



ABAC Adjudication Panel Determination No 209/24

Product: Evil Thoughts Lunchbox
Company: Evil Thoughts Bar
Media: Social Media - Instagram
Date of decision: 14 January 2025
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 16 December 2024 about a social media post marketing the Evil Thoughts Lunchbox (“the product”) by Evil Thoughts Bar (“the Bar”).
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 essential 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;
 - Broadcast codes, notably the Commercial Television Industry Code of Practice – that restrict when advertisements for alcohol beverages may be broadcast;
 - The Outdoor Media Association Code of Ethics and Policies restricts the location of alcohol advertisements on outdoor sites such as billboards.
3. The codes address the placement or content of alcohol marketing or deal with both matters. The ABAC deals with 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 and meet the standards contained in the ABAC.
 4. Ad Standards provides a common entry point for alcohol marketing complaints for ease of public access. Upon receiving a complaint, Ad Standards supplies a copy to the ABAC’s Chief Adjudicator.
 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 complaint raises concerns under the ABAC Code and is within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaint was received on 16 December 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 an Instagram post:





The Complaint

11. The complainant objects to the marketing as follows:
- *This advertisement breaches ABAC Code 3 (b) responsibility toward minors. A marketing communication must NOT: (i) Have Strong or Evident Appeal to Minors*
 - *The advertisement depicts a lunchbox theme. It shows the popular confectionery often found in children's lunchboxes, including Jumpy's chips, Tiny Teddies, Fruit Roll-Ups, and LCM bars.*
 - *Whilst the post's caption states that it is for adults, I believe this post can have a strong or evident appeal to minors beyond the general attractiveness to just adults. The use of confectionery within alcoholic drinks, such as a 'roll-up shot,' is shown with the popular children's confectionery snack of a fruit rollup inside the alcoholic beverage.*
 - *While these confectionery and snacks can attract people of all ages, they have a particular appeal to minors. The use of confectionery in alcoholic beverages can help create a smooth transition from non-alcoholic to alcoholic drinks.*

The ABAC Code

12. 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 Bar's Response

13. The Bar responded to the complaint by email on 29 December 2024. Its primary comments were:

- Regarding the advertised Lunchbox:

We currently have an 18-year-old+ restriction on our business profile, which we can provide proof of. We also use the Instagram option to target advertisements for potential patrons above 18.

As this is not a 'product', nor is it a product for external/online sale and is an in-house purchase of house-made concoctions within our bar, we believe the argument that this could be targeted/promoted towards people not of age is not applicable due to having our responsible serving of alcohol certificates, along with liquor licensing laws that ensure we do not allow underage patrons within our venue to purchase said promotion.

Despite our caption clearly stating that this is an 'adult-specific' service we provide within our 18+ bar, the contents, including 'Roll-Ups' and other various snacks we promote, are not age-specific. Instead, our promotion aims to complement the 90s nostalgic season promotion we are running throughout summer, and we adhere to all legislation from Liquor Control Victoria.

There has not, and will never be, an intention to target an underage audience as we have not provided any ingredients or methods in which we create the alcoholic contents within this lunchbox; along with being purely a cocktail/alcohol bar, we would not benefit as a business from reaching an underage demographic, nor do we agree with serving or promoting to underage peoples.

Minors are strictly prohibited from entering our bar during any day or night trading hours, and our highly qualified staff and management enforce these restrictions. This post was also removed as an advertisement on the day of this complaint.

The Panel's View

14. The Evil Thoughts Bar is located in Brunswick, Melbourne. Its aesthetic is drawn from street skateboarding culture and femme rock. The bar features a TV screen showing 90s and 00s pop culture clips. The Bar's use of nostalgic themes in its marketing and promotions is the background to this determination.
15. In December 2024, the Bar was running a promotion themed 'Australian Nostalgic Summer Season'. One of the promotions was the Evil Thoughts Lunchbox, which consists of a choice of 'fruit' (several themed cocktails), school lunchbox items (a snack-size pack of Tiny Teddy biscuits, an LCM bar, etc.), and a 'note' from Mum and Dad. The note is an evil thought, such as 'Dad and I are getting a divorce... Have fun at school. Xoxo'.
16. The Australian Nostalgic Summer Season and the Evil Thoughts Lunchbox were disseminated via the Bar's social media accounts, and an Instagram post attracted the complaint.
17. The post shows a cocktail and a shot alongside a lunchbox with Jumpy's Chips, a packet of Tiny Teddy biscuits, an LCM bar, a pop-top drink, and an evil note from Mum. The image depicts further school-day references, including chalk drawings of a noughts and crosses game, a paper plane, and an F grade.
18. The complainant contends that the school day's theme and confectionery depictions mean that the post strongly appeals to minors in breach of the Code standard in Part 3 (b)(i). This 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.

