



## ABAC Adjudication Panel Final Determination No. 31/15

**Product:** Little Fat Lamb Hard Cider  
**Company:** Fluid Beverages  
**Media:** Packaging  
**Complainant:** Confidential  
**Date of decision:** 22 April 2015  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Debra Richards  
Professor Louisa Jorm

### Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) concerns packaging for Little Fat Lamb Hard Cider by Fluid Beverages (“the Company”) and arises from a complaint received 18 February 2015.
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”) – 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 – which places restrictions on the location of alcohol advertisements on outdoor sites such as billboards.
3. Within this framework, some of the requirements go to the placement of alcohol marketing, while others go to the content of the marketing. The ABAC is a content code, which means the standards of good marketing practice within the Code apply irrespective of where the marketing occurs (e.g. in print, in digital formats, or by broadcast mediums). Equally, the fact that the marketing is placed in a particular medium or in a particular location will not of itself generally be a breach of the ABAC. In contrast, the placement codes applying to outdoor sites or free to air television don't go to what is contained within alcohol marketing but the codes will be potentially breached if the marketing occurs at particular timeslots or is placed near a school.
  4. For ease of public access, the Advertising Standards Bureau (ASB) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the ASB, 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 the ASB 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 ASB 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 18 February 2015.
8. The Panel endeavour 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 has not been determined within this timeframe due to the two part process associated with determinations concerning product

names and packaging. In these complaints, the thirty day timeframe is not applicable.

### 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 refers to the packaging of Little Fat Lamb Hard Cider pictured below.
11. The product is packaged in a 1.25L plastic bottle and named Little Fat Lamb Hard Apple Cider. The image on the label is of a simple drawing of a green field and blue sky with white clouds. There is a fence and a picture of the back of a sheep sitting on the "TT" in the name of the product.



### The Complaint

12. The complainant is concerned that the packaging:
  - a) comprises plastic containers identical to those used for soft drink;

- b) the name does not reflect an alcoholic drink and is likely to be confused with common soft drinks; and
- c) the combination of high alcohol concentration (8%) and a cheap price encourages consumption by Minors and binge drinking.

### **The ABAC Code**

13. Part 2(a) of the ABAC Code provides that The Code APPLIES to all Marketing Communications in Australia generated by or within the reasonable control of a Marketer, except as set out in Section 2(b). This includes, but is not limited to:

....

- (d) product names and packaging

....

14. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:

- (a)(i) show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines;

- (b)(i) have Strong or Evident Appeal to Minors;

15. Definition in Part 5 of the ABAC provide:

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.

A 'Minor' means a person who is under 18 years of age and therefore not legally permitted to purchase an alcohol beverage in Australia

## The Company's Response

16. The Company responded to the complaint on 2 and 5 March 2015. The principal points made by the company were:
- (a) Fluid beverages is a responsible beverage company, we support and accept regulation within the industry and will work with regulatory bodies, retailers and consumers to ensure we deliver safe consumer products to the market. Little Fat Lamb has been sold nationally now for over two years and this is the first complaint of this nature. It is only sold in licensed independent retail stores to persons of suitable age.
  - (b) The container is specifically designed to offer a low cost, multi-serve option providing the consumer with a safe glass alternative ideally suited for situations where a glass breakage could potential cause an injury and is easily compacted for disposal. To suggest that a specific container is inherent with a beverage type is misleading as glass and cans serve to contain both alcohol and non-alcoholic beverages. It would be akin to saying that all 375ml cans have beer in them or all red 375ml cans have Coke in them. Innovation in packaging has allowed suitable membrane technology to be employed to utilise the benefits of the PET container for alcoholic beverages for long lasting freshness which has not been possible in the past. Unfortunately we are not initiators of this innovation as it is widely used in New Zealand and already throughout Australia (examples supplied).
  - (c) Cider is a new emerging beverage creating its own image in the liquor industry. Similarly to beer advertisements that rely heavily on "blokes humour" cider is creating a fresh, cheeky presence with new label designs not traditionally employed by more established labels used on beer and wine. They tend and to utilise earthy pastel colours opposed to the bright, vibrant colours used on RTD labels. Little Fat Lamb labels have deliberately not used images of apples or any other fruit so as to avoid confusion that the product could be a fruit juice. It clearly outlines exactly what the product is on the facing label and makes an unambiguous representation to the consumer that the product is a "Hard Apple Cider" containing "8.0% ALC/VOL". The taste of the product is without doubt an alcoholic beverage. The fictitious sketch of a lamb revealing its "builders crack" where the wool has pulled up above its pants is to apply a general cheekiness and adult humour that requires the potential purchaser to take a second look. If I can also add the label was designed by a Kiwi might go some way to explain this image and the appeal of a sheep's butt crack to potential Kiwi immigrants...(Oh dear...)
  - (d) The appearance is in line with industry norms for PET Cider. No aspect of the label could be considered to specifically appeal to children. It employs adult humor and soft pastel colours denoting its natural non-artificial composition.

