



ABAC Adjudication Panel Determination No. 103/19

Product: Pirate Life Iced Coffee Milkshake
Company: Carlton & United Breweries
Media: Name, Packaging & Instagram Post
Date of decision: 23 December 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 the name, packaging and an Instagram post for Pirate Life Iced Coffee Milkshake by Carlton & United Breweries (“the Company”) and arises from a complaint received 12 November 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 12 November 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.

Marketing Communication

10. The following product name, packaging and Instagram post is referred to in the complaint.



The Complaint

11. The complainant is concerned that the name and branding of the beer and the Instagram post associates the beer with a soft drink (Farmer's Union Iced Coffee) through the name, colour and the style of beer and will appeal to minors in breach of Part 3(b)(i) of the ABAC Code, in particular:
- the name of the beer and the decal design is referencing the Farmer's Union Iced Coffee drink, which is as popular as Coke in South Australia;
 - the name of the beer is a verbatim reference to Farmer's Union Iced Coffee
 - the colour palette of the beer's decal design is very similar to Farmer's Union Iced Coffee packaging with the sea green and the white used for both products; and
 - the beer itself contains coffee which is a style in tune with the references to Farmer's Union Iced Coffee.

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 22 November 2019. The principal points made by the Company were:

- Pirate Life often creates limited edition brews to drive interest and excitement among its highly engaged community of beer lovers. Iced Coffee Milkshake is the latest limited edition brew; it is only available on-premise, in keg format. The Instagram post shows the tap badge for the product. It uses the familiar Pirate Life brand family visual identity, i.e. bold colours, the prominent Pirate Life logo and the ABV.
- The tap badge bears absolutely no resemblance to the Farmers Union Iced Coffee logo (contrary to the complainant's assertion). The two images are provided side-by-side for ease of reference.



- Anyone encountering the Pirate Life Iced Coffee Milkshake, whether in the context of a tap badge or an Instagram post showcasing that tap badge, would recognise that it is part of the Pirate Life Brewing brand family. In our view it is absolutely impossible to confuse this product for Farmers Union Iced Coffee, which, contra the complainant's assertion, is a chilled coffee milk beverage and not a soft drink.
- We reject the idea that soft drinks or coffee milk beverages hold a strong appeal to minors over and above the appeal they hold for adults. Soft drinks and coffee milk beverages 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 references an iced coffee drink that it necessarily holds some strong and inherent appeal to minors. In particular, we reject the notion that coffee milk beverages hold strong appeal to minors. They are not considered in the definition of 'strong or evident appeal to minors' within the ABAC, and acknowledging that the Panel is not bound by its prior determinations, we note that the Panel recently found that 'iced coffee as a product cannot be said to be strongly or evidently appealing to minors.'¹

- Stepping through the definition of Part 3(b)(i) of the Code:
 - 'Coffee' is an inherently adult flavour. For example, popular Melbourne-based roasters Market Lane Coffee describe their current seasonal espresso blend as "cherry and dark chocolate with red apple."² Coffee is noted for its complexity, and often its bitterness, and culturally, coffee is a definitional 'adult' taste. Further, Food Standards Australia & New Zealand (FSANZ) recommends people under the age of 18 consume no more than 3mg of caffeine per kilogram of bodyweight per day, based on evidence of increased anxiety levels in children above these levels.³ For example, espresso contains 145 mg of caffeine per 50 mL cup. Therefore, a 50mL cup of espresso contains 25 mg more per serving than the recommended caffeine consumption for a 40 kg child.⁴ This further emphasises that coffee style beverages are inherently adult in their nature. 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 'Coffee' and it contains coffee beans, we do not believe that it meets either definition.
 - The clear audience for this product is beer enthusiasts who enjoy beers with interesting flavour profiles. Neither CUB nor any of its associated entities are interested in marketing to individuals who cannot legally consume its products. We note as well that this product is only available in keg format, and thus can only be purchased inside a licensed venue, excluding the possibility that children are able to obtain it. We note that when assessing appeal to minors the Panel will consider the approach of a reasonable person, no matter where the product is sold, however the fact that the product is only available in licensed venues, is indicative of Pirate Life's intention to appeal to, and target adults only. As far as the Instagram post is concerned, it can only be viewed on Pirate Life's age-gated Instagram account.
 - 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.

¹ <http://www.abac.org.au/wp-content/uploads/2019/11/82-19-Determination-Bundaberg-Rum-Icebreak-11-November-2019.pdf>

² <https://marketlane.com.au/coffee-beans/espresso-coffee/seasonal-espresso-blend-3518>

³ <https://www.foodstandards.gov.au/consumer/generalissues/Pages/Caffeine.aspx>

⁴ <https://www.foodstandards.gov.au/consumer/generalissues/Pages/Caffeine.aspx>

- 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, as the colour scheme is a pastel mint, a colour that is not associated with any particular confectionary or soft drinks. The mint shade, in and of itself, does not appeal to minors. While iced coffee drinks are evidently the reference point for the product's name and flavour profile, the tap badge bears absolutely no resemblance to the Farmers Union Iced Coffee logo, which we furthermore contend is a drink marketed to adults, as in the examples of advertising below:



- 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 packaging or the Instagram post.’ The packaging is a tap badge, it is difficult to understand how a tap badge could more clearly reference the product type as its intended purpose is to communicate the type of beer available from the beer tap on which it is placed, being part of the vessel that dispenses the product. It is clear the product is an alcoholic beverage by the reference to Pirate Life BREWING and the prominent alcohol by volume.
- 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 CUB and our associated entities is in compliance with the ABAC.

