



## ABAC Adjudication Panel Determination No. 84/19

**Product:** Carlton & United Breweries  
**Company:** Pirate Life Acai & Passionfruit  
**Media:** Packaging  
**Date of decision:** 29 October 2019  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Jeanne Strachan  
Professor Richard Mattick

### Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns packaging for Pirate Life Acai & Passionfruit by Carlton & United Breweries (“the Company”) and arises from a complaint received 17 October 2019 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:

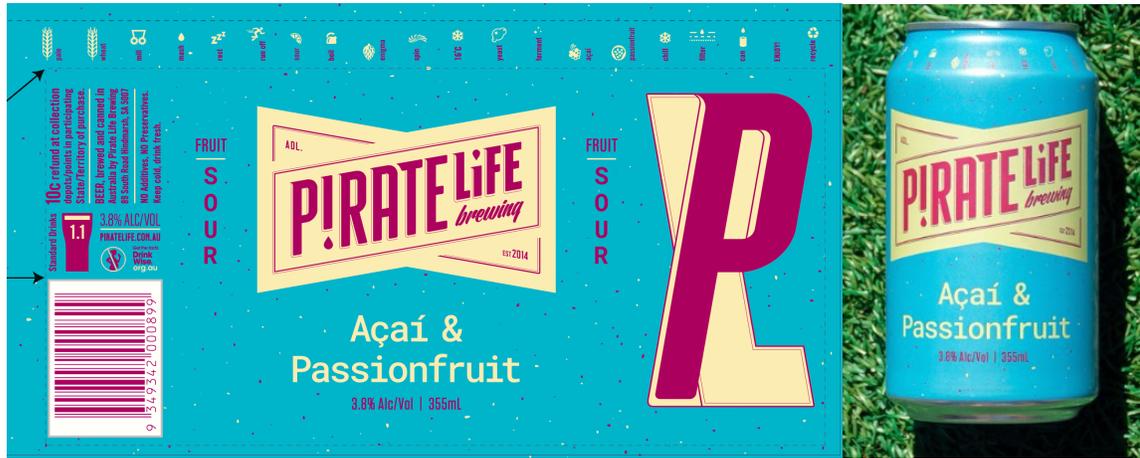
- AANA Code of Ethics – which provides a generic code of good marketing practice for most products and services, including alcohol;
  - ABAC Responsible Alcohol Marketing Code (“ABAC”) – which is an alcohol specific code of good marketing practice;
  - certain broadcast codes, notably the Commercial 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 17 October 2019.
8. The Panel endeavours 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
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 packaging could appeal to minors and be confused for juice or soft drink through its brightly coloured blue and pink can and its name "Açaí & Passionfruit" with no clear descriptors that it is a beer product.

## 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:

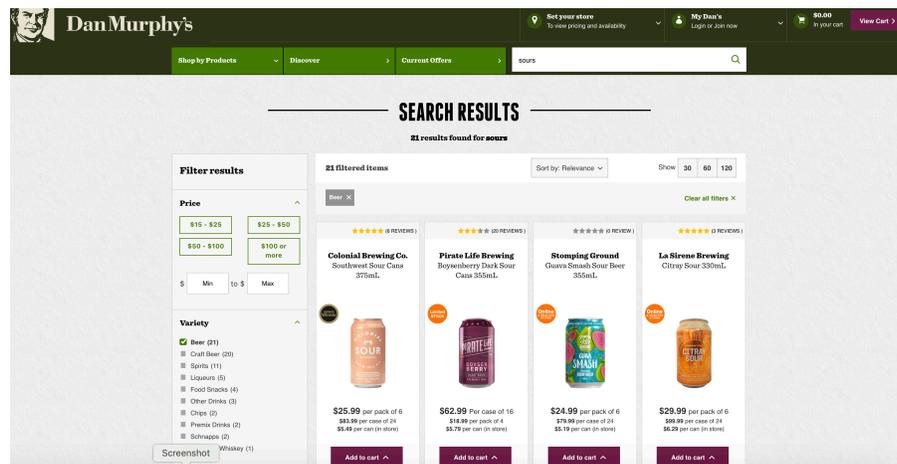
- (i) likely to appeal strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
- (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to 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 letter dated 25 October 2019. The principal points made by the Company were:

- Pirate Life has created an Acai & Passionfruit Sour, tapping into a recent trend in craft beer circles towards sour beers. Sours are also increasing in mainstream popularity, as demonstrated by the extensive search results for 'sours' on the Dan Murphy's website below. We note that the Panel does not comment on other products or materials in market when making a determination but include the below as a clear indication of consumer understanding of the sour beer market.