- (e) No claims or representation that the product is anything other than an alcoholic beverage. Packaging is widely used for this alcoholic beverage type. The label specifically precluded the use of fruit images to avoid confusion.
- (f) The label clearly details “**Hard Apple Cider – 1.25L 8.0% ALC/VOL**”. It is only sold at licensed independent retail outlets.
- (g) The cider market has cannibalised the sparkling wine category. Drinkers are moving from 12-14% alc/vol to levels found in brewed ciders. 8% alcohol cannot be considered high in this category.
- (h) Price is also relative. A bottle of wine (12-14% alc) can be purchased as low as \$2/750ml or a 4 litre cask of wine for \$10. Large volume when compared to what? It is a multi-serve container with a resealable lid. The PET 1.25L resealable container can be opened and stored in the fridge and drunk responsibly. There are no elements of the Little Fat Lamb that are not widely available in the market place today.

17. By email dated 20 April 2015, the Company responded to the Panel’s Provisional Determination. The principal points made by the Company were:

- a) Upon receiving feedback regarding the Little Fat Lamb range, the Company immediately undertook an internal review, taking into consideration some of the concerns with the product’s packaging. The Company confirmed that it failed their own standards in light of the concerns raised, and as of 26 March 2015 an undertaking was given to cease any further production of the product in its current packaging.
- b) Due to strong consumer demand for the product, the decision has been made by the Company to continue with its brand, but with significantly changed presentation. It is intended to continue with the PET container, but using an amber bottle with a new label. It is then intended to continue working with modifications and produce a proprietary shaped container. It is contended by the Company that the changes are in line with similar products currently on the market, and will move the product’s packaging substantially from the area of concern. It is further intended to diversify the brand so that the product is available in cans.

## **The Panel’s View**

### Introduction

18. Little Fat Lamb cider is a relatively new alcohol product available in the Australian market for a little over two years. The marketing strategy of the product is explained by its producers, as distinguishing cider from beer by “creating a fresh, cheeky presence, with new label designs, not traditionally employed by more established labels used in beer and wine”.

19. It is this 'non-traditional' form of packaging and labeling which has attracted the concern of the complainant, who believes the presentation of the product could lead to confusion with soft drinks and that this, together with its high alcohol concentration and price, will encourage consumption by under eighteen year olds and binge drinking.
20. The complaint raises issues of the consistency of the product's name and packaging with the standards of good alcohol marketing practice contained within the ABAC. The ABAC in its current form came into operation on July 2014, and this is the first occasion that the Panel has considered a complaint going specifically to a product's packaging, as opposed to advertising a product, since the commencement of the new Code.
21. This determination will deal with both procedural aspects and substantive aspects as follows:
  - a) The application of the ABAC Scheme to the Company;
  - b) Product packaging and labels under the ABAC;
  - c) Appeal to minors;
  - d) Excessive consumption;
  - e) Provisional Determination;
  - f) Final Determination and next steps.

#### The application of the ABAC Scheme to the Company

22. The ABAC Scheme is quasi-regulatory in nature, which means that the compliance with the ABAC is based upon a contractual commitment given freely by alcohol industry participants, rather than obligations created through legislative authority. While the great majority of alcohol producers are ABAC members, either directly or through membership of the sponsoring alcohol industry peak bodies, Fluid Beverages, the producer of Little Fat Lamb Cider, is not a signatory to the ABAC Scheme.
23. As a result, the Company is not contractually bound to meet the ABAC standards or to comply with a Panel determination. That said, the Company has stated its commitment to good practice in alcohol beverage marketing and has cooperated with the Panel's processes. Accordingly, the Panel has been able to make this determination.

#### Product packaging and labels under the ABAC

24. The ABAC Scheme commenced operation in 1998. In November 2009, the Scheme was extended to apply marketing standards to product names, packaging and labeling. Prior to this time, the Scheme was confined purely to alcohol beverage advertising, and did not include brand names, labeling, and packaging.

