



## ABAC Adjudication Panel Final Determination No. 61/19

**Product:** Little Fat Lamb Fantasy  
**Company:** Drink Craft Pty Ltd  
**Media:** Packaging  
**Date of decision:** 17 October 2019  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Debra Richards  
Professor Richard Mattick

### Introduction

1. This final determination by the ABAC Adjudication Panel ("the Panel") concerns packaging for Little Fat Lamb Fantasy, an alcohol beverage brand produced and distributed by Drink Craft Pty Ltd ("the Company") and arises from a complaint received 4 September 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 4 September 2019. 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.
8. 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 communications.

## **The Marketing Communications**

9. The packaging of the product is shown below and further images are shown in the Company's response at Attachment B.



## **The Complaint**

10. The complaint is included at Attachment A. The complainant is concerned that the product's packaging is likely to appeal strongly to minors because:
- It uses imagery, designs and cartoon characters that are likely to appeal strongly to minors; and
  - It could easily be confused with a soft drink.

## **The ABAC Code**

11. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (b)(i) have Strong or Evident Appeal to Minors
12. 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**

13. The Company provided a detailed response to the complaint by letter dated 27 September 2019 which is at Attachment B. The Company summarised its argument as follows:

- The label is heavily indexed with statements many centred on the label relating to the nature of the product being an alcoholic beverage. Most notably there is a warning banner across the top of the label making certain there is no ambiguity.
- The use of a proprietary shaped amber/brown PET container further separates the product from a PET soft drink bottles that are typically taller, thinner and clear.
- The beverage contains guarana that is widely established and prominently labelled in this type of alcoholic beverage throughout Australia.
- Further confusion with a non-alcoholic energy drink is unlikely as they are packaged differently typically in slim line 250ml and 500ml aluminium cans not PET bottles.
- Individually none of the themes can be said to strongly appeal to minors on their own. They carry very adult communications and symbolism in the context of the category they sell in. The details of the themes are consistent with the other craft beverages. The name Fantasy reflects the flavour of the beverage and has a strong affinity to adults and in the context of where this product is sold and who it is sold to leads to little opportunity for it to appeal to minors. The product is wholesaled to achieve a RRP \$8.99 and deliver the retailers their target retail margin. Individual licensed retailers will price the product according to their requirements.

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

#### Introduction

14. This is the third determination made by the Panel concerning the product Little Fat Lamb. In Determination 31/15 the Panel held the packaging of Little Fat Lamb Cider to be in breach of the ABAC. The packaging was then withdrawn and remodelled in consequence of the determination. In Determination 61/18 the Panel considered two Facebook Pages and numerous posts ostensibly 'marketing' the product,

although investigation revealed the Pages not to be created by or in the control of producers and distributors of the product. On this occasion the complaint is about a new addition to Company's range, namely a product branded as 'Fantasy'.

15. The complaint contends the product packaging appeals strongly to minors and could easily be confused with a soft drink. In making the argument, reference is made to decisions of the Portman Group in the United Kingdom, which it is claimed are highly analogous. For its part, the Company has made a very detailed rebuttal of the complainant's arguments and concludes the packaging does not strongly appeal to minors.
16. The Company is not currently a signatory to the ABAC scheme and is not contractually bound to the Code and the decisions of the Panel. The Company has however indicated its willingness to alter its packaging if the Panel believes it to be in breach of the Code. This is welcomed and enables the determination to be made, but it would be far better for the Company and those involved with the product to use the pre-vetting process before releasing new branding rather than acting later if adverse findings are made.
17. On 16 October 2019 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 has accepted the Panel's decision and the Panel has proceeded to make a final determination of the complaint.

