



## ABAC Adjudication Panel Determination No 154/24

**Product:** Kahlua  
**Company:** Pernod Ricard Winemakers  
**Media:** Social Media - Instagram  
**Date of decision:** 8 November 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 8 October 2024 about a social media post marketing Kahlua (“the product”). Pernod Ricard Winemakers (“the Company”) distribute Kahlua in Australia.
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 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 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 is within the Panel’s jurisdiction.

### **The Complaint Timeline**

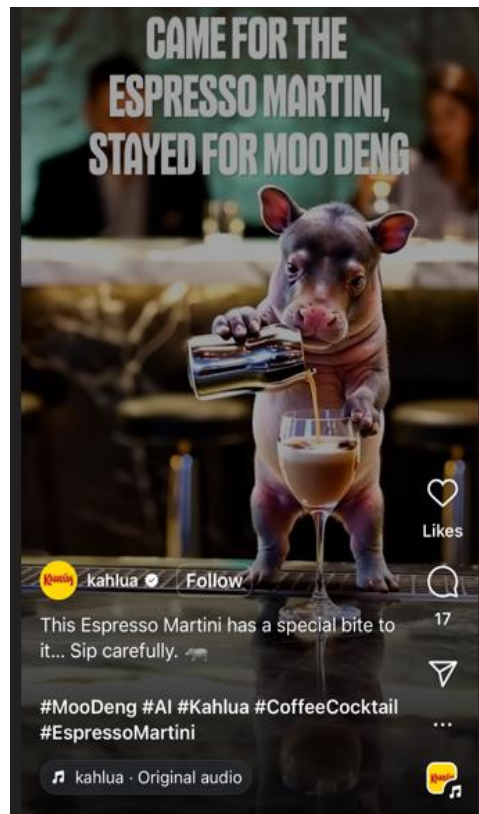
7. The complaint was received on 8 October 2024.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint and this determination was made within the target timeframe.

## 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 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 item.

## The Marketing

10. The complaint relates to a video posted to Instagram. It shows a baby hippopotamus, Moo Deng, pouring an Espresso Martini:



## Complaint

11. The complainant objects to the marketing for the following reasons:
  - *The advertisement has strong appealing images that appeal to minors.*
  - *This is evident through the use of 'Moo Deng' pouring the cocktail in the advertisement. 'Moo Deng' is a popular internet sensation in which many families are traveling far and wide to see the baby hippopotamus.*

- *Using the image of the hippopotamus in a cartooned format can be seen to appeal to a minor audience.*
- *'Moo Deng' shows an approachable and relatable element to the advertisement which draws in under 18-year-olds. This shows a particular attractiveness for a minor beyond the general attractiveness it has for an Adult, as it creates a relatable environment for minors through the use of the cartoon hippopotamus.*
- *'Moo Deng' can be seen throughout the internet as it has gone 'viral' – however as it is located at a zoo it is frequented by families with children who are minors, thus creating a strong connection to minors.*
- *This goes against ABAC Part 3(b) Responsibility toward Minors.*

## **The ABAC Code**

12. Part 2 of the ABAC Code provides that:

- (a) Parts 3 and 4 of the Code APPLY to all Alcohol Marketing Communications.

Alcohol Marketing Communication is defined as meaning a marketing communication for alcohol, 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..

13. Part 3 (b) 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.

## The Company Response

14. The Company responded to the complaint by letter emailed on 18 October 2024. Its primary comments were:
- Pernod Ricard Australia is a signatory to the Alcohol Beverages Advertising Code Scheme (ABAC) and takes compliance with the ABAC Responsible Alcohol Marketing Code (the Code) very seriously. We are committed to the responsible marketing of our products and always endeavour to abide by the Code as well as other applicable advertising codes and laws. As a member of the global Pernod Ricard Group, we are also committed to the responsible marketing and consumption of our products through compliance with the Pernod Ricard Code for Commercial Communications.
  - The complaint is said to relate to an Instagram post that appeared on a Kahlúa Instagram page in October 2024. For the reasons set out below, we submit that there has been no breach by Pernod Ricard Australia of the Code and complaint 154/24 should be dismissed by the Panel.
  - Pre-vetting advice was not requested for the marketing.
  - The account is owned and controlled by The Absolut Company Aktiebolag (The Absolut Company), a Swedish company. The Absolut Company and Pernod Ricard Australia are both part of the Pernod Ricard Group. Pernod Ricard Australia is the exclusive distributor of Kahlúa in Australia.
  - This post was created by The Absolut Company in Sweden.
  - The Absolut Company has informed us that the focus of the Kahlúa Instagram account is the US and the UK markets. The audience reflects the brand's priorities, with 34% of followers living in the US and 16% in the UK. Only 3.8% of followers (1665 in total at the time of writing) reside in Australia. The post was not aimed at an Australian audience and there is no other discernible or direct link between the post on the global Kahlúa Instagram account and Australia.
  - Pernod Ricard Australia does not have control over the account or the post.
  - We were not aware of the post until we received ABAC's letter informing us of the complaint. The Absolut Company does not consult with or seek approval from Pernod Ricard Australia in relation to posts to its Kahlúa Instagram account, in part because Australia is not the intended audience.
  - Pernod Ricard Australia cannot direct The Absolut Company to remove or modify a post on the Kahlúa Instagram account. Upon being notified by us of the complaint, The Absolut Company elected to remove the post.

