in cocktails is not novel, and our marketing is not distinguishable or unique on this basis. Well-recognised cocktails include Fruit Tingle, Caramello, Chocolate Bunny, Spice and Lime Spider. Other common beverages have playful names such as Chocolate Mudslide, Duck Fart, Fluffy Critter and Jello Shots that are no more or less likely to appeal to minors than the products that have been complained against.
- Countless premix take-home drinks share the names of common sweets/confectioneries that are again no more or less likely to appeal to minors. They are also often sold in cans which are indistinguishable from

soft drinks and energy drinks. Ginger beer is both a specific non-alcoholic product and alcoholic product and even features the name beer in both versions. The images below contain examples of these products:



Milky Lane Positions Itself as a Nostalgic Brand

- The business concept draws heavily on theming nostalgic to the 1990s and 2000s. The confectionary items chosen to brand the drinks are consistent with this intention. That is to say, the special appeal of the confectionary items chosen for cocktail theming is not to minors, but is rather to adults for whom the confectionery was once popular.
- The Google trend results shown in the following images support the correctness of this proposition. To put this in perspective, we have included the trend of popular energy drink Prime which is known for its strong appeal to minors. We have also included the trends of other confectionaries that have been used by the brand.

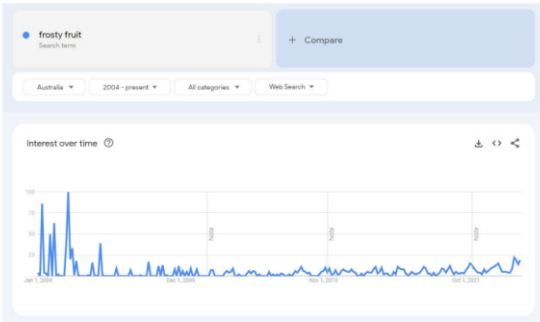


Chart 5.1 Google Trend Search on Term "Frosty Fruit" which was relatively far more popular in 2004-2005.

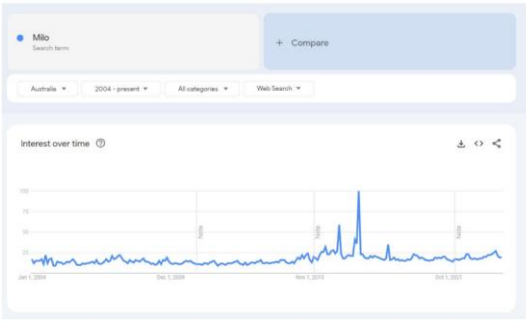


Chart 5.2 Google Trend Search on Term "Milo". However, there may be some ambiguity with this term due to popular music artist with the same name.

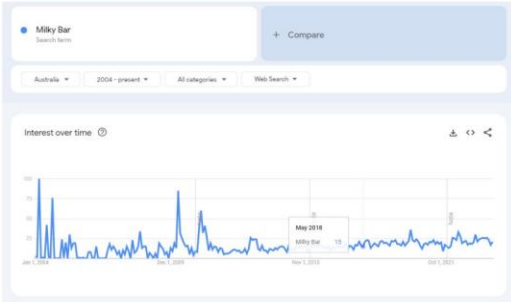


Chart 5.3 Google Trend Search on Term "Milky Bar" which shows that it was 4x more relevant in 2004 than current day.

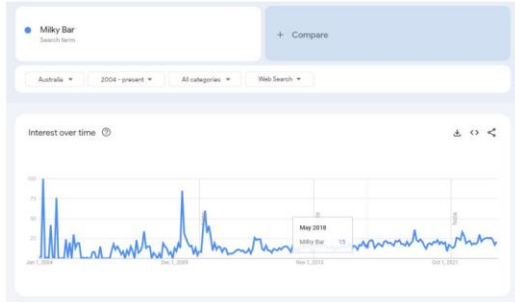


Chart 5.3 Google Trend Search on Term "Milky Bar" which shows that it was 4x more relevant in 2004 than current day.

