



## ABAC Adjudication Panel Determination No. 139/20

**Product:** Matso's Hard Lemon, Hard Melon and Hard Berry  
**Company:** Matso's Brewery  
**Media:** Outdoor  
**Date of decision:** 2 October 2020  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Debra Richards  
Professor Richard Mattick

### Introduction

1. This determination by the ABAC Adjudication Panel ("the Panel") concerns outdoor marketing for Mato's Hard Lemon, Hard Melon and Hard Berry and arises from a complaint received 21 September 2020.
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 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 meeting 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 21 September 2020.
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 independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for this marketing communication.

## The Marketing Communication

10. The complaint relates to the following advertisement located out the front of Brunswick Cellars in Victoria.



## The Complaint

11. The complainant objects to the marketing as:
- there is a placard on the footpath advertising fruit cocktail bottled drinks; and
  - every time I walk past with my 3 and a half year old, he points these drinks out and wants one and I find it unacceptable for advertising to reach a child in this way.

## 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

13. Part 6 of the ABAC Code provides:

**Strong or Evident Appeal to Minors** means:

- (i) likely to appeal strongly to Minors;
- (ii) specifically targeted at Minors;

- (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
- (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

## **The Company's Response**

14. The Company responded to the complaint by letter dated 25 September 2020. The principal points made by the Company were:
- a) We utilise the ABAC Pre-vetting Service regularly for all Matso's product packaging and all of our above the line advertising collateral, and we appreciate the ongoing consultation with the ABAC Pre-vetting team. Recently, the packaging of Matso's Hard Melon and Hard Berry were submitted and approved by the ABAC Pre-vetting process. We have also had Hard Lemon packaging and above the line campaign collateral approved in 2019, with the advertising heading being 'Hard on lemon, soft on sugar', similar to this creative. The poster featuring Hard Lemon with Hard Berry and Hard Melon referred to in the complaint was not submitted to the ABAC Pre-vetting Approval process given it's a point of sale poster and wasn't designed for Outdoor Advertising usage.
  - b) We do not believe this collateral is fundamentally in breach of Part 3 (b)(i) of the code, for the following reasons:
    - The collateral has been supplied for use as point of sale in a licensed alcohol environment (therefore the code does not apply), and the context of which sees this poster displayed as part of an alcohol retailer's signage for their 18+ customers.
    - The use of real fruit imagery promotes a proud selling point of the product, that we use real fruit in the drinks rather than artificial flavours. It is not used for any other reason than to illustrate the flavour profile and the real fruit ingredients of the products.
    - The use of pastels and bright colours is aligned to the colour of the liquids and the fruit flavours being used to make them, and therefore is descriptive of the product and experience.
    - Our references to taste and lower sugar are included to communicate that these are alcoholic products that provide refreshing drinking options for adult consumers who seek to make healthier choices relating to sugar and ingredients.
    - The use of the term 'Hard' on the packaging denotes alcoholic content, and we specifically feature the ABV on the front of all our packaging to ensure that together with the word 'Hard' it denotes an alcoholic drink.

- Furthermore, in the formulation of these drinks, we have sought to create flavour profiles that have a mature taste profile - a tart lemonade, melon with mint, and berry with lime, to set these apart from other less sophisticated tasting products.
- c) Having said the above, we accept that the issue raised in the complaint has some merit. When the artwork was designed, this execution was intended for use within the four walls of licensed premises, with the audience being almost entirely 18+ adults. However, we recognise that the Price Board poster in question is being displayed outside of the licensed premises, and therefore there is risk that minors would engage with it, as is evidenced in the complaint. In this context, we accept that the standards described in the Code would suggest we could have included more prominent messaging indicating the alcoholic nature of these products.
  - d) From now on, we commit to adjusting future artworks being used for point of sale marketing. Matso's and all Good Drinks brands will continue to use the ABAC Pre-vetting service which we find very helpful, and we intend to extend our range of submissions to include in-store posters and point of sale tools from this point onwards
  - e) Thank you for the opportunity to respond and add some commentary to the decision and adjudication of this complaint.

### **The Panel's View**

15. Matso's commenced as a Broome based microbrewery in 2000 with its alcoholic ginger beer proving an early success with locals and tourists. Over time the product range expanded and in 2007 the business commenced brewing offsite through a relationship with fellow West Australian Brewer, Gage Roads. In 2018 Gage Roads acquired the business, and distribution of the Matso's range into bottle shops nationwide further expanded. One retailer now selling Matso's pre-mixed drinks is Brunswick Cellars and this determination flows from sidewalk advertising by the retailer.
16. The advertising takes the form of a poster in A-Frame with the poster being marketing collateral created by the Company. The poster depicts three Matso's products under the heading 'Hard on Taste. Soft on sugar'. The poster shows various fruits such as a sliced lemon, berries, and watermelon slices. The Complainant explains that the poster attracts the attention of a 3 and half year-old son who asks for one of the beverages.
17. Part 3(b)(i) of the ABAC provides that an alcohol marketing communication (which includes a sidewalk poster) must not have strong or evident appeal to minors. Such appeal might arise if the marketing material:
  - is specifically targeted at minors;
  - has an attractiveness for a minor beyond the general attractiveness it has for an adult; and

- uses imagery, designs, motifs, animations, or cartoon characters that are likely to appeal strongly to minors or that create confusion with confectionary or soft drinks.
18. In assessing the consistency of a marketing communication with a Code standard, the Panel adopts the probable understanding of the marketing material by a reasonable person. This means the life experiences, values and opinions commonly held in a majority of the community is to be the benchmark.
19. The Company contends the poster is not 'fundamentally' in breach of the standard and it is argued:
- the poster was intended as point of sale material, i.e. inside a licensed premise and directed towards adults and not minors;
  - the fruit images are used to emphasise that fruit flavours, not artificial flavouring is used in the products;
  - the bright colours used are aligned to the colour of the beverages and the fruit flavours; and
  - the reference to 'taste' and 'sugar' are used to describe the characteristics of the products, while 'hard' signifies the products are alcoholic.
20. The Company points out the poster was not intended to be used in an outdoor setting. It is accepted the poster could have included more prominent messaging as to the alcoholic nature of the products. The Company has used the ABAC pre vetting process in designing some product packaging and will use the service for future marketing materials such in-store and point of sale tools.
21. The Panel acknowledges the reflective response of the Company and the intention that the poster be used inside an alcohol retailer rather than outdoor. The Panel must, however, assess the material as seen by the complainant and believes the poster is in breach of the Part 3(b) standard. In reaching this conclusion the Panel noted:
- the poster employs bright contrasting colours likely to be strongly eye catching and appealing to minors;
  - the depiction of fruit images with the brightly coloured packaging of the products creates a relatable scene for minors;
  - while the labelling of the individual products establishes the beverages as alcoholic, with the term "brewed alcoholic beverage" or "alcoholic lemonade" included below the flavour descriptor, this is not clearly visible on the poster, and within the context of the poster it is not clear the products are alcoholic, and a minor could readily confuse the poster as promoting soft drinks; and
  - taken as a whole, a reasonable person would probably understand the poster has a strong potential appeal to minors.
22. The complaint is upheld.