The Panel's View

15. The Company owns and operates a brewery in Adelaide which is open to the public and in part has a restaurant and bar which serves beers in the Company's craft range. By Instagram post, the Company advised that it was launching a new product to be available on tap from its brewery site. This product is named 'Iced Coffee Milkshake'. The complainant has raised concerns about the product name and branding based on the Instagram post. It is argued the marketing material will appeal to minors.
16. Part 3(b) of the ABAC provides that an alcohol marketing communication must not have strong or evident appeal to minors. The definition of strong or evident appeal gives guidance of what kind of material might breach the standard, namely:
 - material specifically targeting minors;
 - material having a particular attractiveness for a minor beyond the general attractiveness it has for an adult
 - material which uses imagery or designs that are likely to appeal strongly to minors or that create confusion with confectionary or soft drinks
17. It should be noted:
 - that a product name and its packaging fall within the scope of 'marketing communications' for ABAC purposes;
 - a 'soft drink' has been taken by the Panel in previous determinations to capture drinks which do not contain alcohol, including but not limited to carbonated sweet sodas such colas etc. This means an 'iced coffee', a flavoured milk and a 'milkshake' i.e. a combination of milk, flavouring and ice cream are all 'soft drinks' within the meaning of the term used in the Code;
 - the ABAC regulates the marketing of alcohol products and not the physical products themselves i.e. the Panel has no role in assessing whether a particular type or style of alcohol beverage should be permitted only how that product is marketed.
18. The principal argument advanced by the complainant was that depiction of the product branding as shown in the Instagram post drew a very strong resemblance to the South Australian based Farmers Union Iced Coffee. The inference from the complainant was that the Company had deliberately styled its branding of the product to bring to mind the Farmers' Union colour scheme and branding.
19. While the Farmers Union branding and the Company's product branding both use in part a shade of blue, there is not a great deal of similarity between the two brand designs and layouts. The Company strongly refutes it had either the intention, or the outcome of confusing the iced coffee flavoured milk with its iced coffee beer. This can probably be accepted but it is not the end of the issue. The Panel needs to assess consistency with the Part 3(b) standard of:
 - the product name and packaging i.e. its branding including name, style, colour scheme, graphic design etc and the context of this in relation to the container in which the product is available on the market; and

- the Instagram post.
20. In assessing compliance of a marketing communication with a Code standard the Panel is to adopt the standpoint of the probable understanding of the marketing material by a reasonable person taking the content of the marketing as a whole. This means the values, opinions and life experiences common in a majority of the community is to be the benchmark.
 21. The product is apparently available only at this point at the Company's brewery in Adelaide and only 'on tap'. This means the branding layout shown in the Instagram post reflects the decal used on the tap badge at the bar at which the beer is served. The Company states the product will not be available in cans or other containers from retailers but only 'from the keg' in licensed premises.
 22. If the branding is on a tap badge in the Company's brewery, then a reasonable person would understand the branding is related to a style of beer. The same branding on a can in a retail outlet is far more problematic as the product name could likely be taken to be referring to a flavoured milk drink and the potential for confusion with a soft drink is obviously elevated.
 23. The common and widespread understanding of the term 'milkshake' is of a drink consisting of milk, flavouring and ice cream mixed or blended together i.e. non-alcoholic beverage. Further an 'iced coffee' is a style of cold coffee served with milk and again is non-alcoholic. While in recent times the term 'milkshake' has been co-opted to describe a style of craft beer, there is no doubt that a reasonable person would think a beverage branded as an iced coffee milkshake would be referring to a milk based non-alcoholic drink.
 24. The Company has argued that it should not be assumed that 'soft drinks' are predominantly consumed by minors or have an appeal to minors over and above the appeal they have for adults. The Panel is not a research body and public data on the consumption and appeal of various types of soft drinks on demographic breakdowns is not readily available. That said Australian Bureau of Statistics data (2011/12 Australian Health Survey) indicates that milkshakes and flavoured milk are consumed more heavily in the age groups 9 to 13 and 14 to 18 than any other age segment of the population.
 25. Drawing this together the Panel believes the Instagram post is in breach of the Part 3 (b) standard. In reaching this conclusion the Panel noted:
 - the predominant branding features are the Company logo, and the name 'iced coffee milkshake';
 - the alcoholic nature of the product is less prominent than the references to iced coffee and milkshake;
 - a milkshake is a drink consumed across age groups but is popular with under 18 year olds and statistical information suggests the consumption of milkshakes by minors occurs more regularly than with adults;
 - that the highlighting of the term milkshake through a different font style compared to the balance of the branding gives emphasis to this feature of the beverage; and

- taken as a whole it is considered to have evident appeal to minors through a potential confusion with a soft drink.
26. The Company advised that at present the product as currently named and branded is available as a limited edition product only from the Company's brewery. Placed on a beer tap at a bar within a brewery obviously removes any likelihood of confusion with a soft drink and the appeal of a 'milkshake' to minors does not arise. This means the Panel does not find that the point of sale branding on the beer tap in the Company's brewery needs to be removed. As noted in Determination 75,80 & 81/19, however, the use of the term milkshake on a can or other container will be an indicator of the branding being in breach of the Part 3(b) standard.
27. The complaint is upheld in reference to the Instagram post.