



ABAC Adjudication Panel Determination No. 62/19

Product: Bluey
Company: Pinnacle Drinks
Media: Packaging
Date of decision: 27 September 2019
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns packaging for Bluey beer, by Endeavour Drinks Group (“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. There is no record of pre-vetting approval having been obtained for the packaging, however marketing collateral which included the name and images of the packaging has been approved.

The Marketing Communication

9. The packaging of Bluey is included following.



The Complaint

10. The complainant is concerned that the product's packaging strong or evident appeal to minors because:
- it uses the name of the principal character and title of the current hit children's TV program, Bluey; and
 - includes a dog motif.

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:

- likely to appeal strongly to Minors;
- specifically targeted at Minors;
- 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 responded to the complaint by letter dated 16 September 2019. The principal points made by the Company were:
- Endeavour Drinks' aim is to be Australia's most responsible retailer of alcoholic beverages. In 2013 we formalised our status as a signatory to the Alcohol Beverages Advertising Code (ABAC) Scheme. Prior to becoming a signatory, Endeavour Drinks' demonstrated a long-standing commitment to supporting and adhering to ABAC and Advertising Standards Bureau principles. Endeavour Drinks' maintains strict internal and external processes in addition to those required by the ABAC Scheme, which are relevant in this context. As part of our community charter, 'Our Community, Our Commitment', Endeavour Drinks has in place a range of industry-leading initiatives to ensure that minors are not served or marketed alcohol, and to encourage responsible drinking practices. These include:
 - ID25 (ask for ID from anyone who looks under 25);
 - Don't Buy It For Them (stopping secondary supply to minors);
 - our Intoxication Policy (refusal of service to anyone who may be intoxicated); and
 - staff training that exceeds legal requirements, including "Don't Guess, Just Ask", team talkers, regular refresher and reminder courses.
 - In marketing alcoholic products, Endeavour Drinks has been fully aware of the requirement not to market products that have a strong or evident appeal to minors. It is our view that neither the name or packaging of Bluey Lager has a strong or evident appeal to minors.
 - Bluey Lager was first launched around October 2018. Bluey Lager packaging features a black and white sketch image of an Australian cattle dog and the word 'Bluey' written vertically, also in black and white sketch font. The Bluey Lager brand is a revised version of the brand 'Ol' Bluey' which was (and still is) owned by Pinnacle Drinks also. Ol' Bluey was in the market from early 2012 to mid 2013. The Ol' Bluey brand also featured an image of an Australian cattle dog although the image was a silhouette.

- The breed Australian cattle dog is also referred to as 'blue heeler' and is a breed of herding dog that is said to have been originally developed in Australia for droving cattle. The Bluey brand is inspired by one particular Australian cattle dog named 'Bluey' from Rochester, Victoria who, according to the Guinness World Records, holds the record for the "greatest reliable age recorded for a dog" - 29 years and 5 months, recorded in 1939. The story of the oldest living dog Bluey, together with the historical significance of the Australian cattle dog breed, has elevated Bluey to a somewhat iconic status in Australia. This is what Bluey Lager seeks to celebrate. This is reflected in the Bluey Lager brand line which states that Bluey Lager is "brewed in the spirit of Bluey, the oldest living dog who became an Aussie legend."
- Part 3(b)(i) states that a marketing communication must not have a "strong or evident appeal to minors" and there are 5 elements to the defined scope of this term (copied below). We believe that the use of animals such as dogs, in itself, does not meet any of these 5 elements. More importantly, Bluey Lager does not meet any of these 5 elements. A black & white sketch image of an Australian cattle dog is not likely to appeal strongly to minors or have a particular attractiveness for minors beyond the general attractiveness it has for adults. We would submit that dogs are generally liked by a broad spectrum of the community, and if anything, the particular breed of dog chosen for Bluey Lager is less likely to be liked by minors than other brands given the heritage and common use of the particular breed. The dog image is not an animation and it contains no colours or other visual techniques that would cause it to be particularly attractive to minors. Bluey Lager does also include a black box with white text which does have a thin red border but looking at Bluey Lager as a whole, we do not believe this limited use of colour is sufficient to make Bluey Lager particularly attractive to minors.
 - (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.
- We believe the above view is aligned with the considered view of the ABAC Panel in ABAC Determination No. 31/15, in which it made the following comments:

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.