#### Relevance of International Regulatory Decisions

18. Before turning to the substance of the issues before the Panel, it is useful to deal with the arguments advanced by the complainant regarding the guidance to be taken from overseas decisions such as the Portman Group. The Portman Group exists within the wider United Kingdom regulatory regime for alcohol marketing which, like Australia, consists of a mix of direct government regulatory authorities and self-regulatory components. The Portman Group is an example of industry self-regulation and features a Code of Practice on Naming, Packaging and Promotion of Alcoholic Drinks and a public complaints process which adjudicates on compliance with the Code. Its work is focussed primarily on packaging with regulation of alcohol marketing over broadcast mediums and digital media resting with government agencies.
19. Alcohol is a global product and there are a number of large international alcohol corporations which market brands across the world, including Australia. National regulation of alcohol marketing sits on a spectrum, with some countries having highly restrictive regimes which largely prohibit marketing of alcohol and others having very little restriction. Most western nations including Australia permit alcohol

marketing but impose standards which have a public policy goal of encouraging responsible alcohol use or at least discouraging irresponsible use.

20. Within nations with marketing standards regimes, there is a degree of commonality in the subject matter of the standards themselves. For instance, all standards regimes go to alcohol marketing not encouraging excessive consumption and all have a requirement that marketing shouldn't be directed towards those below the lawful drinking age (noting that the age at which it is lawful to consume alcohol varies between countries). While the standards often go to similar policy goals, the scope and the actual standards are constructed differently, and these differences make direct comparison between national regimes a little difficult.
21. The Portman Code provides that a drink, its packaging and any promotional material should not in any direct or indirect way have a particular appeal to under 18s. In some respects, this is wider than the ABAC scheme as it goes to a possible prohibition of a product itself, whereas the ABAC scheme cannot seek to exclude a physical product from the market and is confined only to the marketing of a product. The power to exclude a product in Australia rests with government and some of the State Liquor licensing regimes have this ability.
22. In other respects, the Portman Code is narrower than the equivalent ABAC provision with the ABAC definition of 'strong or evident appeal to minors' having a number of elements of which the Portman expression of 'particular appeal to under 18s' is only one element. In any event, the differences in the regimes and the construction of standards across the world means, at best, that overseas decisions of broadly equivalent bodies to the ABAC Panel are of interest but cannot be taken as decisive or determinative of issues raised in Australia.
23. The complainant referred to three Portman Group decisions which all related to variations to the packaging of a product 'Unicorn Tears' which is a gin liqueur. The packaging in the three cases was held to have particular appeal to under 18s and was in breach of the Portman Code. Unsurprisingly some of the considerations mentioned by the Portman Panel in assessing 'particular appeal' are also reflected in previous ABAC Panel decisions on strong or evident appeal to minors. There is, however, nothing more to be taken from these decisions. Certainly, they are not authority that a 'unicorn' can never be used in alcohol marketing materials as every individual case needs to be assessed on its own merits and with regard to the content of a marketing item as a whole.

#### Is the Packaging Consistent with the ABAC Standard

24. Part 3 (b)(i) of the ABAC provides that an alcohol marketing communication (including product names and packaging) must not have strong or evident appeal to minors. This standard might be breached by marketing that for example:
  - specifically targets minors;

- has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; or
  - uses imagery, designs, motifs, animations or cartoon characters likely to strongly appeal to minors or that create confusion with a soft drink.
25. The complainant contends the packaging is using imagery and cartoon characters that are tropes of children's products. The use of rainbows and unicorns with bright colours is argued to be visually appealing to young people. Further, it is submitted that the physical bottle with the design features means the product could easily be confused with a soft drink. Finally, it is argued that the addition of guarana and the emphasis given to this on the packaging could lead to confusion with an energy drink.
26. The Company made extensive submissions in response to the complaint, making points such as:
- the product falls within the genre of 'craft' alcohol products and this genre's packaging often has edgier design features compared to traditional alcohol products, and hence the Fat Lamb packaging needs to be placed in this context;
  - the packaging clearly identifies the product as being an alcoholic beverage;
  - the physical bottle of the product is distinctive from those used typically for soft drinks, including an amber coloured plastic as opposed to clear plastic found on soft drinks;
  - the term 'fantasy' is used to capture the flavour of the product and fantasy as a concept has many adult themes;
  - the colours used are not atypical in craft products and the rainbow is now widely understood to represent diversity and inclusion;
  - the lamb logo has been modified to include a horn and wings and would not have appeal to minors as it is not child-like, nor a representation of a unicorn recognised by a child; and
  - inclusion of guarana is not going to cause confusion with an energy drink.
27. In assessing if a standard has been breached the Panel adopts the probable understanding of the marketing communication by a reasonable person taking its content as a whole. This means the attitudes, values and life experience commonly shared by a majority of the community is to be the benchmark. Some considerations in assessing strong appeal to minors include:

