



## ABAC Adjudication Panel Final Determination No. 33/19

**Product:** Cheeky Monkey  
**Company:** Cheeky Monkey Brewery  
**Media:** Packaging & Digital  
**Date of decision:** 7 June 2019  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Debra Richards  
Professor Richard Mattick

### Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns packaging and digital marketing for Cheeky Monkey products by Cheeky Monkey Brewery (“the Company”) and arises from a complaint received 2 May 2019.
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. 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.
  4. 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.
  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 2 May 2019.
8. The Panel endeavour to determine complaints within 30 business days of receipt of the complaint. In relation to complaints about product names and packaging, the ABAC scheme rules and procedures apply a two-stage process which allows for the making of a provisional determination and a further opportunity for a marketer to make submissions prior to the Panel making a final determination. As a result, the 30 day timeframe is not applicable to this complaint.

### **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 advice was only sought for the West Coast IPA packaging and it was rejected by the pre-vetting service.

## The Marketing Communication

10. The complaint refers to the packaging of Cheeky Monkey Brewery products pictured below, Facebook and Instagram posts by Cheeky Monkey featuring those products at <https://www.facebook.com/cheekymonkeybeer/> and the Cheeky Monkey website at <https://cheekymonkey.com.au/>.



## The Complaint

11. The complainant is concerned that the packaging and its promotion on the company's website and Facebook and Instagram accounts has strong or evident appeal to minors as:
  - The cartoon 'Curious George' style character and bright, fun graphics make the product appear more like a soft drink than alcohol.
  - The website <https://cheekymonkey.com.au/> does not have any age verification and features a large cartoon hand encouraging the viewer to enter. The cartoon graphics continue throughout the site and marketing material.

## The ABAC Code

12. 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

....

13. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
  - (b)(i) have Strong or Evident Appeal to Minors;
  - (b)(iv) be directed at Minors through a breach of any of the Placement Rules
14. Definition in Part 6 of the ABAC provides:

**Placement Rules** means:

- (ii) A Marketing Communication must comply with codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Alcohol Guidelines).
- (iii) If a media platform on which a Marketing Communication appears has age restriction controls available, the Marketer must utilise those age restriction controls to exclude Minors from the audience
- (iv) If a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, a Marketing Communication may only be placed where the audience is reasonably expected to comprise at least 75% Adults (based on reliable, up to date audience composition data, if such data is available)
- (v) A Marketing Communication must not be placed with programs or content primarily aimed at Minors

**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**

15. The Company responded to the complaint on 12th May. The principal points made by the company were:
- (a) During the brand exploration phase, the multiple monkey motifs were created in various forms and we undertook significant evolution of these to settle on this final form. This monkey is symbolic of the 'cheeky' and 'mischievous' values that make up our brand personality, and at no point in its creation was 'Curious George' referenced or discussed.
  - (b) Stars and thunderbolts are used on some of the packaging. No hearts are used, however. We'd suggest that these are fairly insignificant in the overall package visuals and are supporting elements only that would not influence minors.
  - (c) A quick glance at any craft beer fridge would show far greater 'childlike' elements on packaging from other breweries than what is used on ours.
  - (d) Bright and fun graphics are used across the packaging. These graphics assist in expressing our brand personality and to draw the eye to our product in the bottle shop fridge. Again though, we can't see how the use of these elements would influence minors to single out our product more than a rival craft brewery.
  - (e) The website does include a directional hand. However, the website also has an age verification system to prevent minors from entering the page. We're happy to alter the directional hand on the home page.
  - (f) Video animations are present on Facebook and Instagram. Age recommendations feature across all Cheeky Monkey Brewing Co social profiles.
  - (g) At the time of the complaint, the website was still in its development stage and was not advertised as being live. When the site was advertised as 'live', an age verification modal had been deployed to prevent minors from entering.

- (h) Instagram and Facebook profiles both carry the following industry age recommendation on the main pages: “18+ Enjoy Responsibly”.