- This specific Acai & Passionfruit Sour follows the usual Pirate Life brand family visual identity, with the use of bold colours, the prominent Pirate Life logo, and the brewing process steps along the top of the can.



- We reject the complainant's assertions. In the first instance, the Pirate Life visual identity and branding is so distinctive that this beverage is instantly clear as part of the Pirate Life family of beers, as demonstrated by the brand family line up below. Anyone encountering the Passionfruit and Acai Sour, in any context, would be instantly able to recognise that it is part of a clear and distinct range of beers, brewed and marketed by the same brewing company.

- We also note that the prominence afforded to the alcohol by volume at the bottom of the can, noting in particular the clarity of 3.8% ALC/VOL, and the clear reference to BREWING in the Pirate Life logo. We would also note that the description of the beverage is not confined to ACAI & PASSIONFRUIT but also includes the words FRUIT SOUR, as is evident in flat art.
- We also note the inclusion of the beer brewing process along the top of the can art. This is a distinctive device found on all Pirate Life beers. Pirate Life is very open and transparent about their brewing process, and the device also serves the purpose of making absolutely clear that the product is a beer.
- Firstly, we reject the idea that soft drinks or juice hold a strong appeal to minors over and above the appeal they hold for adults. Soft drinks and juice are marketed to and consumed by adults. As adults regularly consume a variety of flavoured and/or carbonated beverages, it is inappropriate to assert or imply, as the complainant has done that because a product could *'be confused for juice or soft drink'* that it necessarily holds some strong and inherent appeal to minors.
- Nevertheless, stepping through the definition of Part 3(b)(i) of the Code:
  - 'Acai' and 'passionfruit' are inherently adult flavours. The primary flavour characteristics of acai berries are "tart and not very sweet ... a mix between a sweet blackberry and a piece of earthy dark chocolate." Passionfruit is likewise described as "tart-sweet tasting" with a texture of "yellow-orange pulp with small black seeds." 'Tart', 'earthy', and 'pulp' are not terms commonly associated with children's tastes. It is worth noting that the test in this case is that appeal has to be both 'likely' and 'strong'. Given the product flavour is 'Acai & Passionfruit' we do not believe that it meets either definition.
  - The clear audience for this product is sour beer enthusiasts. Neither CUB nor any of its associated entities are interested in marketing to individuals who cannot legally consume its products.
  - As per (i) and (ii) above, not only does this product fail to hold a particular attractiveness for minors above that which it does for adults, it is clearly designed with adult beer enthusiasts in mind.
  - The advertisement contains no imagery, designs, motifs, animations or cartoon characters likely to children, nor do they create confusion with soft drinks or confectionary. The colour palette is bright, yet mature in the overall context given the flavour profiles and the prominent references to the liquid being alcoholic. Spots and bright colours cannot in and of themselves be taken as appealing to children, as has been proved over the course of ABAC

determinations, notably 52/18 with respect to Coopers TropicAle. Additionally, the spots referred to on the can are extremely small and do not present in a polka dot manner, but serve to create a 'speckled' effect, an artistic impression that does not appeal to children. The primary design reference for the can, as we have already stated, is the Pirate Life brand visual identity. The use of this very clear visual identity and branding is enough to indicate that the product is part of a broader family of Pirate Life beers.

- The product does not use any brand identification associated with products primarily in use with minors, as outlined in points (i) through (iv) above.
- We would also like to specifically rebut the assertion that there is no 'overt reference to the product type on the front of the can.' The can says BREWING in very clear letters and also states the alcohol by volume. The top of the can also very clearly references the brewing process, including a reference to Enigma hops visible if only the front of the can is visible. Hops are not used in other beverages.
- CUB is committed to ensuring our promotional and marketing material, and that of our associated entities such as Pirate Life, does not promote or encourage any irresponsible consumption of alcohol. Our goal is for consumers to enjoy our products responsibly and in moderation. Accordingly, we have taken all reasonable precautions to ensure that the marketing material produced by our sponsorship partners is in compliance with the ABAC.

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

15. Pirate Life commenced operations as an independent Adelaide based craft brewery before being acquired by the Company in 2017. The Company produces a range of beers which the Company explains have a common packaging design featuring bold colours, prominent Pirate Life logo and stylistic depiction of the brewing process.
16. One of the beers in the Company's range is sour beer with açai and passionfruit and it is the packaging of this product which has drawn the complaint. The packaging is predominately light blue in colour with the front of the can showing the Pirate Life logo and clearly the words 'Acai & Passionfruit'. In smaller font is text - 3.8% Alc/Vol | 355ml- and the top of the can has words and symbols which relate to the ingredients and brewing process. The back and side of the can has further information some in small font which in part flow from the product being a beer e.g. standard drink glass logo.
17. For the complainant, the packaging could appeal to minors and be confused with a fruit juice or soft drink. The ABAC provides that an alcohol marketing

communication (which includes product packaging) must not have strong or evident appeal to minors. The Code defines 'strong or evident appeal' to mean amongst other things the use of imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to minors or that create confusion with confectionary or soft drink.