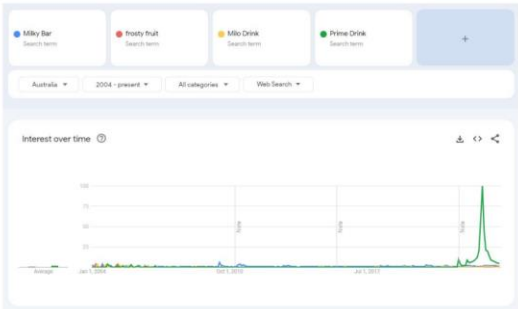


Chart 5.5 highlights the relativity of genuine popular search terms and a beverage which has far more appeal. Prime Drink has demonstrated its ability to appeal to a broad market.

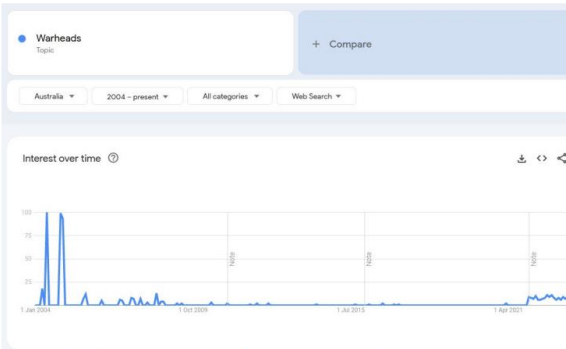


Chart 5.6 Warheads popularity in 2004-2005 is approximately 10x than current day

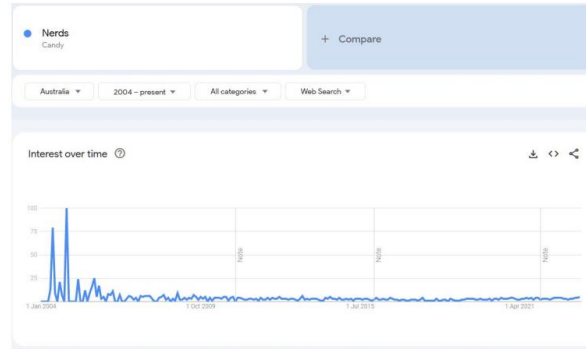


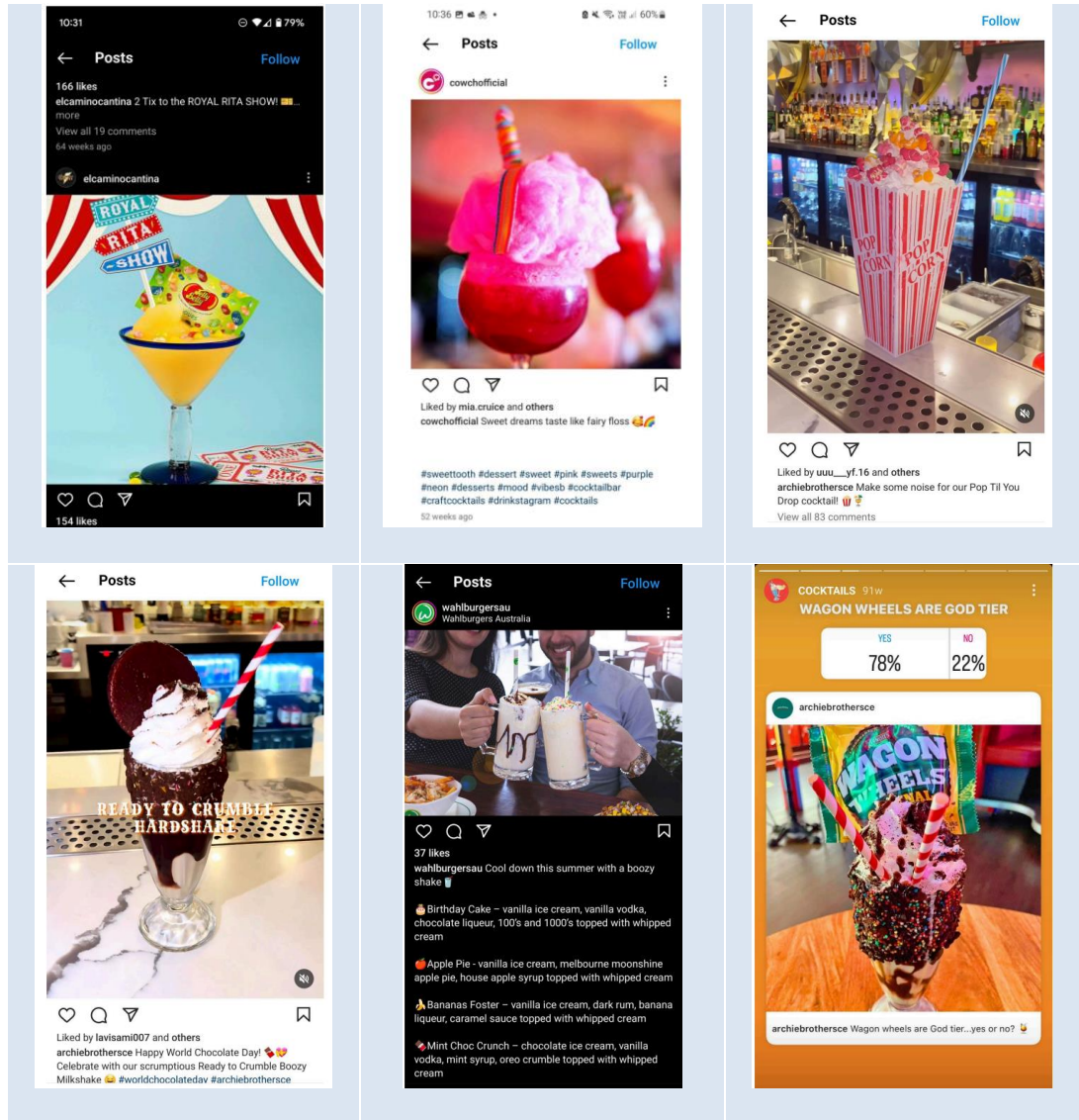
Chart 5.7 nerd Candy popularity in 2004-2005 is approximately 20-25x than current day