25. The 2009 commencement date of this Scheme extension has ongoing relevance, because of the ‘grandfathering’ of product names and packaging which were in the Australian market at that time. This means that the standards apply to new products as they entered the market, but established brand names and packaging can continue to be used and not be challenged by a complaint on the basis of the established brand name and packaging’s inconsistency with ABAC standards.
26. Accordingly, a threshold question is to assess if the Company’s packaging and brand name falls within the grandfathering provision, i.e. was the product’s name, label, or packaging in use by way of the product being on bona fide retail sale in Australia prior to 31 October 2009. As explained by the Company, the product is a recent addition to the Australian market and no contention has been made by the Company that it was on sale in advance of the last few years. This means the ABAC standards do have application to the product’s name and packaging, and the Panel can move to make a substantive determination of the consistency of the name and packaging to the relevant ABAC standards.
27. Under the previous version of the ABAC the Code was structured so as to distinguish between complaints made about brand and retail advertising, and complaints made about product names and packages. While this distinction has been removed in the new Code, the rules and procedures which apply to the Scheme and the Panel’s determinations still recognize differences in relation to decisions regarding advertising and broader marketing on one hand, and decisions regarding product names and packaging on the other.
28. The rules and procedures for decision making on a complaint concerning a product name or packaging provides a marketer the opportunity to seek rehearing of a preliminary determination of the complaint. There is no similar rehearing opportunity for decisions made about brand and retail marketing communications.
29. The rationale for a two stage decision making process for determinations concerning product names and packaging reflects the significant impact of an adverse decision for the marketer if a name or package is held to be in breach of a Code standard. The impact could lead to a product effectively being removed from the market place or, at a minimum, the loss of significant intellectual property value if a brand has to be altered as a result of Panel determination. Clearly, such a consequence is much greater for a marketer than the potential withdrawal of an individual advertising execution or even an entire marketing campaign occasioned by an adverse Panel determination.

#### Appeal to minors

30. The first substantive issue raised by the complaint is that the product’s name and packaging will appeal to minors, because:
  - a) The packaging is identical to that of a soft drink; and
  - b) The name “does not reflect an alcohol drink and is likely to be confused with soft drinks”; and

- c) A high alcohol concentration and its cheap pricing will attract minors.
31. The Code provides that a marketing communication (which includes product names and packaging) must not have strong or evident appeal to minors (i.e. a person under the age of 18). “Strong and evident” is defined in Part 5 of the Code to include:
- a) Likely to strongly appeal to minors;
  - b) Specifically targeted at minors;
  - c) Having a particular attractiveness for a minor beyond the general attractiveness it has for an adult;
  - d) 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.
32. The inclusion of a definition of ‘strong or evident appeal to minors’ within the Code is a significant change to the previous ABAC. Notably, the definition now references the use of imagery, designs, motifs, animations, or cartoon characters that are likely to appeal strongly to minors or that create confusion with confectionary or soft drinks.
33. Legislative provisions prohibiting the packaging of alcohol products which could be confused with soft drinks or confectionaries have been part of State Liquor Licensing laws for some time. For instance, in New South Wales the responsible Minister has the discretion to ban a product likely to be confused with soft drinks or confectionary. The Minister also has a more broadly based power to ban products that for any reason are likely to have special appeal to minors.
34. In response to the concern that the product name and packaging appeals to minors, the Company argues:
- a) There is no inherent linkage between a beverage type and a container;
  - b) Innovations in packaging has allowed the use of the plastic bottling for the product;
  - c) Other alcohol products in Australia use plastic bottling;
  - d) The labeling has not used images of apples or other fruit which might create confusion with a fruit juice;
  - e) The appearance of the label and product is in line with similar norms for cider and no aspect of the label could be considered to specifically appeal to children;
  - f) No claim or representation is made on the product other than that it is an alcohol product;

- g) The label clearly states the alcohol content of the product and that it is “hard” apple cider.
35. In assessing compliance of a marketing communication with a Code standard regard is to be had of the probable understanding of the marketing communication by a reasonable person to whom the material is likely to be communicated, and taking its content as a whole. The notion of the ‘reasonable person’ is borrowed from the Australian common law and refers to the opinions, values, and beliefs held by a majority of the community. A person who holds an alternate opinion is not ‘unreasonable’, but possibly their interpretation would not be shared by a majority of the community.
36. The Panel has considered ‘strong and evident appeal’ in previous determinations. On these past occasions, the Panel has had regard to matters including:
- a) The intention of the marketer as to its target audience is not material, rather it is the probable impact of the marketing communication which is important;
  - b) A marketing communication might have consequential or residual appeal to under 18 year olds and not breach the Code;
  - c) What is not permitted is that the marketing communication have strong or evident appeal to under 18 year olds;
  - d) Assessment of consistency is a case-by-case exercise in which imagery, use of characters, and context is important in deciding the overall or probable impact of the marketing communications.
37. There are several elements of the appeal to minors issue which need to be considered, noting the Panel must then take an overall view of the marketing communication as a whole. These elements are:
- a) Does the product name breach the ABAC standard?
  - b) Does the packaging (bottle) breach the standard?
  - c) Does the imagery, colours, and overall impression of the labeling on the packaging breach the ABAC standard?
38. The Panel does not consider that the product name ‘Little Fat Lamb’ of itself breaches the appeal to minors standard. While some children’s stories refer to small animals, such as lambs, it cannot be said that the product name alone has strong or evident appeal to under 18 year olds. The use of the product name in a particular context may lead to a breach, but simply the name ‘Little Fat Lamb’ is not a breach of this standard.
39. The Panel notes the concern that the product’s packaging is reminiscent of that used for soft drinks. This is because soft drinks are often available in larger plastic bottles containing 1.25L or 2L quantities. The Little Fat Lamb Hard Cider

