



ABAC Adjudication Panel Final Determination No. 68/18

Product: Ri.beer.na Berliner Weisse
Company: Cheeky Monkey Brewery
Media: Packaging
Complainant: Confidential
Date of decision: 21 June 2018
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 Ri.beer.na Berliner Weisse by Cheeky Monkey Brewery (“the Company”) and arises from a complaint received 4 June 2018.
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.
2. 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 meeting the standards contained in the ABAC.
 3. For ease of public access, Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by Ad Standards, a copy of the complaint is supplied to the Chief Adjudicator of the ABAC.
 4. 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.
 5. The complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

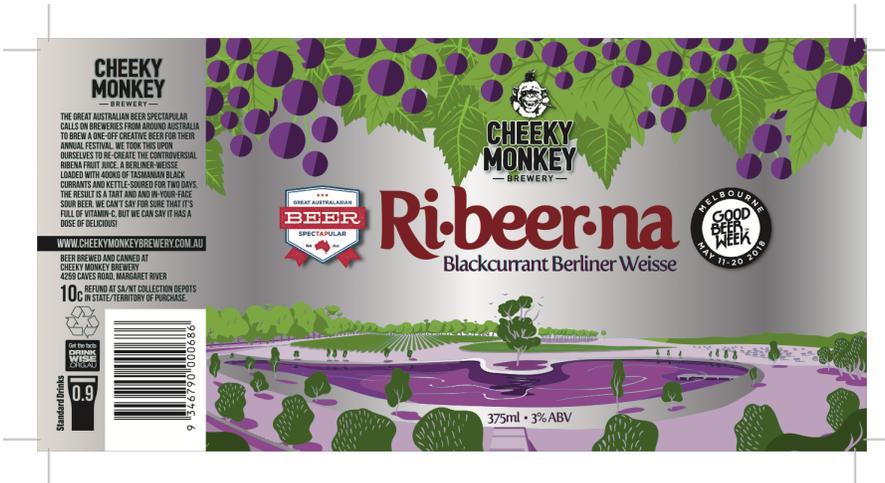
3. The complaint was received on 4 June 2018.
4. The Panel endeavour to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint has been determined within this timeframe.

Pre-vetting Clearance

5. 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

6. The complaint refers to the packaging of Ri.beer.na Berliner Weisse pictured below.



The Complaint

7. The complainant is concerned that the packaging:
 - mimics the branding of Ribena which is a drink targeted at children;
 - could be mistaken as Ribena by a child which is dangerous; and
 - has the appearance of a children's drink.

The ABAC Code

8. 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

....

9. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (b)(i) have Strong or Evident Appeal to Minors;
10. 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

11. The Company responded to the complaint on 6 and 21 June 2018. The principal points made by the company were:
- (a) It is clearly stated, front and centre, in large text that the product is a "beer" and states the ABV in the bottom centre of the can to prevent any such confusion, therefore I believe there to be no strong or evident appeal to minors.
 - (b) Berliner Weisse is a style of beer originating in Germany, which has been around since the 15th Century and is a well-known style. "Berliner Weisse" is located very close and the same size to "Black Currant" and therefore I believe there to be no confusion, strong or evident appeal to minors
 - (c) The brightly coloured illustration is adopted from our flagship Pale Ale product. It is an illustration of the view from our brewery in Margaret River, WA. All our products use bright colours to convey our 'fun and playful' brand lifestyle. The use of bright colours is common therefore I believe there to be no strong or evident appeal to minors.
 - (d) Our logo has remained unchanged since established and does not appeal to minors. The term "brewery" is in proportion to our brand name and logo, therefore does not cause any confusion or appeal to minors as it has remained consistent throughout the product.

- (e) The term “beer” is clearly stated on the front of the can in a large font, the packaging of the product in a can is irrelevant therefore no confusion, strong or evident appeal to minors.
 - (f) This product is a one off limited release which won't be reproduced.
12. By email dated 21 June 2018, the Company responded to the Panel's Provisional Determination. The principal points made by the company were:
- (a) ABAC's provisional determination is accepted.
 - (b) Cheeky Monkey has no plans to reproduce ri-beer-na.
 - (c) There may be some ri-beer-na remaining in the market, most likely in Vic and SA, but it is almost 100% sold out in WA.
 - (d) We have nil stock remaining at the brewery for sale.

The Panel's View

13. Cheeky Monkey is a craft brewery located in Western Australia's Margaret River district. The company commenced operations in 2012 producing a range of beers. A feature of the company's branding is the use of brightly coloured packaging.
14. In late May 2018 the company released a new beer product called Ri.beer.na. The product is described as a blackcurrant Berliner Weisse. A Berliner Weisse is a sour beer type originating from Northern Germany.
15. The choice of the product name and its packaging is a parody of the well known soft drink and fruit drink Ribena. Ribena was launched in the United Kingdom in 1938 based on blackcurrants. The brand is well known in Australia and is associated primarily as a children's drink.
16. The complaint contends that the company's product name and packaging has the appearance of a children's drink and could be mistaken as Ribena. It is argued that the packaging is irresponsible for this reason.
17. The ABAC provides that an alcohol marketing communication including product names and packaging must not have strong or evident appeal to minors. Strong or evident appeal might arise if a marketing communication uses imagery designs or motifs that are likely to appeal strongly to minors or that create confusion with confectionary or soft drinks.
18. The company argues that the name and packaging is consistent with the ABAC standard. It is contended that the product is clearly labelled as a beer and adopts a fun and playful style consistent with the company's overall branding.
19. In assessing if a marketing communication is consistent with an ABAC standard the Panel is to have regard to the probable understanding of the marketing communication by a reasonable person taking its content as a whole. The reference to a reasonable person is drawn from the Australian

common law system and means that the values, opinions and life experiences common in a majority of the population is to be the benchmark.

20. The Panel does consider the product name and packaging is in breach of the ABAC standard. In reaching this conclusion the Panel has noted:

- The product name is clearly a parody of the well known blackcurrant based soft drink, Ribena;
- Ribena would generally be regarded by a reasonable person as a drink primarily targeting children;
- The product packaging resembles Ribena in the use of purple colouring and depictions of blackcurrants;
- The product packaging adopts a font style for the name which is identical or very similar to that employed on Ribena products;
- While a reasonable person would likely understand the product to be a tongue in cheek play on the Ribena name the product packaging does create a potential confusion with the children's drink Ribena; and
- Taken as a whole the similarity in the packaging's design, colouring, and use of the font for the name would be taken as having a strong or evident appeal to minors.

Provisional Determination

21. The Panel made a provisional decision to uphold the complaint on 12 June 2018 on the basis that the product packaging has strong or evident appeal to minors in breach of Part 3(b)(i) of the Code.
22. On 21 June 2018, the Company advised that it accepts the Panel's provisional decision. Accordingly, a rehearing of the complaint is not required.

Final Determination and next steps

23. In light of the Company's decision not to seek a rehearing, the Provisional Determination of 12 June 2018 is now made final and the complaint is upheld in relation to the breach of Part 3(b)(i) of the Code.
24. The Company has indicated that the product will no longer be produced. The Company can seek to have replacement packaging reviewed by the Scheme pre-vetting process in accordance with Rule 4.17 of the ABAC Scheme Rules and Procedures.