The confectionary items that Milky Lane use have no specific or unique appeal to minors

- Many (if not most) adults consume confectionery, and the branding/theming is not such that it would be unappealing to adults. Arguably, if a product has equal appeal to both minors and adults, or if it is not possible to objectively determine whether something has more or less appeal to minors or adults, then it cannot reasonably be said to have “strong or evident appeal to minors” as referred to in the Complaint.

Competitive landscape is similar

- It is also important to note that the business operates within a competitive market. Within that market the types of products and marketing that are the subject to this complaint are commonplace.
- The ubiquitousness of these kinds of products, and the associated marketing activity, should also assist in determining the standard that should be applied. There is a vast difference in terms of the appeal and reach of television advertising versus a social media post
- The images below are indicative of similar types of products and marketing.



Venue Compliance is Well-Managed

- The products in question are only available for consumption on the licensed premises where their service is supervised by properly qualified staff of the licensee. This should be compared to a takeaway liquor product that might be found by a child in a domestic, unsupervised situation. They are not available for delivery or takeaway where consumption is unsupervised and may fall into the hands of a minor.
- Moreover, there have been no reported or detected instances of underage drinking in any of the Milky Lane restaurants. Our restaurants do not experience any unusual pressures in relation to attempts by underage persons to access the products.

- Notwithstanding the above, and regardless of whether the products or marketing can properly be said to have Strong or Evident Appeal to Minors, we recognise the utility of additional measures to minimise the risk of underage drinking. Accordingly, we have taken the following steps in the past and going forward.
 - Adopted a risk management plan
 - The official web site for the Milky Lane brand and relevant marketing materials and menus include prominent statements about underage drinking.
 - Reduce the frequency of posts of alcoholic beverages and consider the promotion of mocktails

Conclusion

- In all the circumstances, and in a balanced view, there is no apparent or evidentiary basis for a view that our marketing activity has a strong or evident appeal to minors. The preferable decision of the panel is to set aside the complaint and to collaboratively work with Milky Lane (and many other brands) to better navigate and manage marketing and communications.

