



ABAC Adjudication Panel Final Determination No. 53/19

Product: Joker & the Thief
Company: Grand Ridge Brewery
Media: Packaging
Date of decision: 7 October 2019
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Louisa Jorm

Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) concerns packaging for Joker & the Thief beer by Grand Ridge Brewery (“the Company”) and arises from a complaint received 2 August 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:

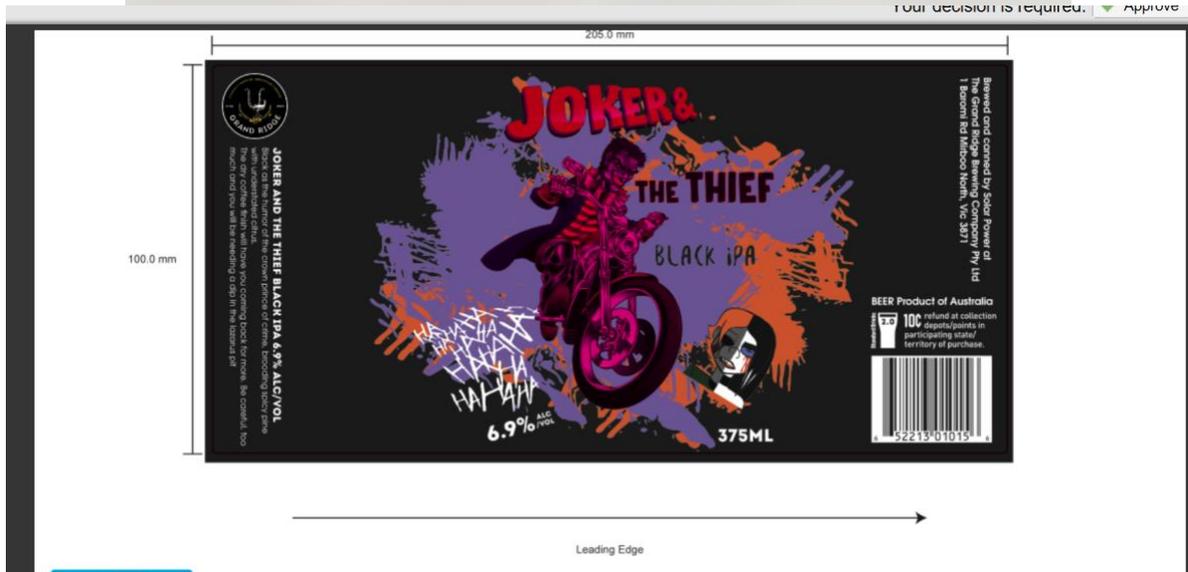
- AANA Code of Ethics – which provides a generic code of good marketing practice for most products and services, including alcohol;
 - ABAC Responsible Alcohol Marketing Code (“ABAC”) – which is an alcohol specific code of good marketing practice;
 - certain broadcast codes, notably the Commercial Television 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 the other codes as well as meeting the standards contained in the ABAC.
 4. For ease of public access, Ad Standards (AS) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by AS, 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 AS 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 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 August 2019.
8. Generally, the Panel endeavours to make a decision within 30 business days of the receipt of a complaint but this timeline is not applicable due to the two-part process involved in determinations concerning product names and packaging.
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 the marketing communication.

Packaging

10. The following product packaging is referred to in the complaint.



The Complaint

11. The complainant is concerned that the beer label depicts a graphic cartoon of Joker on a motorcycle, clearly aimed at an under 18 demographic. The image shows 'He Ha Ha' laughter as shown with any Batman/Joker imagery.