### **The Panel's View**

16. In recent years the Australian craft beer industry has expanded with many new products coming onto the market. As a whole, unlike the long-established beer producers represented by the Brewers Association of Australia, craft brewers are not through their peak industry body (the Independent Brewers Association) or individually members of the ABAC scheme. Cheeky Monkey is a West Australian based craft brewery which has been operating since 2012. The Company is not an ABAC signatory but has previously co-operatively engaged with the ABAC complaints process (Determination 68/18) and has done so again with this complaint.
17. The complaint goes to the packaging of the Company's products and to the marketing of the products via the Company's Facebook page, Instagram account and website. The complaint about the product packaging goes to six individual products although the concern is expressed generically about all six, namely that the packaging and its associated digital marketing has strong appeal to minors (under 18 year olds). There is also a concern that the Company website also strongly appeals to minors in that the site does not employ age verification or age restriction controls to exclude minors from accessing the site.

### The Product Packaging

18. Since the ABAC Scheme first commenced in 1998 the Code provisions and the reach of the Scheme has been periodically adjusted and generally expanded. One such expansion occurred in 2009 when the Code standards were applied to product names and packaging. This extension was not retrospective, which meant names and packaging in the market as at 31 October 2009 could continue to be used even if the even if the product name and packaging did not meet the ABAC standards. Over time the proportion of products which benefit from this exclusion is diminishing as new products are introduced to the market and older products refresh their branding by using new packaging designs. As the Company did not join the market until 2012 its product name(s) and packaging must meet the ABAC standards.
19. The complaint references some six Company products that are part of a new branding campaign by the Company. As each of the products feature the use a stylised monkey image it is convenient to identify the products by beer type, container and predominant packaging colour:
- Session Ale, bottle and teal
  - Cider, bottle and apple green
  - IPA, can and purple
  - Mid, can and burnt orange
  - Pale Ale, can and aqua
  - Lager, can and gold
20. The complainant makes the same criticism of each product's packaging, specifically that the use of the stylised monkey head image is similar to the children's cartoon character 'Curious George' which combined with bright fun colours and graphics make the products appear more like a soft drink than alcoholic beverages. In response the Company argues:

- the monkey motif symbolises the brand attribute of being cheeky and mischievous and is not reflective of 'Curious George';
  - the graphics are bright, fun and eye catching as reflects the brand attributes but would no more influence minors than packaging on many craft beers; and
  - overall the packaging features would not influence minors
21. The Code provides that a product name and packaging must not have strong or evident appeal to minors. This might be breached if the marketing could be said to specifically target minors or have a particular attractiveness for a minor beyond the general attractiveness it has for an adult. The use of imagery, designs, motifs animations or cartoon characters which create confusion with confectionary or soft drinks is one example of packaging that will breach the standard.
22. In assessing if a Code standard has been breached the Panel is to have regard to the probable understanding of the packaging by a reasonable person taking the contents of the packaging as a whole. The reference to a 'reasonable person' is borrowed from the common law system and means that the opinions, values and life experiences common in a majority of the community is to be the benchmark.
23. Over time the Panel has made a number of decisions about alcohol marketing and product names and packaging, in particular in relation to consistency with the standard going to strong appeal to minors. From these previous cases the following general considerations can be derived:
- each case has to be considered on its own merits and it is the overall impression created by the packaging that is to be assessed by a combination of features such as imagery, colour, use of language, product name and type of product container;
  - it is possible that a marketing item might have some residual or incidental appeal to minors while not strongly or evidentially appealing to minors; and
  - the intention of the marketer as to its intended audience is not the test but the understanding of the marketing item by a reasonable member of the community.
24. In some determinations the Panel has considered the use of stylised animal characters in marketing communications including product packaging. Some observations from these cases include:
- there is a heightened risk, but it does not automatically follow that the use of an animal character within a marketing communication will cause the item to strongly appeal to minors;
  - there are a wide variety of animation and cartoon styles by which animals are depicted, with some clearly more childlike in appeal while others clearly adopt adult and mature styles e.g. Japanese anime; and
  - the context of how the animal depiction is used within the marketing item as a whole will be critical.
25. In relation to product packaging creating confusion with a soft drink, some considerations include:
- does the packaging clearly identify the product as an alcohol beverage through use of an alcohol term like beer, ale, vodka, style of wine etc;

- does the packaging have a visual design that resembles a soft drink such as the display of fruit images, bright colours and the use of a font style found typically on soft drinks or fruit juices;
- the use of terms commonly associated with a soft drink or fruit juice e.g. orange, lemon, blueberry, pop, smash etc; and
- the type of physical package used and whether this is similar to that used by soft drinks or fruit juices e.g. prima style juice box.