The Panel's View

Introduction

14. Milky Lane is a restaurant chain whose first store opened in Bondi Beach in 2016. The chain now has locations in several States based on a franchise model. The restaurant's menu has burgers, fries and desserts as the main food offerings. The restaurants are also licensed and the drinks menu features cocktails as well as beer and wine. The Company has an extensive social media presence which forms a major part of its marketing strategy.
15. This determination arises because of a complaint about three social media posts promoting the availability at cocktails at most Milky Lane venues. As a general proposition, the marketing of restaurants will not usually fall within the domain of the ABAC Scheme. While the standards of good marketing practice in the Code apply to 'alcohol retailers' and it is common for restaurants to hold a liquor licence and hence be an alcohol retailer, mostly the marketing of restaurants does not place an emphasis on alcohol as such. Further as a licensed premise, the primary regulator of a restaurant within the shared regulatory space of alcohol and alcohol marketing will be the relevant State or Territory Liquor Licensing Authority and not the ABAC Scheme.

16. Accordingly, it might be thought more appropriate for any concerns regarding the Company's marketing involving alcohol to be directed to say Liquor and Gaming NSW and dealt with under the NSW Liquor Act and specifically the Liquor Promotion Guidelines issued under section 102 (4) of the Act. The Panel has decided to deal with the complaint for several reasons:
- the complaint goes to the social media marketing of the Company and hence to a potentially wide audience e.g. the Company's Instagram account has 247,000 followers and its Facebook page 238,000 followers;
 - a review of the Company's social media accounts indicates that posts specifically featuring alcohol products and particularly cocktails are a regular practice; and
 - the Company has announced that it will be releasing a range of ready to drink alcohol (RTD) products and the marketing of RTD products by alcohol producers falls squarely within usual remit of the ABAC Scheme.
17. It should be noted that the Company is not a signatory to the ABAC Scheme and has not made a prior contractual commitment to market consistently with the Code standards nor to abide with Panel determinations. That said, the Company has co-operated with the complaints process and provided a comprehensive and thoughtful response to the complaint.

The complaint and the Company's response

18. The complainant has identified three social media posts promoting different Milky Lane cocktails. The complaint also notes that the cocktails are included on Milky Lane's menu. The concerns of the complainant can be summarised as:
- the naming of these products to include and resemble popular and well-known confectionaries will have strong appeal to minors;
 - the photos used for the advertisement include real versions of the original confectionary products alongside the new alcoholic versions designed by Milky Lane; and
 - the placement of original versions of candy, chocolate and ice blocks alongside alcoholic versions will have strong appeal to minors as well as an obvious association with the children's confectionery product.
19. The Company believes the social media posts are not problematic, are consistent with industry norms and do not strongly appeal to minors. It is argued that:
- the use of confectionary theming in cocktails is not novel, and its marketing is not distinguishable or unique on this basis;

- countless premix take-home drinks share the names of common sweets/confectionery. They are also often sold in cans which are indistinguishable from soft drinks and energy drinks;
- the ubiquitousness of these kinds of product, and the associated marketing activity, should assist in determining the standard that should be applied;
- its business concept draws heavily on theming nostalgic to the 1990s and 2000s. That is to say, the special appeal of the confectionery items chosen for cocktail theming is not to minors but is rather to adults for whom the confectionery was once popular. The nostalgic appeal to adults is supported by Google trend results;
- the products in question are only available for consumption on licensed premises where their service is supervised by properly qualified staff of the licensee; and
- if a product has equal appeal to both minors and adults, or if it is not possible to objectively determine whether something has more or less appeal to minors or adults, then it cannot reasonably be said to have “strong or evident appeal to minors” as referred to in the complaint.

The Company’s submissions- some general comments

20. Before turning to an examination of the three posts, it is worth addressing the Company’s arguments in so much as they go to wider propositions regarding the application of the ABAC standards. Firstly, the Company contends that confectionery theming of cocktails is common practice and its cocktails should be considered in that light.
21. It is a perfectly valid observation that there are various alcohol products adopting flavour profiles of confectionery and/or the names of confectionery. The ABAC Scheme does not purport to regulate physical beverages but rather is focussed solely on the marketing of alcohol products. Accordingly, the taste of a product, or its colour or ingredients are not Code issues and to the extent these matters are regulated, the responsibility rests with government agencies.
22. That said, it is recognised both by the ABAC and government alcohol marketing guidelines that drawing on confectionery names and imagery raises the potential for the marketing material to have a strong or special appeal to minors. In fact, in some jurisdictions such as NSW, the Liquor Act provides a power to the Minister and the Department Secretary to declare a product as undesirable and prohibited for sale if the liquor product is likely, for any reason, to be confused with soft drinks or confectionery.