19. The Bar contends the complaint is misplaced. It points out that the post is a promotion about alcohol options available only in the Bar itself, i.e. there is no 'alcohol product' on broader sale. The Bar operates in line with Victorian liquor licencing laws, and minors are not exposed to the Lunchbox promotion, nor can they gain entry. Further:
- the Bar's Instagram account is age-restricted, and posts are targeted to adults;
 - Minors are strictly prohibited from entering the Bar within trading hours of the day/night, and highly qualified staff and management enforce these restrictions; and
 - the promotional snack component is provided only in the Bar and is designed to complement the nostalgic 90s theme.
20. The Bar's points are valid. It is a licensed premises regulated by the Victorian Liquor Commission, and there is no suggestion that responsible service of alcohol obligations are not met, including not serving alcohol to minors or permitting minors access to the venue.
21. This, however, is not a complete answer. The aim of regulating alcohol as a product and of alcohol marketing in particular, goes beyond ensuring an individual alcohol retailer serves alcohol responsibly and doesn't supply alcohol to minors. It is also about how alcohol use is portrayed, and importantly, alcohol marketing should not present alcohol to strongly appeal to minors.
22. This is why regulatory requirements of both government and the ABAC scheme place obligations on the messaging conveyed by marketing to the broader community. For its part, the Victorian Liquor Commission has powers under the Liquor Control Reform Act to ban advertisements or promotions that are considered likely to encourage irresponsible alcohol consumption or that are otherwise not in the public interest.
23. The Commission has published Responsible Alcohol Advertising and Promotion Guidelines to provide principles of good practice and examples of unacceptable practice. Principle 7 provides that advertising (including social media) must not encourage underage drinking or otherwise be likely to appeal to minors.
24. The examples of unacceptable practice in the Principle align with the ABAC standard in Part 3 (b) of the Code and also include:
- using settings primarily used by minors, such as schools or playgrounds;
 - using props or characters commonly associated with minors or their interests or activities;

- advertising or promoting alcohol in connection with non-related products or services typically purchased or used by minors.
25. The ABAC standards for responsible alcohol marketing have two parts. The content standards apply to the messaging conveyed by alcohol marketing communications such as social media posts. The placement standards seek to have marketing directed towards adults and, to the extent reasonably possible, away from minors, irrespective of the content of the marketing communication.
26. The Bar's Instagram account is age-restricted, which means account holders under the age of 18 will not be served with the post. This will greatly limit the potential for minors to see the post, but it can't exclude the possibility. For instance, a minor might have access to a parent's smartphone and access to Instagram, or possibly there is co-viewing of the post by an adult account holder and a minor.
27. The technology and policy obligations applicable to social media are constantly transforming, and possibly, a time will be reached when age restriction controls are considered sufficient to negate the need for the strong appeal to minors' content standards to apply to marketing over social media. For instance, the recent Online Safety Amendment (Social Media Minimum Age) Act 2024 seeks to preclude under-16-year-olds from accessing social media.
28. Drawing this together, the Bar's use of age restriction controls does not negate the requirement to equally meet the ABAC content standards. It is the responsibility of an alcohol retailer to both create alcohol marketing that does not strongly appeal to minors and endeavour to restrict the potential exposure of minors to the marketing material by satisfying the ABAC placement standards.
29. The issue is whether the post is consistent with Part 3 (b) standard or whether a reasonable person probably understands the post has a strong appeal to minors. Some characteristics of 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.
30. 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 more of the characteristics does not necessarily mean that the marketing item will have a strong or evident appeal to minors. The overall impact of the marketing communication, rather than an individual element, shapes how a reasonable person will understand the item.
31. The Bar's post draws on nostalgia for school days, say, in the 1990s, for an adult today. While the post might do this, it can equally appeal to a minor. While nostalgia is a perfectly valid marketing theme, thought needs to be given to whether the imagery and messaging are strongly appealing to minors, as the references remain relevant and relatable to this group. In other words, the messaging is not nostalgic for minors but reflects their current lived experience.
32. The Panel believes the post breaches the Part 3 (b) standard. In reaching this conclusion, the Panel noted;
- the depiction of popular children's snacks and confectionery items will be highly familiar and relatable to minors;
 - the graphics of chalk outlines of the noughts and crosses game, paper plane and the like will be recognisable and relatable to minors;
 - the juxtaposition of this imagery with the alcoholic drinks raises the implication of a smooth transition from non-alcoholic foods and beverages to the use of alcohol; and
 - as a whole, a reasonable person would probably understand that the post has a strong or evident appeal to minors.
33. The complaint is upheld.