- the use of colours, imagery, language and overall messaging;
  - whether adult themes are used;
  - product name and type of physical product container; and
  - the combination of all elements together.
28. In relation to confusion with a soft drink, some factors to be weighed include:
- is the product clearly identified as an alcohol beverage;
  - any visual design features that resemble those found typically on a soft drink, like fruit images, bright colours, font and print types often seen on soft drinks;
  - use of terms often found on soft drinks like orange, lemon, pop, smash etc; and
  - the type of physical container and whether this is similar to that often used by soft drinks or fruit juices.
29. The Panel recognises that independent smaller alcohol producers in the craft sector often adopt marketing and packaging designs which are more distinctive and edgier than established alcohol producers. This is not however relevant in assessing consistency with ABAC standards which uses the benchmark of the probable understanding of a marketing communication by a reasonable person. Craft products are assessed against this benchmark rather than the intention of the marketer or the 'norms', if any, of the particular sub set of product marketing within the overall alcohol beverage sector.
30. The packaging does identify the product as being alcoholic through express language which is reasonably prominent within the design of the packaging. Further, the mention of the ingredient of guarana is not considered likely to make the product confusing with an energy drink. Energy drinks are generally available in cans which adopt different sizes to those most commonly associated with other soft drinks or beer products. It should be noted that the ABAC scheme does not go to the desirability of physical alcohol products being on the market and is confined to the marketing of the products. Taken as a whole, the packaging is not considered likely to be confused with a soft drink. The Panel must separately consider whether the packaging is strongly appealing to minors.
31. On balance, the Panel does believe the packaging breaches the Part 3 (b)(i) standard. This arises through a combination of elements namely:

- the use of the bright colours which are the most striking overall feature of the packaging design;
  - the use of the unicorn/lamb creature;
  - the use of clouds;
  - the use of the style of font and representation of the name 'fantasy'; and
  - the overall impact of the packaging as a whole.
32. This conclusion does not mean that it is impermissible to name an alcohol product 'fantasy' or to use a lamb/unicorn creature on packaging. What is not permitted is the use of packaging which taken as whole would be taken by a reasonable person as being strongly or evidently appealing to minors.
33. Accordingly, the complaint is upheld.

## Attachment A

### **Little Fat Lamb Fantasy - ABAC Complaint**

The product's packaging is likely to appeal strongly to minors because:

- (a) it uses imagery, designs and cartoon characters that are likely to appeal strongly to minors; and
- (b) it could easily be confused with a soft drink.

This breaches section 3(b)(i) of the ABAC Responsible Alcohol Marketing Code.

This new product in the Little Fat Lamb range produced by United Distillers uses imagery, designs and cartoon characters that are tropes of children's products. The marketing concept combines the themes of rainbows, unicorns and fantasy. The bright, rainbow coloured exterior labelling will be bright and visually appealing to young people. The rainbow colour scheme, PET bottle and cartoon character mean that it could easily be confused with a non-alcoholic product. Images of this product are included below.

There are international precedents holding that unicorn packaging may have a special appeal to children. A recent complaint decision about 'Unicorn Tears Gin Liqueur' in the UK stated that while "the product communicated its alcoholic nature with absolute clarity" and "such imagery could hold a broad appeal for all age groups" the "overall impression conveyed by the product, including the unicorn logo and childlike typeface... did have a particular appeal to under-18s" and therefore upheld the complaint. This is a highly analogous matter.