- The post is not an Alcohol Marketing Communication as defined in the Code. The post was not generated by, for, or within the reasonable control of Pernod Ricard Australia, and there is no direct link to Australia. As ABAC's Guidance Notes state: 'Alcohol is a global product and the internet is global in its reach. In contrast, the ABAC Scheme is limited in its reach to marketing which is linked to Australia. This means the Scheme and the remit of the Panel do not extend to every alcohol marketing item which can be accessed in Australia over a global digital platform. To fall within the ambit of the Scheme the marketing must have a discernible and direct link to Australia.'
- As the post is not an Alcohol Marketing Communication for the purpose of the Code, we have not undertaken an assessment of the post's compliance with the Code.
- We wish to reiterate that Pernod Ricard Australia is committed to the responsible marketing of its products and upholding compliance with the Code. Pernod Ricard Australia maintains strict internal and external processes to help ensure compliance.

## **The Panel's View**

### **Introduction and jurisdiction of ABAC Scheme**

15. This determination relates to a complaint received about a post made to an Instagram account for Kahlua. The post shows Moo Deng - a baby pygmy hippopotamus animated so as pouring an Espresso Martini. The image is superimposed with text 'Came for the Espresso Martini, stayed for Moo Deng'.
16. The complainant believes the post breaches the ABAC standard in Part 3 (b)(i) by having strong or evident appeal to minors. It is argued Moo Deng has become an internet viral sensation and its use combined with being set in a zoo means the image is highly relatable and familiar to minors.
17. Kahlua is a coffee liqueur developed in Veracruz Mexico in 1936. In 2005 the brand was acquired and became one of the 240 different alcohol product brands owned by the global alcohol giant Pernod Ricard. The Australian brands within the Pernod Ricard stable are the wines of Jacob's Creek, St Hugo and George Wyndham.
18. Along with numerous other Pernod Ricard brands, Kahlua is managed within the Absolut Group headquartered in Sweden. This fact is the basis for Pernod Ricard Australia's contention that the Instagram account on which the post was made and hence the post itself is not a marketing communication captured by the ABAC Scheme. While Pernod Ricard Australia is the distributor of Kahlua in Australia, it is argued:

- The Instagram account is owned and controlled by Swedish based The Absolut Company Aktiebolag (The Absolut Company);
  - The post was created by The Absolut Company without the knowledge of Pernod Ricard Australia which only became aware of the post upon receipt of the complaint;
  - The Absolut Company does not consult with or seek approval from Pernod Ricard Australia in relation to posts to its Kahlúa Instagram account;
  - Australia is not the intended market of the account with it being aimed at the UK and US markets. Only 3.8% of the account's followers are from Australia;
  - Pernod Ricard Australia cannot direct The Absolut Company to remove or modify a post on the Kahlúa Instagram account.
19. Together this is submitted to mean that even though Pernod Ricard Australia is one of the corporate entities within Pernod Ricard Group, the post does not have a discernible and direct link to Australia. On this reasoning, the post should be found to be outside the jurisdiction of the ABAC Scheme.
20. The ABAC Scheme is part of the Australian regulatory framework applying to alcohol marketing occurring in Australia. There are regimes in most other nations that regulate alcohol marketing taking place within the boundary of those individual nation states. A challenge posed by the nature of alcohol as a product and social media platforms such as Instagram is that they operate globally. This means social media posts including those promoting alcohol brands can be accessed reasonably freely from most parts of the world irrespective of the origin of the post.
21. The remit of the Panel and the ABAC standards does not extend to every alcohol marketing item that can be accessed in Australia over a global digital platform. To fall within the ambit of the Scheme the marketing item must have a discernible and direct link to Australia such as:
- the Instagram account is under the control of an Australian alcohol marketer; or
  - if the Instagram account is under the control of an international entity there is a discernible and direct link to Australia so there is an Australian entity to which the ABAC obligations can attach ie an Australian entity with reasonable control over the marketing communication
22. The Company's advice that it did not control the Instagram account nor create the post can be accepted. There are no apparent Australian specific references

on the Instagram account. In large measure the posts on the account are 'nationality neutral' in that they are about cocktail or food creations made with Kahlua.

