



ABAC Adjudication Panel Determination No 102/24

Product: Hard Rated
Company: Carlton & United Breweries
Media: Large Novelty Can
Date of decision: 15 August 2024
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 5 July in relation to a large novelty can of Hard Rated (“the product”) by Carlton & United Breweries (“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 5 July 2024.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint and this determination was made within the target 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 advice was obtained for the content of the marketing item (Approval Number 9108).

The Marketing

10. The complaint relates to a large novelty can of Hard Rated located at Reddacliff Place (Library Square), Brisbane.



Complaint

11. The complainant objects to the marketing as follows:
- *For weeks, we had a giant Minion in this spot in the Reddacliff Place (Library Square), presumably to promote the latest movie. Little kids LOVED it.*
 - *Now it's been replaced with a gigantic hard soda.*
 - *Now kids see a massive can of alcohol rather than their favourite movie character.*

The ABAC Code

12. Part 3 (b)(i) of the Code provides that An Alcohol Marketing Communication must NOT:
- (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.
13. Part 4 of the Code requires that the following Placement Standard be applied:
- (a) An Alcohol Marketing Communication must comply with code provisions regulating the placement of Alcohol marketing and an Alcohol Alternative Marketing Communication must comply with code provisions regulating the placement of Alcohol Alternative marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy).

The Company Response

14. The Company responded to the complaint by letter emailed on 15 July 2024. Its primary comments were:
- Carlton & United Breweries (CUB) takes responsible advertising of alcohol seriously. We are aware of the Code requirements and our policy and practice is in line with ensuring compliance with all relevant alcohol and marketing guidelines.
 - Assertions made by the complainant:
 - *For weeks, we had a giant Minion in this spot in the Reddacliff Place (Library Square), presumably to promote the latest movie. Little kids LOVED it. Now it's been replaced with a gigantic hard soda. Now kids see a massive can of alcohol rather than their favourite movie character.*
 - The Hard Rated can was submitted for pre-vetting under application number 06732-2023 and approved on 08.05.2024 (approval no. 9108).
 - The can does not strongly appeal to minors.
 - The face of the can makes it clear that this product is alcoholic and not intended for children. The can is primarily black in colour, with several clear alcoholic cues, including the word 'alcoholic' shown in bold capitals in the centre of the front label, the 4.5% ABV reference at the bottom of the front label and large ARMs logo shown on the front label. We submit that the fact that this can has been increased in size is not sufficient for it to have specific appeal to minors above that which it would have to adults.
 - This position is confirmed by the pre-vetting approval obtained from ABAC.
 - The large can does not share any similar characteristics to or otherwise generally resemble a minion character.
 - We submit there are in fact various distinguishing elements between the minion and can, including the clear distinguishing shapes, the differing overall colourways (noting the can is primarily black whilst the minion is largely blue in colour due to its suit), and the very nature of the items themselves with a Hard Rated can being an inanimate beverage object whereas the minion is an animated character. Finally, we note that any content previously displayed in that marketing space is irrelevant to the question of whether the Hard Rated can, in and of itself, has strong appeal to children.

- The placement of the Hard Rated can does not breach any codes or guidelines and is compliant with the ABAC standard. We note that the pre-vetting submission (for which approval was received) made specific reference to the proposed placements of the large Hard Rated cans, including at Reddacliff Place (266 George Street, Brisbane).
- The applicable code for this outdoor advertisement is the Outdoor Media Association's Alcohol Advertising Policy. The guidelines provide that alcohol advertising is not to be placed on signs within a 150-metre sightline from a school's boundary. Library Square is not within 150-metres of a school.
- We work closely with our media agencies to ensure that they understand the requirements of the Code and confirm their commitment to it. Our media agency, PHD, ensures that all sites chosen follow the requirements of the Code and the Outdoor Media Association's Alcohol Advertising Policy.
- CUB is committed to ensuring our promotional and marketing material, and that of our associated entities, does not promote or encourage any irresponsible or illegal consumption of alcohol. Our goal is for adults to enjoy our products responsibly and in moderation. Accordingly, we have taken all reasonable precautions to ensure that the marketing material produced complies with the ABAC standard.

The Panel's View

Introduction

15. This is a somewhat unusual case that arises from the placement of a large novelty prop can of the alcohol product Hard Rated at Reddacliff Place in the Brisbane CBD. The complainant explains that the Hard Rated promotion was in the same location as an earlier and equally large depiction of a Minion, a character from the children's movie, Despicable Me. The concern is that minors will be drawn to the Hard Rated promotion because:
 - the Hard Rated novelty can has similarities such as size and novelty value with the Minions promotion;
 - the two promotions were located in the same spot; and
 - minors had become familiar with seeing the Minions promotion and hence went looking to the spot and found the Hard Rated large novelty can instead.
16. It should be noted that the Hard Rated product name and can design emerged following the Panel's decision in Determination 119 and others/23 which

considered the branding and packaging of a product 'Hard Solo'. The Panel found that the Hard Solo branding and packaging drew on the well known and long established brand elements of Solo soft drink and this association with a popular soft drink for the reasons detailed in the determination resulted in Hard Solo breaching the Code standard on alcohol marketing not having strong or evident appeal to minors.