- <http://www.portmangroup.org.uk/complaints/complaint-decisions/complaint-decision-details/2019/04/16/unicorn-tears-raspberry-gin-liqueur>.
- <http://www.portmangroup.org.uk/complaints/complaint-decisions/complaint-decision-details/2019/04/16/unicorn-tears-gin-liqueur>
- <http://www.portmangroup.org.uk/complaints/complaint-decisions/complaint-decision-details/2019/04/16/unicorn-tears-raspberry-gin-liqueur-miniature>

Further, with the addition of guarana in this latest version of Little Fat Lamb, the product is even more likely to appeal to the youth market. The word guarana appears to be in larger font than the word alcoholic and combined with the labelling could easily be confused with an energy drink.

Images of the product Little Fat Lamb Fantasy, accessed 29 August 2019

Image A: Drink Craft website <https://drinkcraft.com.au/little-fat-lamb-pet-1250ml-mystery-x-12pk>  
2



**\*\*\*NEW RELEASE\*\*\* LITTLE FAT  
LAMB - PET 1250ml FANTASY x  
12pk**

Only logged-in licensed members can purchase this product.

IN STOCK

Fantasy is now a reality.....NO BULL! Now with wings!

Image B: Premix King Ascot Vale Facebook page <https://www.facebook.com/premixkingascotvale/>

Image C: Little Fat Lamb Facebook page <https://www.facebook.com/Little-fat-lamb-234482920232316/>

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## Attachment B

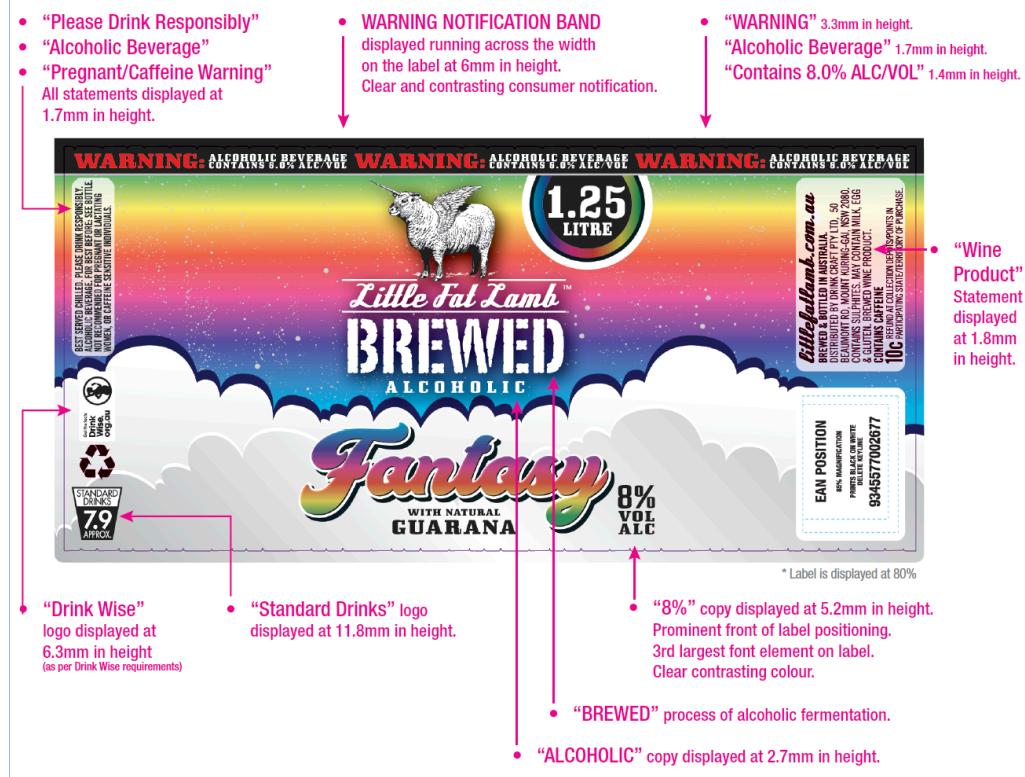
Little Fat Lamb is a craft brewed product that is ranged alongside of other alcoholic craft beverage products. It is only sold by licensed retailors nationally. There has been substantial development in the craft beverage space over the last 10 years generating a plethora of new designs and colours in this category. The context of the products marketing appeal must be considered in relation to the category that it positioned in. For the purposes of comparison, a range of products from the alcoholic craft beverage category all currently available to consumers in Australia have been captured below. These serve to highlight the routine use of marketing puffery utilised to separate this beverage category from other more mainstream categories. By no means are these examples suggesting that they are either acceptable or not in the marketplace they are provided to simply ensure there is context to the response given.

