



ABAC Adjudication Panel Determination Nos 169 & 173/24

Products:	Frosty Fruit, Zooper Dooper and Calippo Drinks and Watermelon & Vanilla Triple Distilled Vodka RTD
Company:	Milky Lane
Media:	Social Media – Facebook and Instagram
Date of decision:	27 November 2024
Panelists:	Professor The Hon Michael Lavarch (Chief Adjudicator) Professor Richard Mattick Ms Debra Richards

Introduction

1. This provisional determination by the ABAC Adjudication Panel (“the Panel”) arises from two complaints received on 25 and 30 October 2024 about social media marketing of Frosty Fruit, Zooper Dooper and Calippo Drinks and Watermelon & Vanilla Triple Distilled Vodka RTD (“the products”) by Milky Lane (“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 – restrict when advertisements for alcohol beverages may be broadcast;
 - Outdoor Media Association Code of Ethics and Policies – which places 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, and 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 marketing content 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. Occasionally, 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 25 and 30 October 2024.

- 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

- 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 before 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 advice was not obtained for the marketing,

The Marketing

- The complaints relate to two different social media posts made by the Company. The first post contained three different images, one each for Frosty Fruits, Zooper Dooper and Calippo drinks. The second post was for the Company's Watermelon and Vanilla RTD product in a 350 ml can.

Post 1 (3 images):





Post 2

Milky Lane • October 19 at 11:24 AM • 🌐

MILKY LANE RTD'S ARE BACK! Our Spring Sale treat? Buy 3, get 1 FREE! Save \$40 per case, you're welcome! 🍹

- 🍹 Lower Sugar, High Enjoyment!
- 🍹 Fewer Calories, Full Flavour!
- 🍹 Summer In A Can? Also-fruitly!

With a zesty citrus kick and a tropical twist, our drinks are crafted for cocktail lovers—and anyone just looking to kick back (or crank it up a notch)! 🍹

Hurry up! Our Buy Three, Get One Free deal is waiting for you—let's make it a party! 🍹

The image shows a can of Milky Lane Watermelon RTD (Ready To Drink) beverage. The can is pink and white with the brand name and flavor clearly visible. Next to it is a glass filled with the same drink, topped with fresh raspberries and a slice of lime. The background is dark with some light effects, suggesting a bar or party setting.

Complaint

11. The complainants object to the marketing as follows:

Post 1 – Frosty Fruit, Zooper Dooper & Calippo Drinks

- *Milky Lane has reposted the same image that has been found to breach the ABAC code 3(b)(i) having strong or evident appeal to minors (Frosty Fruits).*
- *Similarly, [two of the] images...use popular well-known confectionary ice cream Zooper Doopers and Calippo, which have a strong appeal to minors. The placement of the original ice blocks alongside the alcohol versions of the cocktails has a strong appeal to minors as it shows an obvious association between the cocktail and ice cream.*
- *This is in breach of ABAC (b), Responsibility toward minors, (i) (A), (B), (C), (D).*
- *This also breaches Liquor and Gaming NSW, Liquor Promotion Guidelines – Principle 1 Appeal to minors.*
- *The Liquor and Gaming NSW, Liquor Promotion Guidelines state, “Promotions that hold particular appeal to minors pose a significant risk as they lead to increased levels of alcohol-related harm in a vulnerable group. The National Health and Medical Research Council Guidelines refer to the increased risks of harm from alcohol for minors. Early drinking is related to increased alcohol consumption in adolescents and young adulthood. These drinking patterns are also related to the possibility of damaging other developing brain and development of alcohol-related harms in adulthood (Liquor and Gaming NSW, 2024).”*

Post 2 – Watermelon & Vanilla Triple Distilled Vodka RTD

- *Concerned it will appeal to minors with its bright colours and fun cartoon depictions of fruit and lollies.*

The ABAC Code

12. Part 3 (b)(i) of the Code provides that An Alcohol Marketing Communication must NOT:

- (i) Have a 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 complaint 169/24 by emails on 26 October and 12 November 2024. Its primary comments were:
 - These actually aren't cocktails. They're just fun aesthetic slushie beverages.
 - I'm happy though, as a sign of good faith and also due to it being an issue in the past, to remove the Frosty Fruit image from the post and shoot that again soon so that it doesn't reflect the previous image (please know it'll be very similar to but a new image). We still need to post fun exciting sexy drinks online though which is why we decided to have all drinks available as non-alcohol also and post those online!!! Business is tough right now and exciting product development helps us bring new customers in.
 - The post was published by a recently appointed social media agency that we engaged approximately three months ago. The post was published by a new account coordinator for their business. The agency edited the post without advising us. We noticed some replies to comments that we requested to be removed. The owner and senior account manager of the agency have been away on leave. Apologies for the delay in response on this matter.
 - To avoid any further confusion we removed the Facebook post last week. It was a basic communication breakdown with a new team. We will make our best endeavours to ensure it won't happen again.
 - This is a very difficult time for the hospitality industry with sales at a record low so we are constantly exploring ways to attract customers and keep within your regulations. Social media is an important tool for our business. We continue to do our best to comply with ABAC guidelines and we look forward to working together again in the future.

