



ABAC Adjudication Panel Determination No 33/24

Product: Various
Company: Drakes Supermarkets
Media: Packaging
Date of decision: 5 April 2024
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Louisa Jorm
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 23 February 2024 in relation to a television advertisement by Drakes Supermarkets (“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 complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaint was received on 23 February 2024.
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

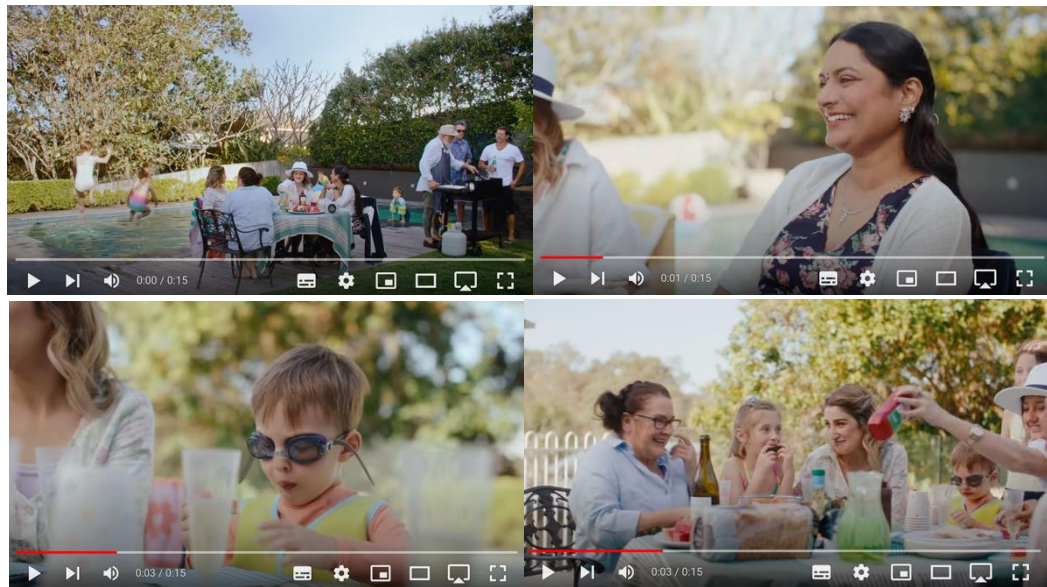
materials and advice and the availability of Panel members to convene and decide the issue. The complaint was completed in this timeframe.

Pre-vetting Advice

9. A component of the ABAC Scheme is an advice service by which an alcohol marketer can obtain an independent opinion of a proposed alcohol marketing communication against the ABAC standards prior to public release. Pre-vetting advice is separate from the complaint process and does not bind the Panel but represents best practice on behalf of alcohol marketers. Pre-vetting approval was not obtained for the television advertisement.

The Marketing

10. The complaint relates to a television advertisement for Drakes supermarket that can be viewed at <https://www.youtube.com/watch?v=OqFhmQluuiU>. The advertisement shows an outdoor barbecue occurring next to a swimming pool. At the BBQ are adults and children with the children seen jumping into the pool. There are various foodstuffs on the table and sausages on the BBQ. Amongst the items are a bottle of wine and shots of zero alcohol beers.
11. A voiceover narrates the scene- 'If you've got friends and family coming over for a barbie, pick up all the ingredients from Drakes, like snags, skewers, sauces, fresh breads and salads'. An older man tending the BBQ concludes the ad by speaking to camera saying 'Drakes have all the ingredients for summer days.'





Complaint

12. The complainant objects to the television advertisement as it *shows a bbq with children present... wine and adults drinking also featuring a brand of beer.*

The ABAC Code

13. Part 3 (b) of the Code provides that an Alcohol Marketing Communication must NOT:
- (ii) depict a person who is or appears to be a Minor unless they are shown in an incidental role and there is no implication they will consume or serve Alcohol.

14. Part 8 of the Code includes the following definitions

Alcohol Alternative means a beverage that is at or less than 0.5% alcohol by volume that:

- has an appearance and style commonly associated with Alcohol; and
- uses a brand or descriptors commonly associated with Alcohol, such as beer wine spirit or other; and
- is not a beverage commonly understood as non-alcoholic, such as fruit juice, soft drink, flavoured milk or other which fall outside the Code remit.

Alcohol Alternative Marketing Communication means a marketing communication for an Alcohol Alternative, in any media, generated by, for or within the reasonable control of an Alcohol producer, distributor or retailer, that has a discernible and direct link to Australia, apart from the exceptions listed in Part 2(b).

The Company Response

15. The Company responded to the complaint by letter emailed on 1 March 2024:

- The television advertisement was approved for free to air broadcast by Clear Ads Australia and complied with the AANA Code of Ethics, the AANA Code for Marketing & Advertising Communications to Children, the AANA Food and Beverages: Advertising and Marketing Communications Code and the AANA Environmental Claims in Advertising and Marketing Code
- The television advertisement is not alcohol or alcohol alternative specific. They are part of a series of Drakes Supermarkets brand commercials depicting everyday situations of a Family Road Trip, Hike, BBQ, Breakfast, Dinner, Beach Day etc. All the television commercials feature products available in Drakes Supermarkets to satisfy customers' everyday needs. The commercial in question is BBQ food specific and does have non-alcoholic products that are available at Drakes Supermarkets as complementary and support products to realistically demonstrate the everyday situation of a family BBQ that is relatable to Drakes targets.
- The producers and distributors of the non-alcoholic products had no involvement in the production or approval of the commercial.
- Drakes Supermarket does not hold a liquor licence for its supermarkets and does not retail alcohol products but does stock and sell a range of zero alcohol products.
- We believe the advertisement is within the scope of the code. We do not believe the commercial is an alcohol communication and also stress that minors who appear in the commercial are in an incidental role and there is no implication that they would consume or serve alcohol.

