



ABAC Adjudication Panel Determination No 91/24

Product: Topsy Tea
Company: Coastal Moon Distillery
Media: Packaging
Date of decision: 15 July 2024
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 19 June 2024 in relation to the packaging (including the name) of Topsy Tea (“the product”) by Coastal Moon Distillery (“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:
 - 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;
 - 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 are within the Panel’s jurisdiction.

The Complaints Timelines

7. The complaint was received on 19 June 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 Clearance

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 advice was not obtained for the product packaging.

The Marketing Communication

10. The complaint relates to the packaging of Topsy Tea (including the name):





The Complaint

11. The complainant objects to the marketing as follows:

- *The name 'Topsy Tea' appears to go against the below the following ABAC guidance checklist points:*
 - *Show, directly imply, encourage or treat as amusing excessive alcohol consumption (more than 10 standard drinks per week or more than 4 standard drinks on any one day), or alcohol consumption while pregnant or breastfeeding.*
 - *Show, directly imply, encourage or treat as amusing, rapid alcohol consumption, misuse or abuse of alcohol or irresponsible or offensive alcohol related behaviour*
 - *Encourage choice of an alcohol beverage by emphasizing its alcohol strength/intoxicating effect*
- *The definition of the word Topsy is as follows:*
 - *unsteady, staggering, or foolish from the effects of liquor*
 - *slightly intoxicated or drunk.*
 - *characterized by or due to intoxication:*
 - *a tipsy lurch.*

- *tipping, unsteady, or tilted, as if from intoxication.*
- [The definition above] *would advertise and encourage excessive drinking.*

The ABAC Code

12. Part 3 (a) of the ABAC Code provides that a Marketing Communication must NOT:
- (i) show (visibly, audibly or by direct implication), encourage, or treat as amusing, consumption inconsistent with the Australian Guidelines to Reduce Health Risks from Drinking Alcohol, such as:
 - (A) excessive Alcohol consumption (more than 10 standard drinks per week or more than 4 standard drinks on any one day); or
 - (B) Alcohol consumption while pregnant or breastfeeding;
 - (ii) show (visibly, audibly or by direct implication), encourage, or treat as amusing, rapid Alcohol consumption, misuse or abuse of Alcohol or other irresponsible or offensive behaviour that is related to the consumption or presence of Alcohol;
 - (iv) encourage the choice of a particular Alcohol product by emphasising its alcohol strength (unless emphasis is placed on the Alcohol product's low alcohol strength relative to the typical strength for similar products) or the intoxicating effect of Alcohol.

The Company's Response

13. The Company responded to the complaint by letter emailed on 25 June 2024. The principal comments made by the Company were:
- Coastal Moon, born on the Gold Coast, is crafted to 'Share the Spirit'. Founded by three lifelong friends with a passion for spirits, our journey began humbly in a shed with a custom still. Now, we proudly offer Coastal Moon for customers to enjoy responsibly with friends, capturing the essence of coastal living and endless summer days. Our commitment lies in crafting high-quality spirits with a modern twist, ensuring there's something for everyone—from single-malt whiskey to bubble gum vodka. Proudly Australian-made, each batch is meticulously crafted with locally sourced ingredients for a unique flavour experience. Sit back, unwind, and savour our premium spirits, crafted with love in small batches to ensure exceptional quality.

- We recognise ABAC's commitment to responsible alcohol promotion through four key standards, that content must not target minors, not encourage excessive drinking, not promote alcohol as a mood enhancer or therapeutic solution nor depict alcohol consumption during activities requiring safety precautions.
- Furthermore, we acknowledge that ABAC participation and adherence to its guidelines are voluntary, including accepting Panel decisions on complaints. Despite not being a member, we recognize our responsibility to ensure our products, ethos and marketing do not encourage excessive consumption or appeal to minors. Therefore, based on these principles, we argue the complaint is unfounded and anticipate the Panel will align with our position given the ABAC standards is based on the probable understanding of the marketing by a reasonable person, where the 'reasonable person' test is sourced from a common law system and means the life experiences, values and opinions held by most people in the community as the benchmark.
- The labelling and/or product name had not been submitted to ABAC for pre-vetting approval.
- We contend that it does not breach the Code. According to the Macquarie Dictionary, an Australian dictionary, the definition of "tipsy" may be deemed as being:
 - slightly intoxicated or affected by alcoholic drink; fuddled; inebriated.
 - inclined to tip or tilt.
- So, in Australian English, "tipsy" primarily refers to being slightly drunk or affected by alcohol. It denotes a state of **mild intoxication rather than being heavily drunk.**
- Furthermore, the name 'Tipsy Tea' was chosen to avoid appealing to minors, as tea is traditionally associated with adult and elderly populations rather than children and that the product is an alcoholic beverage. References to 'spiked' and 'sparkling' were also utilised to further distance the product from minors, devoid of depictions of activities, popular personalities, cartoon characters, or typical activities and products associated with minors. The packaging features a single illustration of a peach, highlighting its flavouring ingredient and justifying its inclusion.
- In accordance with the Food Standards Code legislation (FSANZ), the product includes the mandatory labelling inclusive of the ABV percentage, pregnancy warning, Standard Drink and Enjoy Responsibly stamps.