23. The Company provided several examples of RTD products with product names or can designs that reference confectionery. Notably some of the examples provided have been the subject of complaints to the ABAC Scheme and Panel determinations have led to the modification or removal of the packaging from the market on the basis of the marketing being considered to have strong appeal to minors:
- [Determination 132 & 137/21](#) - 4 Pines Ben & Jerry's Chocolate Chip Cookie Dough Inspired Nitro Beer;
 - [Determination 24/23](#) – Billson's Grape Bubblegum Vodka and other products; and
 - [Determination 118/22](#) – Billson's Fairy Floss Vodka and other products.
24. There are many thousands of packaged alcohol beverages available for purchase in Australia, and many thousand more versions of alcohol drinks made at bars, clubs and restaurants. Given the size of the market and the marketing associated with individual products and alcohol retailers, it is almost inevitable that there will be at any given time a proportion of marketing communications containing messaging inconsistent with responsible marketing standards. It is no defence to a complaint to argue that there is other marketing not meeting good standards, just as it is no defence to a speeding ticket to argue that there are other speeding cars.
25. A second argument was that the Company's venues and the cocktails draw on a nostalgic appeal to adults from experience and memory of the 1990's and 2000's. Clearly fashion, trends and tastes change over time. In the age of social media something might trend and have enormous reach and then disappear within a very short timeframe. On the other hand, other things have enduring popularity.
26. The use of nostalgia as a marketing thematic is legitimate but it can also be difficult to determine when or why a product or activity that was popular with children and adolescents in the 1990's would still not have evident appeal to minors today. Products such as Milo have been consumed by minors over generations and confectionery such as Milky Bars and Strawberries & Cream lollies have long been staples in supermarkets and many convenience stores.
27. Thirdly the Company points out that the cocktails were only available to be purchased and consumed at its restaurants and it follows appropriate responsible service of alcohol (RSA) standards. There is no reason to doubt that the Company and its individual franchisees meet good standards in serving alcohol at its venues. The ABAC standards however apply to the marketing of alcohol to the wider community and not to RSA obligations. Meeting RSA requirements is a basic condition of holding a liquor licence as

regulated by government liquor bodies and is not relevant as such to the ABAC standards of good marketing practice.

28. Finally, the Company submits that if a marketing communication is equally appealing to minors and adults, it cannot be regarded as having strong appeal to minors. Clearly if a marketing item can be fairly considered as targeting minors or having an attractiveness to minors beyond its appeal to adults, then it will breach the ABAC standard. It is possible of course that a marketing communication might have strong appeal across age groups.
29. Ultimately the Panel is to assess the marketing communication standing in the shoes of the 'reasonable person'. On occasions reasonable minds can differ about the interpretation that most members of the community might place on an item of marketing. The test is at the civil law standard of the balance of probabilities and not the criminal law standard of beyond reasonable doubt.

Strong and evident appeal to minors - general considerations

30. 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.
31. 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.
32. 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.
33. 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. If the marketing communication could be interpreted in several ways, the most probable understanding is to be preferred over a possible but less likely understanding.