The Panel's View

Background and ABAC coverage of the posts

14. This determination is about two social media posts made by Milky Lane. The first is promoting three drinks, marketed as being flavoured by the ice blocks Frosty Fruits, Zooper Doopers and Calippos. The drinks are shown positioned with images of the corresponding ice blocks. The post poses the accompanying text question - 'You can add TWO Cocktails only to the Permanent Menu from the three posted here- let us know and it's happening'.
15. The second post shows an image of the Company's Watermelon & Vanilla Triple Distilled Vodka RTD in a 350 ml can. The can is placed next to a glass of the product presented to resemble a red 'soda float' style drink with a straw, a sour strap lolly attached to the drink, and floating bubbles. The accompanying text explains that the Milky Lane RTDs are back, with a product description and price information.
16. The complainants contend that the social media posts will appeal to minors. This concern brings into focus the ABAC standard in Part 3 (b)(i) of the Code that provides alcohol marketing must not have strong or evident appeal to minors.
17. The Company responded to the first complaint concerning the post about Frosty Fruit, Zooper Dooper and Calippo drinks, explaining that the drinks were not alcoholic beverages but rather a new range of mocktails intended to be added to the Company's drinks menu for consumption in the Company's restaurants. It was explained there had been a mistake in the text describing the drinks as cocktails that had been rectified before being notified of the complaint.
18. The ABAC Scheme does not regulate physical beverages nor is it the regulator of the responsible service of alcohol obligations of licensed premises. This means that the ABAC Scheme has no role in assessing if the Company's beverage offerings are desirable. To the extent physical beverages are regulated, this responsibility rests directly with government agencies such as Food Standards Australia and State/Territory Liquor Licencing Authority.
19. The scope of the ABAC Scheme is confined to the marketing of alcohol and alcohol alternative products. The premise of the complaint about the social media posts promoting the Frosty Fruits, Zooper Doopers and Calippos flavoured drinks is that they are alcoholic beverages. In response, the Company states the drinks are in fact non-alcoholic and any impression created by the social media post that they were, was a mistake and has been rectified.
20. Several observations should be made in these circumstances:

- the Panel is to assess the marketing communication as it was at the time of the complaint;
 - marketing communication is to be assessed from the standpoint of the probable understanding of the marketing by a reasonable person, rather than what the marketer might have intended; and
 - if a beverage being marketed does not contain alcohol, it will still be captured by the ABAC obligations if it can be fairly regarded as an alcohol alternative, namely a beverage that:
 - has the appearance and style commonly associated with alcohol; and
 - uses a brand or descriptors commonly associated with alcohol such as beer, wine, spirits etc; and
 - is not commonly understood as non-alcoholic such as fruit, soft drink, or flavoured milk etc.
21. Reflecting these observations, the Panel believes the post featuring the Frosty Fruits, Zooper Doopers and Calippos drinks would be understood by a reasonable person as referencing alcoholic cocktails given the text describing the drinks as 'cocktails'. This is further supported by user comments replying to the post that assume the drinks are alcoholic cocktails and a reply from the Company to one user comment advising the drinks can be made as a mocktail, implying they are alcoholic cocktails. The Company explains this was an error by a staff member that has been rectified.
22. For completeness, if the drinks were taken as being non-alcoholic, the Panel does not believe the drinks would be captured as alcohol alternatives. The drinks do not:
- resemble commonly known alcoholic cocktails as such;
 - no common alcohol descriptors are used; and
 - the presentation of the drinks would be more commonly associated with a milkshake or a soda float ice cream-based non-alcoholic beverage.
23. This means the Panel is to determine if the post is consistent with the ABAC standard in part 3 (b)(i) or whether it would be regarded as a marketing communication having strong or evident appeal to minors.

Strong and Evident Appeal to Minors

24. The Part 3 (b)(i) 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. The Panel has considered the Part 3 (b) standard on many occasions. While each marketing communication must always be assessed individually, some characteristics within marketing material that 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.

26. 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.

27. The assessment of consistency of a marketing communication with a Code standard is from the probable understanding by a reasonable person. The notion of the 'reasonable person' is taken from the legal system and means that the life experiences, values, and opinions found in most of the community are the benchmark.
28. Of the three images in Post 1, the promotion of the Frosty Fruits cocktail has previously been found by the Panel to breach Part 3 (b)(i) in Determination 187/23. The Company accepted this image as a breach of the Code, explaining the image was only intended for temporary use promoting the non-alcoholic mocktail and a new image for the mocktail would be prepared.
29. The Panel believes the other two images in Post 1 also breach the standard noting:
- the images of the cocktails are bright and eye-catching;
 - the post positions the drinks with the well-known ice blocks Zooper Doopers and Calippos which are likely to be highly recognised and relatable to minors;
 - the combination of the cocktail name and imagery of the ice blocks creates an illusion of a smooth transition from a non-alcohol product to an alcoholic beverage; and
 - taken as a whole a reasonable person would probably understand the marketing would have evident appeal to minors.
30. The Panel believes Post 2 also breaches Part 3 (b)(i) of the Code. In reaching this conclusion the Panel noted:
- the poured red drink resembles a soft drink;
 - bright colours and bubbles eye-catching to minors are used;
 - the strap lolly clearly associates the product with the confectionery;
 - taken as a whole, the post is likely to be understood by a reasonable person as having a strong appeal to minors.
31. As mentioned, the Company faces no ABAC constraint in having physical beverages of the style promoted in the posts on the restaurant's menu. The Company can make social media posts about non-alcoholic drinks. Its obligation under the ABAC is not to give the reasonable viewer of the post the probable understanding that it is marketing alcoholic cocktails in a manner that will strongly appeal to minors.
32. The complaints are upheld.