is available in a plastic bottle of 1.25L size. The product packaging as a result does bring to mind a soft drink or, potentially, a fruit drink.

40. The Panel, however, accepts the argument advanced by the marketer that there is nothing inherent with the use of a plastic container that should automatically prohibit its use for alcohol beverages. For instance, it is usual for wine to be available in glass bottles, as it is for a range of non-alcoholic drinks. Equally, alcohol such as beer is freely available in both cans and glass bottles, as are non-alcoholic drinks, such as soft drinks. While it has not been as common to see alcohol products in a plastic bottle, this might change in the future.
41. The conclusion that the Panel draws is that it would be unreasonable to hold that an alcohol beverage cannot be sold in a plastic container simply because non-alcohol beverages are sold in plastic containers. Again, as with the issue around the product's name, it is the overall context of how an individual alcohol product is packaged and presented that is the important consideration.
42. The Panel, however, does consider the labeling on the bottles to be in breach of the ABAC standard regarding appeal to minors. In reaching this conclusion, the Panel has noted:
  - a) The use of the character of the little fat lamb has been drawn in a cartoon style reminiscent to that used in materials directed to children;
  - b) The colours used for the lamb and scenery would be particularly appealing to children;
  - c) The font used for the words 'Little Fat Lamb' and 'Hard Apple Cider' are reminiscent of a childish style of writing and appear to be 'coloured in', as might take place with a children's colouring in book;
  - d) The combination of the label with the plastic bottle used creates confusion with a soft drink;
  - e) Taken as a whole, all of these elements create an overall impression which is strongly or evidently appealing to minors.

### Excessive consumption

43. The second substantive issue raised by the complaint is that the product's name and packaging will encourage binge drinking, because of its high alcohol concentration (8%) and its cheap pricing.
44. The Code provides that a marketing communication (which includes product names and packaging) must not show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines.
45. In response to the concern that the product name and packaging encourages excessive consumption, the Company argues:

- a) Cider is an alternative to the sparkling wine category and drinkers are moving from 12-14% alc/vol in the sparkling wine category to lower levels of alc/vol found in brewed ciders. 8% alc/vol cannot be considered high in the brewed cider category.
  - b) Price is also relative. A bottle of wine (12-14% alc) can be purchased as low as \$2/750ml or a 4 litre cask of wine for \$10. Large volume when compared to what? It is a mult-serve container with a resealable lid. The PET 1.25L resealable container can be opened and stored in the fridge and drunk responsibly. There are no elements of the Little Fat Lamb that are not widely available in the market place today.
46. The Panel does not consider that the product's name or packaging encourages excessive consumption. The Panel has previously found that a product's alcohol content, price and quantity does not of itself breach this provision of the ABAC. Alcohol products may be purchased in varying alcohol concentrations, quantities and prices but it does not follow that the purchase of products with higher alcohol concentrations, in larger quantities or at lower prices means that a consumer then drinks excessive quantities of alcohol. This product may be shared with others or consumed over a period of time.

#### Provisional Determination

47. The Panel made a provisional decision to uphold the complaint on 16 April 2015 on the basis that the labeling on the bottles has strong or evident appeal to minors in breach of Part 3(b) of the Code.
48. On 20 April 2015, the Company advised that it was acting to cease further production of the product in its current packaging. The Panel takes this advice as acceptance of the provisional decision and that a rehearing of the complaint is not required.

#### Final Determination and next steps

49. Accordingly, in light of the Company's decision not to seek a rehearing, the Provisional Determination of 16 April 2015 is now made final and the complaint is upheld in relation to the breach of Part 3(b) of the Code, but is dismissed on all other grounds.
50. The Company has indicated that the product in its current packaging will no longer be produced. The Company can seek to have its replacement packaging reviewed by the Scheme pre-vetting process in accordance with rule 4(n) of the ABAC Scheme Rules and Procedures.