23. Beyond this it is also noted:

- Kahlua as a product is self-evidently available for retail sale in Australia.
- Instagram as a social media platform is a standard medium to build awareness of and promote engagement with an alcohol brand.
- There does not appear to be an Australian specific Kahlua Instagram account (nor an Australian specific Kahlua Facebook Page).

24. Pernod Ricard Australia states it cannot direct The Absolut Company as the Instagram account holder to remove or modify posts on the account. But evidently the Australian entity is not without some standing in the Pernod Ricard global group, as it raised the complaint with its Swedish counterpart and the post was removed.

25. So what should be made of all of this? It seems that the Instagram account could be regarded as global marketing for Kahlua, at least in English speaking countries. The account's content might be tilted towards the UK and the US but on the figures supplied by the Company these two countries represent just 50% of the total followers. Presumably the other 50 % of followers are found in numerous nations across the world including the nearly 4% in Australia.

26. Conceivably the Instagram account could be subject to alcohol marketing regulation:

- in Sweden as the country where the account is hosted and the content created;
- in the UK and the US if these are the focus markets for the content;
- in other countries depending on how the regulatory regimes are structured in each country; or
- a combination of the above including EU regulation given Sweden's membership of the EU.

27. The Panel is not blind to the position advanced by Pernod Ricard Australia and the reality of the operation of a global corporate group. Each company in the group is its own legal entity subject to the national regulatory regimes where it operates. It would not be expected that The Absolut Company in Sweden will be running past its Australian counterpart every post it will create on the global Kahlua Instagram account.



28. That said, the Panel believes the Instagram account and the posts made to it do have a discernible and direct link to Australia and Pernod Ricard Australia is an alcohol product distributor with a sufficient measure of control over the account for the post to be regarded as falling within the ambit of the ABAC obligations. In reaching this decision the Panel had regard to:

- Pernod Ricard Australia is the distributor of Kahlua in Australia and the product is readily available in Australia alcohol retail outlets;
- Pernod Ricard Australia is part of the global corporate group that produces and markets Kahlua;
- the Kahlua Instagram account can easily be accessed by Australian consumers of the product and nearly 4% of the followers of the account are Australian;
- there is no Australian specific Instagram account for Kahlua with Australian consumers accessing the global account;
- Pernod Ricard Australia, while not the host of the account nor the creator of the account's content is able to raise concerns about the content within the Pernod Ricard Group including with The Absolut Company.

#### **Does the post breach the ABAC Standard**

29. Part 3 (b)(i) of the Code provides that an alcohol marketing communication must not have strong or evident appeal to minors. This might occur if the alcohol marketing communication:

- 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.

30. The Company did not provide comments on the consistency of the post with the Part 3 (b) standard given its contention that the Instagram account and hence the post was not within the remit of the ABAC Scheme. It did note that the Pernod Ricard Group as a whole is committed to the responsible marketing and consumption of alcohol products through compliance with a Group Code for Commercial Communications.

31. The Code of Commercial Communications contains a section on underage consumption which in thematic terms is similar to the ABAC standard. The Pernod Ricard Code provides commercial communications inter alia:
- should not be of primary appeal to minors; and
  - should not use creative features, objects, images, styles, symbols, colours, music and characters (either real or fictitious including cartoon figures or celebrities such as sports heroes) of primary appeal to children or underage.
32. The Panel believes the post does breach the ABAC standard. The pygmy hippopotamus Moo Deng has attracted considerable public attention and while this is not confined to minors, the image of a baby and cute animal does have evident appeal to minors. Further the setting in a zoo also grounds the image with an activity highly popular with minors.
33. It is noted that the post is out of character with the general style of posts on the Kahlua Instagram account. The account features depictions of the use of the product in making drinks and the people shown are always mature adults in adult settings. Memes with animals have not otherwise been used. The post was removed upon the Australian entity raising it with the account holder.
34. The complaint is upheld.