The ABAC Code

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

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

13. Definition in Part 6 of the ABAC provides:

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

14. The Company responded to the complaint by email dated 12 August 2019. The principal points made by the Company were:

- Grand Ridge have been creating craft beers and labels for 30 years and have not and would never target under 18 markets in any way.
- We are a very responsible producer in all ways possible. All the beers are brewed without the use of added chemicals or preservatives. We are Solar powered and have recyclable packaging. Our target audience are craft beer enthusiasts who have well developed palates as we make big flavoured beers. The age group is typically 30-70.
- The image of "The Joker" is depicted in an adult oriented style.
- The Hahahaha is simply the jokers laugh not in any way aimed at minors.
- The name "Joker and the Thief" is neither based on the popular Batman characters, nor does it (to our knowledge) appear in the popular comics or movie series. Rather the name was inspired by the Australian Rock band Wolfmother's 2005 ballad "The Joker and the Theif", posts on our social media account directly quote this song 'I'll tell you all a story 'bout the Joker and the Thief in the night'. The naming of this beer was in line with inspiration from great Australian music.

- We use bright colours and emotionally engaging pack design to appeal to craft beer drinkers, NOT children. At 6.9% and a highly complex, hop driven beer the flavour profile only suits a highly developed palate of typically 30 plus
- We would like to point out that the packaging for this beer was finalised and sent to printers well before the recent media attention surrounding the ABAC's decision regarding 'Jedi Juice', which we understand is a totally different concept.
- I would respectfully request that the label is reviewed with the knowledge of our influence of great adult rock music of past eras that clearly connect with a mature 30 plus crowd. Joker and The Thief'. We hope the panel sees this label in the spirit and intent with which it was created and that the result is satisfactory and we look forward to working with the ABAC in the future.
- If the review panel still feels after one complaint that the imagery attracts minors we would look at new artwork if absolutely necessary for any future runs.

The Panel's View

Introduction

15. Grand Ridge is a well-established Australian craft brewery located in the Victorian town of Mirboo North. The Company has released a dark IPA style beer branded as Joker and the Thief. It is the packaging of the product, specifically the graphics on the beer can, which has attracted the concern of the complainant.
16. On 19 September the Panel made a provisional determination that the product packaging was in breach of Part 3 (b) of the Code and consistent with the rules and procedures applying to decisions concerning product packaging, the Company was afforded an opportunity to seek a rehearing of the provisional determination by making further submissions. The Company as at the date of this determination has not responded to the provisional determination, and as the timeframes permitted under the rules and procedures for seeking a rehearing have expired, the Panel has proceeded to make a final determination of the complaint.
17. The complainant takes the packaging to be utilising imagery drawn from the 'Batman' superhero franchise of comics, movies, TV series and animations. In this franchise, the Joker is one of the recurring criminal protagonists with whom Batman battles. The complainant believes the Joker character as depicted on the can is aimed at under 18 year olds.
18. The Company maintains that the inspiration for the Joker and Thief name is not the Batman franchise but the 2006 song of that title by the rock band Wolfmother. It seems, in turn, that Wolfmother drew on the reference to the joker and the thief in lyrics in a song written by Bob Dylan, 'All Along the Watchtower', in 1967.

19. While the Company's inspiration for the Joker and the Thief name may not have come from Batman, the issue for the Panel is whether the packaging as a whole, inclusive of the name and the graphics, has strong or evident appeal to minors (under 18 year olds) in breach of Part 3 (b) of the Code. In assessing this issue, the Panel will consider the interplay of the following matters:
- whether the product name would be reasonably associated with the Joker which originated from the Batman franchise;
 - whether the product would be understood as an alcohol product or potentially confused with a soft drink; and
 - taken as a whole would the packaging have strong or evident appeal to under 18 year olds.