18. The Company argues the ABAC standard on appeal to minors has not been breached. It is contended that:
  - the product packaging sits within the Pirate Life range which is distinctive and 'instantly recognisable' as a beer brewed by the same company;
  - the packaging contains clear references to being an alcoholic beverage;
  - soft drinks and fruit juices don't hold any strong appeal to minors over above the appeal they have to adults;
  - the flavours of acai and passionfruit are inherently adult flavours being tart, earthy and pulp which are not associated with children's tastes;
  - the target audience is sour beer enthusiasts and there is no company interest in marketing to minors;
  - the packaging colour palette is mature and does not have design features likely to appeal strongly to minors; and
  - the referencing to brewing, alcohol by volume and the brewing process together establish the product packaging as relating to a beer.
19. In assessing if an ABAC standard has been complied with, the Panel adopts the standpoint of the probable understanding of the marketing communication by a reasonable person taking the content as a whole. This means that the values, opinions and life experiences common in a majority of the community is the benchmark.
20. The issue for the Panel is whether the packaging would be understood by a reasonable person as having strong or evident appeal to minors. This means would someone under the age of 18 be attracted or drawn to the product packaging through it:
  - being apparently targeted at minors or
  - having a particular attractiveness for a minor beyond its general attractiveness it has for an adult or
  - using imagery or designs that are likely to appeal strongly to minors or that create confusion with soft drink

21. Considerations as to whether a product packaging could be confused with a soft drink include:
- does the packaging clearly identify the product as an alcohol beverage through the use of alcohol descriptions like beer, ale, vodka style of wine etc;
  - the presence of visual design features that would be commonly found on soft drinks such as fruit images, bright block 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.
22. It should be noted that the ABAC does not contain a specific standard that product packaging clearly identify the product as an alcohol beverage. The Australian New Zealand Food Standards Code provides that the label of an alcohol beverage containing more 1.15% alcohol by volume must include a statement of the alcohol content. The product packaging meets this legislative requirement.
23. Some alcohol marketing codes of practice do stipulate that product packaging must clearly establish that the product is an alcohol beverage. For instance, the United Kingdom Portman Code, which applies to alcohol packaging provides that-'The alcoholic nature of a drink should be communicated on its packaging with absolute clarity'. Hence a failure to meet this requirement is of itself a breach of that code. There is no equivalent of this requirement in the ABAC.
24. The product packaging in this case does not in the Panel's opinion clearly establish the product is alcoholic. While it may be true that regular consumers of the Pirate Life range of products will readily recognise the packaging as consistent with the Company's brand, it is not likely that this branding is so well known in the community that it is immediately recognised as a beer by an average consumer. There are cues on the packaging that the product is alcoholic, but these cues are not the prominent features of the packaging.
25. That said, the assessment as to whether the product packaging might be strongly appealing to minors because of potential confusion with a soft drink is more finely balanced. The test is the overall understanding a reasonable person would gain by a cursory viewing of the packaging. This means that the larger text, colouring and most prominent design features will be most influential. It cannot be expected that an average consumer will pick up an individual can, turn it around a full 360 degrees and study it in fine detail.
26. The prominent features on the packaging are:
- that it is a can of a size used typically for beer or soft drinks;

- the light blue colouring;
- the Pirate Life logo in which the words 'Pirate Life' is more prominent than 'brewing'; and
- the words 'Acai & Passionfruit'.

27. Assessing these features:

- the light blue block colouring is not typical of cola or orange or lemonade soft drinks;
- the can size is used across beers and sweet soda type soft drinks with energy drinks typically using different can sizes;
- Pirate Life for a person unfamiliar with the brand, wouldn't particularly indicate the type of beverage; and
- açai and passionfruit wouldn't immediately be generally recognised as flavour characteristics of a beer and might tend to suggest the product is a soft drink although açai is not a typical soft drink flavour.

28. On balance the Panel does not believe the packaging has strong or evident appeal to minors. Its overall design features are not likely to draw the attention of minors. It is quite sedate in colouring and its design does not have a dramatic eye-catching impact. It is a very marginal assessment as to whether the product could be confused with a soft drink, and on this point reasonable minds might disagree. The packaging could certainly do more to convey it is an alcohol beverage, but the product doesn't resemble any immediately recognised soft drink brand or type and on balance is not considered as causing confusion with a soft drink.

29. The complaint is dismissed.