



ABAC Adjudication Panel Determination Nos 202 & 203/23

Product: Cellarbrations
Company: Australian Liquor Marketers Pty Ltd
Media: Television – Free to Air
Date of decision: 29 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 two complaints received on 19 December 2023 in relation to a television commercial for Cellarbrations (“the product”) by Australian Liquor Marketers Pty Ltd (“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:
 - (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 complaints raise concerns under the ABAC Code and accordingly are within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaints were received on 19 December 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 obtained for the marketing (Approval Number 7033).

The Marketing

10. The complaint relates to a television commercial for Cellarbrations:

<p>“The Twelve Days of Christmas” by Ian Post is playing throughout the entire ad.</p> <p>We see an unopened bottle of beer being placed by an adult woman into a stubby holder with “This belongs to Santa” written on it. Next to the stubby holder is a mince pie. Christmas ornaments and a child’s drawing of a Christmas scene are also shown.</p> <p>The light is switched off.</p>	
<p>The scene changes to a woman in a kitchen, pouring a cup of coffee.</p> <p>She looks at someone off screen and says, “Santa clearly enjoyed his beer?”.</p>	
<p>A man walks past, rubs his stomach and kisses her on the shoulder as he says “Said it was delicious. Thank you.”</p>	

<p>We see that the beer is now opened and empty, and that only a morsel of the mince pie remains.</p> <p>A voice over says:</p> <p><i>“For Christmas drops that always hit the spot. Cellarbrations. Good shout”</i></p>	
	

Complaint

11. The complainants object to the marketing as follows:

- *If young children believe in Santa, this ad shows a dad drinking Santa’s alcohol; and*
- *[The ad is] trying to tell kids to buy alcohol for “Santa” to drink at night.*

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, 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 email on 24 January 2024. The principal comments made by the Company were:
- The marketing received Alcohol Advertising Pre-vetting Service Approval on 11 September 2023.
 - It is our belief that Christmas is a cultural event celebrated broadly across Australia. The rituals, icons and tropes of Christmas (including representation of fictional character 'Santa') are encoded in broad culture and not the exclusive domain of minors.
 - There is a sophisticated 'wink of the eye' intelligence in this spot that appeals particularly to adults that would have low likelihood of comprehension to minors.
 - The absence of 'Santa' imagery specifically is a choiceful decision we made to avoid any confusion of who we were targeting.
 - The post 8:30pm media scheduling is in line with the ABAC guidelines for advertising. This timing greatly reduces the risk of minors being exposed to the advertising.
 - In summary, the combination of factors 1) Christmas is a broadly celebrated event, not just for minors 2) sophisticated adult messaging 3) absence of more overt Santa imagery 4) and adult media schedule would rule out this as a risk to violation of the code having strong or evident appeal to minors.
 - As always, we have followed the process outlined in the pre-vetting process to the t and our communication is always and in this instance in line with the intent and spirit of the code.

The Panel's View

14. This determination relates to television advertising for Cellarbrations. The ad portrays a domestic Christmas scene where presumably a mother is seen placing a beer in a stubby cooler. The next scene has the couple in the morning having a sedate but playful exchange about Santa enjoying the beer.
15. The complainants are concerned that the marketing uses Christmas imagery, specifically Santa, which would capture the attention of minors and also

encourages children to engage with alcohol by leaving it out for Santa. These concerns raise Part 3 (b)(i) of the Code which requires that an alcohol marketing communication must not have strong or evident appeal to minors.

16. 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.
17. 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.
18. 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.
19. The Company contends the ad is consistent with the ABAC standard, arguing that:

- Christmas is a cultural event celebrated broadly across Australia;
 - the rituals, icons and tropes of Christmas (including representation of fictional character 'Santa') are encoded in broad culture and not the exclusive domain of minors;
 - the advertisement includes sophisticated 'wink of the eye' adult messaging that appeals particularly to adults. There is low likelihood that it would be comprehended by minors.
20. Marketers need to be aware of the appeal of Christmas to minors. The inclusion of Christmas in a marketing communication raises an inherent appeal to minors and the marketing as a whole will need to carefully provide context and balance to ensure that the marketing item is consistent with the Code standard.
21. In this case, the Panel does not believe that the marketing breaches the Part 3 (b)(i) standard. In reaching this conclusion the Panel noted:
- the advertisement is set in a domestic environment at Christmas and there are cues that a younger child or children are part of the household although only adult characters are shown;
 - Christmas has broad appeal to both adults and children alike and this together with the domestic setting would be familiar to minors;
 - Santa is a standard trope used to signify the Christmas period. In a particular context marketing with a Santa character can have strong appeal to minors, but it does not automatically follow that a reference to Santa will always have strong appeal;
 - context will be decisive in how a marketing communication will be probably understood and in this case Santa is alluded to and not depicted as such and there is no interaction between a child and Santa;
 - the theme of the ad is a shared warm experience between parents and the ad would not be understood as being directed towards minors; and
 - taken as a whole, the overall tone of the marketing is adult and not considered strongly appealing to minors with any appeal being incidental at its highest.
22. The complaint is dismissed.