17. The Company withdrew the Hard Solo branding and packaging from the market. It then sought and obtained ABAC pre-vetting certification for the branding and packaging design of Hard Rated pursuant to rule 4.21.3 of the ABAC Rules and Procedures. The effect of certification is that the Panel is not to consider any further complaints about the Hard Rated packaging itself. Certification however does not preclude the consideration of other marketing materials featuring the Hard Rated packaging design and hence the Panel can make a decision on the use of the novelty large prop can.
18. The complaint raises two separate but related questions for decision, namely:
 - is the Hard Rated novelty can of itself an item of marketing which has strong or evident appeal to minors; and
 - does the placement of the Hard Rated novelty can at Reddacliff Place breach any ABAC standard.

Does the novelty can have strong or evident appeal to minors

19. Marketing comes in many and varied forms and the ABAC Code adopts an expansive approach as to the types of marketing items (described as marketing communications within the Code) that are captured by the ABAC standards. A large novelty version of a product can is undoubtedly a marketing communication for ABAC purposes. This means that the Hard Rated promotion using the prop can must not have strong or evident appeal to minors.
20. Part 3 (b)(i) of the Code provides elaboration on when the strong or evident appeal to minors standard might be breached including 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.

21. 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.
22. 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.
23. The Company has provided detailed arguments as to why it contends that the large novelty can is consistent with the Part 3 (b) standard. Its main points include:
- the face of the can makes it clear that this product is alcoholic and not intended for children;
 - there are several clear alcoholic cues, including the word 'alcoholic' shown in bold capitals in the centre of the front label, the 4.5% ABV reference at the bottom of the front label and large ARMs logo shown on the front label;
 - that this can has been increased in size is not sufficient for it to have specific appeal to minors above that which it would have to adults;

- the large Hard Rated can does not share any similar characteristics to or otherwise generally resemble a Minion character;
 - there are various distinguishing elements between the Minion and can, including the clear distinguishing shapes, the differing overall colourways (noting the can is primarily black whilst the Minion is largely blue in colour due to its suit), and the very nature of the items themselves with a Hard Rated can being an inanimate beverage object whereas the Minion is an animated character;
 - any content previously displayed in that marketing space is irrelevant to the question of whether the Hard Rated can, in and of itself, has strong appeal to children.
24. 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.
25. There are a couple of aspects of the potential appeal of the novelty can. Firstly, does the prop can irrespective of the context of its use, have strong appeal to minors? Oversized versions of common items like a beverage can are eye catching and will draw attention. After all that is the point of using props of this nature for marketing.
26. That said, the Panel does not believe the prop novelty can of itself has a strong appeal to minors or certainly no greater appeal to minors than it would have to adults. The prop is a straight representation of the actual design used for the product and it establishes the product is alcoholic, uses dark and mature colouring and otherwise would not be regarded as strongly appealing to minors.
27. The finer judgement is the context of the use of the prop can as it is possible to conceive of circumstances where the use of the Hard Rated prop could be understood as having strong appeal to minors. The context submitted by the complainant is that the prop Hard Rated can was in the same location as a prior oversized Minion. The Panel understands the point being made, and if the Hard Rated prop was positioned with the Minion character as part of the same promotion, then strong appeal to minors would likely occur.
28. The situation however is that the Minions promotion had ended and the unrelated Hard Rated promotion had commenced. The two promotions were not connected. Outdoor sites such as billboards and the advertising spot at Reddacliff Place will rotate through several different promotions in the course

of a month and it would not be expected that the perception of the current promotion or ad would be influenced by a prior promotion.

Does the Reddacliff Place location of the Hard Rated promotion breach any ABAC Standard

29. A second component of the ABAC standards is the policy goal that irrespective of the content of a marketing communication, the audience of the communication should be overwhelmingly adults and not minors. This policy goal is embodied in the ABAC Placement Standards.
30. The first Placement Standard (Part 4 (a) of the Code) provides that an alcohol marketing communication must comply with code provisions regulating the placement of alcohol marketing that have been published by Australian media industry bodies. For outdoor settings such as Reddacliff Place, the applicable media code is the Outdoor Media Association (OMA) policies.
31. The OMA Placement Policy (section 3.1) provides that OMA members will not advertise alcohol products, wagering and gaming products or adult sexual products within 150 metre sightline from the boundary of a school. The delineation of 150 metres sightline as the appropriate radius is based on the science on how messages are absorbed. It is contended that most messaging is taken in at a distance of no greater than 100 metres and even the largest sign is not clearly visible at a distance of greater than 140 metres.
32. The implementation of the OMA policies is via the Measurement of Outdoor Visibility and Exposure (MOVE) tool. This tool provides audience measurement for some 77,500 OOH advertising sites. Attached to MOVE is school mapping data which contains the boundary locations of 12,165 schools in each Australian State other than Tasmania. The MOVE software is described on the OMA website as measuring various audience demographics including age segments.
33. While Reddacliff Place is a popular area adjacent to the Queen Street Mall and to various public buildings, the spot is not within 150 metres of a school and there is no breach of the ABAC Placement standards by the Hard Rated promotion being located there.
34. Drawing this together, neither the ABAC content or placement standards have been breached and the complaint is dismissed.