26. While reviewing past determinations is useful in drawing out guidance, this case is an example where a finely balanced judgement is required and it is quite possible if ten fair minded people were reviewing the packaging, six might find the packaging is consistent with the Code and the other four people believe the packaging did have a strong appeal to minors. The Panel has decided that four of the products meet the ABAC standard, while two (IPA can, purple and Mid can, burnt orange) does not. In relation to the four products which the Panel believes meet the standard, the Panel has noted:

- The brand name Cheeky Monkey is not, in isolation, strongly appealing to minors, though it is possible the use of the name in particular contexts might contribute to a marketing communication having heightened appeal to minors.
- The monkey image used by on the packaging is adult in nature and shows a section of the animal's head removed to reveal a portion of the monkey brain. This is not considered an image having childlike appeal and it does not resemble the popular children's character Curious George as argued by the complainant.
- The colour plate is generally muted rather than vibrant and does not have vividly contrasting and hence eye-catching colours likely to attract the attention of a minor.
- The products are identified as being alcoholic beverages and the containers are consistent with those used with alcohol e.g. dark coloured glass and beer can style and dimensions.
- Taken as a whole the packaging has its own style which is livelier and more irreverent than a traditional beer or cider packaging, but this is not considered as giving the packaging strong or evident appeal to minors, nor would a reasonable person confuse the products with a soft drink.

27. The Panel believes the packaging of two products do breach the strong appeal to minors standard. These two are the IPA can, purple and the Mid can, burnt orange. In reaching this conclusion the Panel noted:

- The IPA packaging uses a vivid deep purple colour which when contrasted with the red, featured both in the bubble containing the brand name and the stars, and combined with the explosion like pattern in the colouring creates eye catching and appealing imagery for minors.
- The Mid packaging uses a colour which resembles an orange soft drink and could, without the cues, be confused as a soft drink;
- The terms 'IPA' and 'Mid', while understood by some beer drinkers are not so widely recognised of themselves to clearly identify the products as alcoholic.
- The reference to the alcohol content on the products is not prominent.
- While no one element of the packaging of both products is inconsistent with the Code standard, the cumulative effect of the elements and the lack of clear reference to the

products being alcoholic when taken as a whole, means the packaging breaches the Code standard.

#### Provisional Determination

28. The Panel made a provisional decision to uphold the complaint in relation to two of the products on 4 June 2019 on the basis that the product packaging has strong or evident appeal to minors in breach of Part 3(b)(i) of the Code.
29. On 6 June 2019, the Company advised:

*We accept the panels decision, however I would like to mention that we feel the clause regarding "IPA" and "Mid" are not accurate. "IPA" is the most popular craft beer style in Australia, as found in the attached survey (<https://www.beercartel.com.au/blog/2018-australian-craft-beer-survey-results/>) a whopping 31% voted it as their favourite and 79% voted it as their most consumed. Which I think means it is very well known. "Mid" is also found on many mass-produced beer brands such as Carlton Mid.*
30. As the complainant accepts the Panel's provisional determination, a rehearing of the complaint is not required. In making the final determination the Panel acknowledges the points made by the Company concerning the understanding amongst beer drinkers if IPA beer and that 'mid' strength is also a term used on various beer products. The Panel view is based on the impact of the packaging and that the terms alone are not so widely understood amongst the wider population as to reduce the strong appeal of the packaging to minors.

#### Final Determination and Next Steps

31. In light of the Company's decision not to seek a rehearing, the Provisional Determination of 4 June is now made final and the complaint is upheld in relation to the purple IPA can and burnt orange Mid Can on the basis of a breach of Part 3(b)(i) of the Code, but the remaining cans meet the ABAC standard.
32. The Panel will now consider the complainant's concern that the Company website and social media accounts also strongly appeal to minors and do not employ age verification or age restriction controls to exclude minors from accessing the site.