The Company has had no involvement in the Facebook Pages referenced in the complaint.

### Confectionary/Soft Drink Confusion

#### Defining Attributes:

- Sold only by licensed retailors and positioned with other craft alcoholic beverages.
- Contains more than 10 prominent cues on the label detailing the nature of the beverage being alcoholic.
- Presents a "Warning" statement across the top of the label detailing the nature of the beverage.



Examples below of category puffery contrasting the nature of the beverage:



### The Bottle

Unique proprietary bottle shape, not clear but coloured amber/brown. A colour widely associated with alcoholic beverages in particular beer. The bottle presented with a different label (Available October 2019) clearly shows the bottle has little relationship to that of other PET containers utilised for soft drink. The label presented on an aluminium can also serve to highlight a stark contrast to soft drink products. The label and the bottle are distinct and unique and unlikely to be confused with non-alcoholic beverages.



## Minors – The Name

The word “Fantasy” is positioned centrally on the bottom third of the label on the flavour panel position. Fantasy flavours are widely accepted as the correct industry nomenclature for beverage flavours not naturally occurring in nature. They are often a blend of flavours containing a range of esters either synthetically produced or extracted from fruit. Typically fantasy flavours will be a blend of berry and citrus fruit esters. Consumers normally struggle to say what a fantasy flavoured beverage tastes like unless prompted by colour or suggestion. An easily recognisable alcoholic beverage using fantasy flavours are “ice” products.

The typeface is stylised and in keeping with the brand logo positioned centrally in the top third of the label separated by the statements “BREWED” and “ALCOHOLIC” printed in two different typefaces for visual prominence. Visually the word Fantasy reads as “Little Fat Lamb Fantasy”. Fantasy is a significant adult theme stretching across a range of typically positive adult behaviours or ideas. In response to the suggestion there may be confusion with the name "Fantasy" due to this being a common name of the illegal drug gamma hydrobutyrate (GHB), a powerful depressant is highly unlikely for the vast majority of the adult population and especially minors. This suggestion does reinforce that the word has a multitude of adult applications.

This drug based allegation would no doubt suggest the below products would be contentious too?



## Guarana

Guarana in alcoholic beverages in Australia has been widely established for more than 10 years. Each of which prominently position the word on the label of the slim line can. Examples are:



The market has had little trouble differentiating these products from non-alcoholic variants packaged similarly.

### The Colours

The colours are not atypical in the craft beverage category and are widely used.

Combining the range of colours of the label with the fantasy flavour leaves the consumer with no suggestion as to what to expect in terms of taste profile adding to the uniqueness of the taste experience. The colours are also used by community groups to represent diversity ie in this case flavour profile but also has strong representation of inclusiveness, peace and pride widely recognisable by adult consumers.