The Joker imagery

20. The complainant believes the packaging is bringing to mind the Joker of the Batman franchise and implies from this a strong appeal to minors. The Joker is the best known of the Batman protagonists appearing in the original comic book series and then reprised in the 1960's TV program 'Batman' and a movie based on the TV show. More recently the character appeared in the second of the three Christopher Nolan directed movies 'The Dark Knight' (2008) and was the villain in the 1989 Batman movie played by Jack Nicholson. In the 2016 movie Suicide Squad, the Joker was portrayed independently of Batman as a criminal anti-hero. A movie entitled 'Joker' to be released shortly provides a Joker origin story to explain how the character emerged. This most recent reincarnation is also independent of Batman.
21. In fictional depictions the Joker is a white man wearing white clown makeup. On the Joker and Thief packaging the motorcycle riding Joker is black reflecting that the product is a black IPA. There are, however, pointers to the character stylised on the can that bring to mind the Joker from popular fiction more than the title and lyrics of the Wolfmother song namely:
- the exaggerated smile and red lips which is a recurring motif of the Batman/ Joker character;
 - the image of a woman's face which is reminiscent of the Joker's love interest, Harley Quinn;
 - the text 'HAHAHAHA..' which is commonly associated with the Joker character; and
 - the albeit small font size text on the can 'black as the humour of the crown prince of crime'.
22. While the Batman franchise is well known it cannot be said to have the cultural level impact of Stars Wars canvassed by the Panel in Determination 34/19. Further, while the Joker is the best known of the Batman protagonists, the reference to the character alone with nothing else would not be expected to automatically mean

an alcohol product had strong or evident appeal to minors. What can be drawn is that the Joker as presented on the packaging would be understood by a reasonable person to be a likely reference to the fictional character derived from the Batman franchise and that the character is likely to be easily recognised across age groups including under 18 year olds.

Confusion with a soft drink

23. The ABAC provides that one way in which an alcohol marketing communication might have strong or evident appeal to minors is that it uses imagery, designs, motifs, animations or cartoon characters that create confusion with a soft drink. In past determinations the Panel has noted factors in weighing up if packaging could be confused with a soft drink as including:

- 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 displays of fruit images, bright colours and the use of 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.

24. The product packaging contains several references to the can containing an alcohol beverage, namely:

- the term 'black IPA',
- references to 6.9% ALC/VOL
- small font text- 'beer product of Australia'
- small standard glass graphic
- small font text- 'brewed and canned'

25. It should be noted the small text references are positioned on the back or side of the can. The references to black IPA and the principal mention of the 6.9% alcohol strength is position on the front of the can amongst the graphic design featuring the Joker character. The can is 375ml which is the standard size used for most can beers. This is also a can size used in many carbonated soft drinks. Energy drinks such as Red Bull and Monster tend to employ different sized cans with either lesser or greater volumes than 375ml.

Strong or evident appeal to Minors

26. The ABAC provides that a marketing communication, including product names and packaging, must not have strong or evident appeal to minors. Examples of when

this occurs include marketing which specifically targets minors or marketing which has a particular attractiveness for a minor beyond the general attractiveness it has for an adult. In making an assessment of consistency with a standard the Panel is to adopt the viewpoint of the probable understanding of the marketing communication by a reasonable person taking the contents as a whole.

27. In the current case, the assessment involves drawing together the impact of the graphic design featuring the cartoon Joker character, with factors such as the colouring used and considerations of whether the product packaging could be confused with a soft drink such as an energy drink or a carbonated soda style drink. All the elements as canvassed above need to be balanced up as a whole to reach a conclusion on how the packaging would probably be understood in terms of its appeal to minors.
28. The Panel believes the packaging is in breach of the Part 3 (b) standard. In reaching this conclusion the Panel had regard to:
 - the cartoon Joker character would likely be taken as a reference to the Joker popularised initially through the Batman comic book, TV and movie franchise;
 - the Joker character would be recognised across age groups including under 18 year olds;
 - the product is not clearly identified as an alcoholic beverage as the term 'IPA' is not necessarily widely understood to be a type of beer. In addition, the placement of the term 'black IPA' and the 6.9% ALC/VOL advice is obscured with graphic design features i.e. the white Ha, Ha, Ha lettering and the general background colouring;
 - the overall design, colour and imagery is powerful and emotionally engaging and is likely to appeal strongly to under 18 year olds; and
 - the Joker depiction is likely to have appeal beyond an adult audience and be highly engaging to under 18 year olds.
29. Accordingly, the Panel makes a final determination that the product name and packaging is in breach of Part 3 (b) of the Code.