The Panel's View

Introduction

16. Drakes is an independent supermarket chain operating 60 stores in South Australia and Queensland. The Company employs a range of advertising and marketing channels including TV ads. This determination arises from a complaint about a TV ad centred on a family BBQ and is part of a wider campaign depicting everyday situations using products available from Drakes.
17. The TV ad shows a family scene set alongside a swimming pool. The group has a mix of children and adults with an older man tending sausages on the BBQ while on the table is a range of food and drinks. Amongst the items seen are several drinks that at first blush appear to be alcohol products, namely two brands of beer and a bottle of wine.
18. The complainant was concerned about alcohol products being placed with children. In fact, the drinks shown are not alcoholic beverages but zero alcohol beverages that are sold by Drakes. The Company is not an alcohol retailer and does not hold a liquor licence.
19. Prior to 1 August 2023 the complaint may have been regarded as outside the scope of the ABAC Scheme, however with the adoption of the current version of the Code the ABAC obligations have extended to 'alcohol alternatives' ie the marketing of beverages which do not contain alcohol but are styled as alcohol products such as zero alcohol beer. Accordingly the Panel is called upon to consider:
 - Is Drakes an entity that falls within the potential ambit of ABAC marketing obligations;
 - Can the TV ad be regarded as a marketing communication for ABAC purposes; and
 - Depending on the first two questions, is the TV ad consistent with the relevant ABAC Standard.
20. In applying the Code the Panel is guided by the 'reasonable person' test. This concept is taken from the Common Law system and means the Code is interpreted as it would be probably understood by a reasonable person who has values, opinions and life experiences found commonly in the community.

Is Drakes Supermarkets within the ambit of the ABAC Scheme?

21. As mentioned, the Company is not an alcohol retailer and does not sell alcohol products. It is however a retailer of alcohol alternative products. Two of the products that it stocks are shown (briefly) in the ad, namely Asahi 0.0% super

dry beer and Peroni Nastro Azzurro 0.0%. Both of these products fall within the definition of 'Alcohol Alternative' which means a beverage that is at or less than 0.5% alcohol by volume that:

- has an appearance and style commonly associated with alcohol; and
- uses a brand or descriptors commonly associated with alcohol, such as beer, wine, spirit or other; and
- is not a beverage commonly understood as non-alcoholic, such as fruit juice, soft drink, flavoured milk or other which fall outside the Code remit.

22. This means it is possible for Drakes to fall within the remit of the ABAC Scheme if it generates or has reasonable control of a marketing communication for alcohol alternative products. That said, Drakes' primary business is obviously not the retailing of zero alcohol beers. It is a supermarket and its marketing will go to its business as a general retailer of foods, drinks and general household items and mostly will not involve alcohol alternate beverages. Its general marketing that does not include references to alcohol alternatives will not fall within the potential scope of the ABAC Scheme.
23. It is also acknowledged that Drakes Supermarkets is not an ABAC signatory and has not made a prior commitment to abide by the ABAC standards in its marketing of alcohol alternatives. It has nonetheless responded to the complaint and cooperated with the ABAC process. This speaks well of the Company's social responsibility and its willingness to consider concerns raised by the public.

Is the television advertisement an Alcohol Alternative marketing communication?

24. If it is accepted that it is possible for a marketing communication from Drakes to fall within the remit of the ABAC Scheme, then the issue is whether this particular TV ad can be regarded as an alcohol alternative marketing communication.
25. The advertisement shows an outdoor family barbecue showcasing a wide range of products available at Drakes supermarkets. In one scene the camera pans to focus on two zero alcohol beer brands that are available at Drakes supermarkets. However, the voice communications specifically reference food products and generically reference 'all the ingredients for summer days', and the frame at the end reference 'ingredients for every day'.
26. The Company contends that the advertisement is not alcohol or alcohol alternative specific and is part of a series of advertisements that feature products available in Drakes Supermarkets to satisfy customers everyday needs. They have advised that the producers and distributors of the non-

alcoholic products shown in the ad had no involvement in the production or approval of the commercial.

27. It is a borderline assessment as to whether the ad can be fairly considered as being an alcohol alternative marketing communication. Clearly the theme of the ad is about the items available at Drakes that might be consumed at a BBQ. The ad is not about promoting Asahi or Peroni zero alcohol beers as such and the products are not mentioned by name and are shown quite fleetingly amongst a range of products
28. On balance, the Panel does not believe that the ad falls within the intended scope of an alcohol alternative marketing communication. A reasonable person would probably understand that a range of products for a BBQ are available from Drakes. However:
 - drinks are not mentioned;
 - drinks only appear incidentally in the ad and more akin to props than products being sold; and
 - the narrative of the ad is not about drinks - alcoholic or otherwise.
29. Accordingly, the Panel concludes that the ad itself is not a marketing communication for ABAC purposes. The complaint is dismissed.