- In Determination No. 115/16, the ABAC Panel again considered the use of animals in the context of alcohol-related marketing. The ABAC Panel concluded that the use of an animal (a turkey in that case), in itself, could not reasonably be said to be strongly appealing to minors. The ABAC Panel commented that *“while an animal is featured, the turkey is not shown in a manner which gives it appealing characteristics and the advertisements as a whole are clearly adult in theme.”* We believe the same is true of Bluey Lager. The packaging of Bluey Lager features an Australian cattle dog and the word ‘Bluey’ both of which are in black and white. There is nothing about the packaging which has appealing characteristics from the perspective of minors.
- The Bluey Lager brand was developed by Pinnacle Drinks independently of the animated series ‘Bluey’ (Bluey Show) and Pinnacle Drinks has used the brand name ‘Bluey’ long before the Bluey Show existed. The Bluey Show is an animated series broadcast by the Australian Broadcasting Corporation. The Bluey Show is quite clearly aimed at children but there is no connection between the Bluey Show and Bluey Lager. The only similarities are the title and that both feature the breed of Australian cattle dog albeit in very different forms. It is clear that the dog featured on Bluey Lager does not resemble the animated dogs of the Bluey Show and we do not think the reasonable person would draw a connection between the two versions of Australian cattle dog. According to the IMDb website, the Bluey Show was first released in October 2018 which was a number of years after Pinnacle Drinks first developed the Ol’ Bluey brand and around the same time that Pinnacle Drinks revised the Ol’ Bluey brand into the Bluey Lager brand. It is clear that the Pinnacle Drinks brand and use of the Bluey name existing long before the Bluey Show was available. The two uses of the Bluey name are clearly coincidental and we do not believe that the reasonable person would draw a connection between the two. Most importantly, we do not believe there are sufficient grounds to suggest that Bluey Lager would have a strong or evident appeal to minors merely due to the existence of the Bluey Show. For the reasons outlined above, we believe the complaint should be dismissed, and the Panel should determine that there has been no breach of the Code.

The Panel’s View

14. On 1 October 2018 the animated children's TV series 'Bluey' premiered on ABC Kids, one of the digital channels of the national broadcaster. A co-production between the ABC and the BBC the series features a six year old blue heeler puppy named Bluey and her family. Set against the backdrop of Brisbane the series has themes of growing up, family and Australian culture with each character reflecting different dog breeds. The show has proven to be very successful and is mooted to

be the most watched program for the ABC on video on demand, catch up TV and the ABC iview platform.

15. More or less at the same time the Bluey animated TV series was launched, the Company released onto the Australian alcohol market a beer branded as 'Bluey'. According to the Company the beer was a rebranding of an earlier beer product called 'Ol' Bluey' which had been on sale from 2012 to mid 2013.
16. The complainant has contended that the packaging and name of Bluey beer will have strong or evident appeal to minors because of the similarity with the TV animated character. It is pointed out that the name of the product is the same as the children's character and the packaging features a depiction of a blue heeler dog which is the breed of dog upon which the TV animation is based.
17. The Company argues that the beer branding:
 - was inspired by the name of a blue heeler dog which is recorded as the longest-lived dog in history and iconic status of the breed of dog more generally; and
 - does not resemble the TV character other than the name and a reasonable person would not connect the two beyond the coincidence of the name.
18. There is no doubt that the ABC series has struck a chord with many Australian pre-school and primary school children and as a result the show and characters would also likely be recognised by at least the parents of children who watch the program. It is also true that the term 'bluey' has a long history within the Australian vernacular and popular culture particularly related to a red headed person being affectionately called blue or bluey. There are also numerous references to the blue heeler dog having the nickname bluey in common use. For instance, a cursory internet search revealed:
 - a World World Two comic strip entitled 'Bluey and Curly' which followed the adventures of two soldiers, one a redhead nicknamed Bluey;
 - a TV police show of the mid to late 1970's entitled 'Bluey';
 - a brand of laundry powder called Bluey;
 - a civil engineering company called 'Bluey Technologies';
 - 'Blue Heelers' was the name of a long running TV police show of the 1990's and early 2000's; and
 - Virgin Airlines initially branded their Australian operations as 'Virgin Blue' in reference to the vernacular nickname of blue for the colour red which featured on their livery.
19. The point is that there is no monopoly on the use of the name Bluey and given the similar timing of the premier of the animated TV series and release of the beer, it can be reasonably accepted that the use of the name is coincidental. That said the test to be applied by the Panel in assessing if the brand name and packaging has

strong appeal to minors is how the marketing material would be understood by a reasonable person.

20. The Panel does not believe the product packaging breaches the ABAC standard. In reaching this conclusion the Panel noted:

- the name 'Bluey' has a long and varied history of use in Australia and cannot reasonably be confined to relate solely to the current TV animated series;
- the depiction of a blue heeler dog on the packaging does not resemble the TV animated character either in appearance or colouring;
- the packaging is typical of that employed on beers and would not be confused with a soft drink; and
- taken as a whole the packaging does not have features likely to be strongly or evidently engaging to children or adolescents.

21. Accordingly, the complaint is dismissed.