The specific posts

Frosty Fruit Cocktail Social Media Post





34. The Frosty Fruit Cocktail social media post shows a long-stemmed glass filled with an orange drink. It is garnished with pineapple and what would appear to be mint, and there is a red striped straw in it. There is a whole coconut behind the glass. Also behind and next to the glass are wrappers from Frosty Fruits tropical icy poles, and an actual icy pole removed from its wrapper. The photo is accompanied by the following text:



milkylaneofficial    LAST CALL FOR OCTOBER SPECIALS 

Plan Ahead and click the link in our bio 

1. Frosty Fruit Cocktail
2. Strawberry and Cream Shots
3. Loaded Reese's Pb Donut Fries
4. Chicken Caesar Burger

Get moving as it's the final week and they're available everywhere except Bendigo    

Milky Bar Milo Espresso Martinis Social Media Post

35. The Milky Bar Milo Espresso Martinis Social Media post shows a long-stemmed glass filled with a chocolate coloured beverage and topped with what is presumably Milo. Behind the glass is a package of Milky Bar chocolate, and a tin of Milo. Beside the glass are several blocks of chocolate, removed from the packaging and placed in a small dish. The photo is accompanied by the following text:



Strawberries & Cream Shots

36. The Strawberries & Cream Shots social media post shows four shot glasses filled with a red beverage, and garnished with Strawberries & Cream lollies, which are also shown scattered around the glasses. The photo is accompanied by the following text:



37. The Panel believes that all three social media posts breach the Part 3 (b)(i) standard by having strong or evident appeal to minors. The Panel noted:
- the images of the cocktails are bright and eye-catching;
 - the nostalgia appeal of the product names to adults is founded on the likely consumption of the confectionery/soft drink of adults while minors

and there is no particular basis to believe there is not a continuing use of the products by minors;

- Milo remains a popular and well known drink for minors and the confectionery items would be entirely familiar to minors given the common presence of the products in supermarkets and other retail stores;
- the combination of the product name and imagery (Frosty Fruits, Milky Bar, Milo and Strawberries & Cream) creates an illusion of a smooth transition from a non-alcohol product to an alcohol beverage;
- the text does not unambiguously establish the cocktails are alcoholic in nature;
- the 'reasonable person' benchmark is based on the balance of probabilities and does not require that the Panel's view is beyond reasonable doubt or objective rather than subjective; and
- taken as a whole a reasonable person would probably understand the marketing would have evident appeal to minors.

38. For completeness, the complainant noted the cocktails appeared on the Company's menus. Menus are point of sale materials, and while a menu might often be posted on a restaurant's website, consistent with its decision in [Determination 222/21](#), the Panel does not believe the Code should be understood as usually applying to menus as such. Point of sale marketing falls within the domain of government liquor licensing regulators.

Conclusion

39. Drawing the issues canvassed in the determination together:

- the ABAC standards apply to the marketing of alcohol beverages and not the physical beverages themselves. This means there is no ABAC constraint on the Company devising cocktails of various ingredients or flavour profiles;
- the responsible service of alcohol obligations on licenced premises are regulated directly by the government and not the ABAC Scheme. Governments have issued alcohol promotional guidelines for licensees which largely accord with the standards contained in the ABAC;
- both the direct government regulatory requirements on marketing and the ABAC have a key standard that alcohol marketing must not have strong appeal to minors. Both regimes expressly recognise that confusion with a soft drink or confectionery can be a ground for alcohol marketing having a strong appeal to minors;

- the naming of alcohol beverages after well known confectionery is not prohibited by the ABAC but such names will generally raise an elevated risk that the marketing of the product will have a strong or evident appeal to minors;
 - equally the placement of an alcohol beverage in a marketing communication with images of well known confectionery items can indicate a potentially strong appeal of the marketing material to minors;
 - whether an individual marketing communication is consistent with a Code standard is a case by case assessment and viewed from the benchmark of how a reasonable person would most probably understand the marketing material.
40. Particularly noting the Company's move into RTD products, the Panel recommends that the Company accesses ABAC resources in developing its suite of marketing materials including:
- the provisions of the [ABAC Code](#);
 - [guidance notes](#) to assist in the interpretation of the Code; and
 - past [adjudication decisions](#).
41. The ABAC Scheme also offers advertisers a confidential, user-pays pre-vetting service where proposed marketing can be assessed against the provisions of the Code by experienced pre-vetters. The use of pre-vetting is both good practice as well as prudent risk management in major branding and marketing decisions such as the packaging design of RTD products.
42. The Panel finds that the three social media posts for Frosty Fruit Cocktails, Milky Bar Milo Espresso Martinis and Strawberries & Cream Shots breach Part 3 (b)(i) of the Code by having strong or evident appeal to minors.