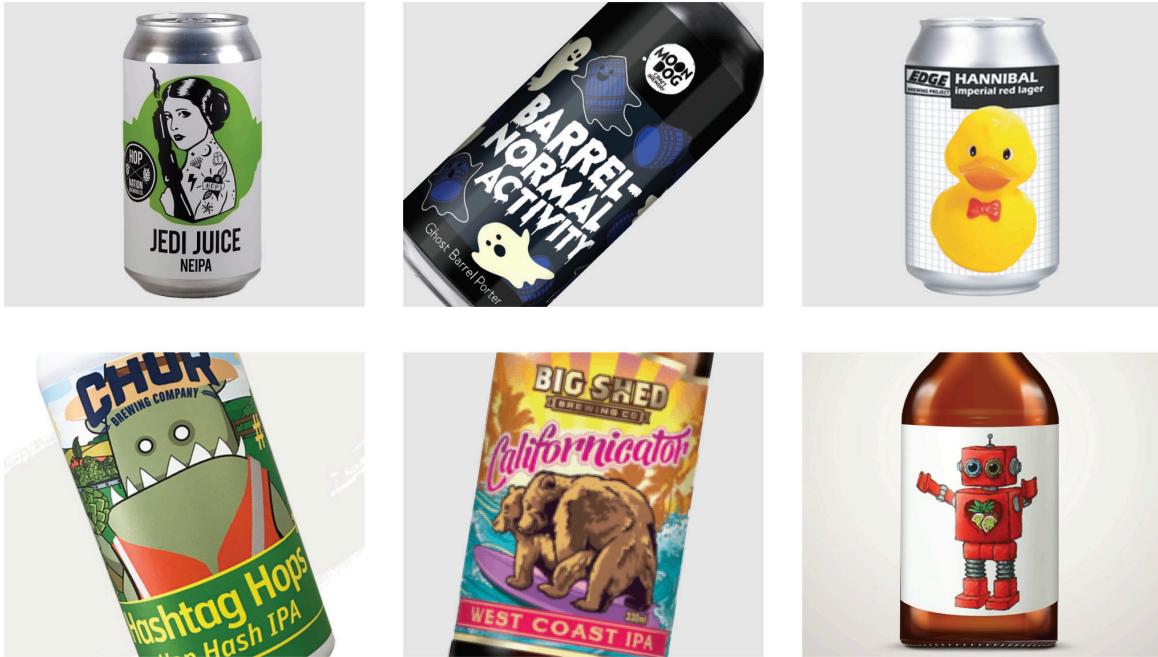
### The image of the lamb

The little Fat Lamb logo is positioned centrally and in the top third of the label. The Lamb logo typically details a real life etch of a lamb. It is unlikely that this etch of a lamb would appeal in any way to an age group in particular. For the Fantasy, the logo has been modified subtly in the same etch style to include a horn and a wing on the side. These modifications are subtle puffery and again unlikely to draw appeal from minors. Adults will reflect on these somewhat awkward modifications to the original logo, but there is little in this etched drawing that could be reasonably considered to be "childlike" or what would be expected by a minor to represent a fictitious unicorn.

There are no rainbows, cartoon characters or animals other than the lamb.

The craft beverage category contains many examples of imagery designed as puffery for the consumer to be challenged by. The Little Fat Lamb Fantasy logo would sit very

much at the bottom end of the craft beverage category in terms of visual image puffery.



#### Further measures to be put in place

The purpose of our above stated position is to give background to the development of the product not to exonerate it. But if changes need to be made we are happy to assist. If we deconstruct the label removing the contentious themes one at time there should be a point we can reach and acceptable balance to ensure the products success in the category which it competes and the wider communities expectations.



## Summary

### Confusion with Soft Drink/Confectionary

The label is heavily indexed with statements many centred on the label relating to the nature of the product being an alcoholic beverage. Most notably there is a warning banner across the top of the label making certain there is no ambiguity.

The use of a proprietary shaped amber/brown PET container further separates the product from a PET soft drink bottles that are typically taller, thinner and clear.

The beverage contains guarana that is widely established and prominently labelled in this type of alcoholic beverage throughout Australia.

Further confusion with a non-alcoholic energy drink is unlikely as they are packaged differently typically in slim line 250ml and 500ml aluminium cans not PET bottles.

### Appeal to Minors

Individually none of the themes can be said to strongly appeal to minors on their own. They carry very adult communications and symbolism in the context of the category they sell in. The details of the themes are consistent with the other craft beverages. The name Fantasy reflects the flavour of the beverage and has a strong affinity to adults and in the context of where this product is sold and who it is sold to leads to little opportunity for it to appeal to minors. The product is wholesaled to achieve a RRP \$8.99 and deliver the retailers their target retail margin. Individual licensed retailers will price the product according to their requirements.