#### The Facebook and Instagram sites and Company website

33. In addition to raising a concern about the product packaging, the complainant contended the associated marketing of the products contained on the Company's website and its social media channels on Facebook and Instagram also had strong or evident appeal to minors. The assessment of the product packaging involved the review of static marketing items while the contents of the website and social media channels add the dimensions of a more dynamic presentation of the products and some narrative descriptions of the products' characteristics.
34. The Panel has determined that two of the product's packaging has breached the ABAC standard and therefore depictions of those products on the Company's social media and websites will breach the ABAC Code.
35. In relation to the depictions of the other 4 products referred to in the complaint, the question is whether the additional marketing features on the internet platforms can be fairly

concluded as having strong or evident appeal to minors when taken as a whole with the product packaging. In large measure the visual feature of the digital presentation accessible via social media is the use of a short video for each the products where the product is manipulated in some fashion e.g. a can is crushed or disappears into the background colour plate. The website has a page for each product which contains a description of the products attributes often using evocative words and phrases.

36. The videos show movement that give more impact to the bright colours used in the product's colour plate but in terms of contemporary capacity of digital marketing the overall affect is still passive i.e. the viewer is watching rather than interacting and the monkey image plays no additional role e.g. the monkey doesn't come alive in an animation form as might be seen in video game.
37. The Panel believes the video presentations don't add particularly to the appeal to minors of the packaging but finds the following marketing communications to be in breach of the Code standard:
  - The website page featuring the IPA purple can flowing from the decision about the packaging and also due to the narrative elements used to describe the product ie Ka-pow, Ooof, Sock! which further emphasise the understanding that the packaging is displaying an explosion.
  - The website page featuring the Mid burnt orange can flowing from the decision about the packaging and also the graphics showing stars and hearts further emphasising the strong appeal to minors.
  - The videos posted on the social media channels of the IPA purple can and the Mid burnt orange can use graphics which when combined with the features of the packaging tip the marketing to having a particular attractiveness to minors.
  - The video posted on the website and social media channels of the Lager gold can uses more dynamic graphics with sharp contrasting gold and deep colours quickly interchanging.

### The Placement Rules

38. In addition to the standards which apply to the content of alcohol marketing, the Code imposes requirements on the placement of alcohol marketing irrespective of the content. The Placement Rules have the policy intent to direct alcohol marketing toward adults and to the extent it is practically possible away from under 18 year olds. This is done by creating differential requirements on marketers linked to the technical capacity of the medium over which the marketing communication is conveyed.
39. In relation to digital media channels such as Facebook, Instagram and websites, Placement Rule 2 requires that available age restriction controls must be utilised to exclude minors from the audience of the marketing. The Panel has taken this requirement to mean that a marketer on its own website and social media channels must use the level of audience restriction that is practically available to it noting that the operation of the platforms means that the fullest technical capacity that the operator can apply to restrict minors may not be able to be actually accessed by a Company holding an account on the platform.
40. The complainant contends that the Company did not have in place age verification controls for its website. The Company explains that its website was under development at the time of the complaint and was not 'live' and age restrictions were only put in place once the

website became 'live'. It also contends 'age recommendations' feature across its social profiles.

41. It is evident that the complainant was able to access the Company's website when no age verification was in place. The fact the Company did not intend the site to be 'live' doesn't relieve it of its obligations when its site was able to be publicly accessed. Further, a check of the Company's Facebook and Instagram accounts reveals that minors holding accounts on these platforms are able to access the Company's accounts, so it appears the Company is not applying available age restriction controls. As explained in Determination 16/19, practically activating age restriction controls, given the somewhat complicated and at times varying practices of Facebook and Instagram, is not straightforward. It appears; however, the Company has not sought from the Platform operators the application of age restriction controls available to the holders of corporate accounts on those Platforms.

### Conclusion

42. The Panel has reviewed six separate product packages and associated marketing of the products via digital channels. It is accepted that the complainant is raising a legitimate point about the potential of the packaging and the promotion of the products having a strong appeal to minors. While the decision is finely balanced, the Panel believes the packaging for the IPA purple can and Mid burnt orange can do breach the ABAC content standard as does the website page promoting this product. Also, the videos posted on the social media channels featuring the IPA, Mid and Lager can product are considered in breach of the Code. The Company's digital channels are not meeting the requirements of the ABAC Placement Rules regarding the use of available age restriction controls. This was the case with the Company's website at the time of the complaint and it appears to be case with its social media accounts as at the time of this determination.
43. Accordingly, the complaint is upheld in part in relation to Part 3(b)(i) in relation to the IPA and Mid packaging, website page and video and the Lager video. The complaint is also upheld in relation to Placement Rule 2 in relation to the website as at the time of the complaint and currently in relation to Facebook and Instagram.