- Topsy infers only slight intoxication, nor does it promote rapid consumption or the misuse or abuse of alcohol.
- The product is a moderate alcoholic content beverage.
- The label imagery avoids promoting any activity, excessive consumption or featuring amusing characters or humour suggestive of misuse. It includes a single peach illustration to highlight its role as a flavouring ingredient. The term "tipsy" denotes moderation, and the product includes pregnancy warnings and 'Drink Responsibly' stamps to promote responsible consumption and discourage heavy intoxication.
- Our market analysis indicates that using the word 'tipsy' distinguishes our product as a moderate alcoholic beverage, avoiding promotion of excessive consumption or high intoxication.
- In comparison, products like 'High Pour Sally Cosmo Can' and 'Doozy Half and Half Vodka Iced Tea and Lemonade' emphasise alcohol strength and imply high intoxication. 'Jim Beam Black Double Serve' also emphasises alcohol strength. 'El Toro Lime Ranch Water' focuses on "ranch water" rather than clearly indicating an alcoholic beverage.
- Our product's packaging and the use of the word "Tipsy" are intended to portray the beverage as suitable for adult consumption, emphasising moderate enjoyment rather than high alcohol strength or imply rapid consumption to induce intoxication. Our labelling and imagery avoid promoting excessive consumption or suggesting alcohol misuse. Additionally, our packaging prominently displays the (moderate) ABV percentage, pregnancy warnings, and 'Drink Responsibly' stamps, underscoring our commitment to promoting responsible consumption and discouraging heavy intoxication. Therefore, we maintain that the term "Tipsy" promotes a moderate and responsible drinking experience in line with industry standards.
- We contend that we have not breached the Code as articulated in our above response.

The Panel's View

14. This determination arises from a complaint concerning the packaging and branding of a type of alcoholic tea called Topsy Tea. The product is a new edition to a range of spirits from the Gold Coast craft distillery Coastal Moon. Topsy Tea is packaged in a 330ml can, distilled with vodka and is 5% alc/vol.

15. The packaging of the product has a predominantly yellow background with the front of the can displaying the Company's name at the top and the product name 'Topsy Tea' in large white cursive style font. Below the name are the descriptors 'spiked iced tea' in white and a highlighted term 'sparkling peach' in red. An image of a peach is shown above a red/orange splash pattern. The bottom of the can has in very small font the information '330ml' and '5% abv'.
16. The rear and side of the can contains further product information, and text reading 'Indulge in the perfect blend of real tea-leaf brew spiked with coastal moon distillery's smooth premium vodka - it's crisp, bubbly, and just the right amount of sweetness, treat yourself to a uniquely refreshing beverage.'
17. The complainant contends the packaging and particularly the product name implies or encourages excessive alcohol consumption, rapid consumption and encourages the choice of the product by emphasising its alcohol strength. This is argued to arise from the meaning of the word 'tippy' which suggests intoxication and being unsteady as the result of alcohol use.
18. These concerns raise several ABAC standards, namely that an alcohol marketing communication (that includes product names and packaging) must not:
 - show or encourage consumption inconsistent with the Australian health guidelines e.g. excessive alcohol consumption of 10 standard drinks per week or more than 4 standard drinks on any one day - Part 3 (a)(i)(A);
 - show or encourage rapid alcohol consumption - Part 4 (a)(ii); and
 - encourage the choice of an alcohol product by emphasizing its alcohol strength or intoxicating effects - Part 3 (a)(iv).
19. In deciding the compliance of a marketing communication with a Code standard the Panel is to place itself in the position of a reasonable person and assess the probable understanding of the marketing by that person. A 'reasonable person' is a concept taken from the common law system and means that the life experiences, values and attitudes shared by most members of the community is the benchmark.
20. The reasonable person test is based on the balance of probabilities, and this means that if a marketing item could be understood in several ways, the most likely understanding is to be preferred over a possible but less likely understanding of the message in the marketing communication.
21. The Company argues that its packaging design and product name is consistent with the ABAC standards. It is submitted that:

- the term ‘tipsy’ refers to being slightly drunk or affected by alcohol and hence denotes mild intoxication rather than being heavily drunk and it does not promote rapid consumption;
 - the name was selected to avoid the product appealing to minors and to identify the product as being alcoholic; and
 - the packaging portrays the product as being suitable for adults and emphasising moderate enjoyment and alcohol strength.
22. When assessing how packaging such as a can would be most likely understood, most weight should be given to the front of the can and its principal design features such as its colour scheme, largest font wording and most eye-catching design elements. This is because an average consumer cannot be expected to pick up a can, turn it around through the full 360 degrees and study it in fine detail. In this case the message from the packaging would be:
- the product name; and
 - its yellow and red colour scheme; and
 - the peach image.
23. In large measure the design of the can is simple and unexceptional. The issue really turns on the tipsy tea name and whether a reasonable person would understand from this that the product is encouraging excessive consumption and/or promoting the choice of the product on the basis it will get you drunk.
24. While the complainant's take on the packaging and product name is not fanciful, the Panel does not believe that it is the most probable understanding. The Panel believes the packaging does not breach the relevant standards noting:
- the use of the term tipsy within the context of the can design as a whole would be most probably understood as a cue establishing that the product is alcoholic in nature;
 - while a somewhat old-fashioned word, ‘tipsy’ would most likely be understood as invoking moderate rather than excessive pattern of consumption i.e. consumption which would be no more than the 4 standard drinks on a single day noted by the Australian health guidelines to be consistent with reducing the risk of adverse health harms;

- beyond the name tipsy there are no other elements of the packaging design that are suggestive that excessive or rapid consumption is being shown or encouraged;
 - the packaging is not emphasising the alcoholic strength of the product; and
 - taken as a whole, a reasonable person would not probably understand that the packaging is calling on a consumer to drink excessively.
25. The Company should be mindful that it would be possible to use the product name in marketing material in a manner that could be suggestive of more than moderate alcohol consumption. Hence care should be taken, and it would be good practice for the Company to use the ABAC Pre-vetting service to take independent advice on major marketing campaigns and core messaging.
26. The complaint is dismissed.