



ABAC Adjudication Panel Determination No. 40/20

Product: Kiwifruit & Cherry Sour Ale
Company: Pirate Life
Media: Digital (Website)
Date of decision: 18 May 2020
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns a website advertisement for Kiwifruit & Cherry Sour Ale by Pirate Life (“the Company”) and arises from a complaint received 27 April 2020.
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 Code”) – 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 and Policies – which place 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 other codes as well as meeting the standards contained in the ABAC.
4. For ease of public access, Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the Ad Standards, 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 Ad Standards 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 the 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 27 April 2020.
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 was completed in this timeframe.

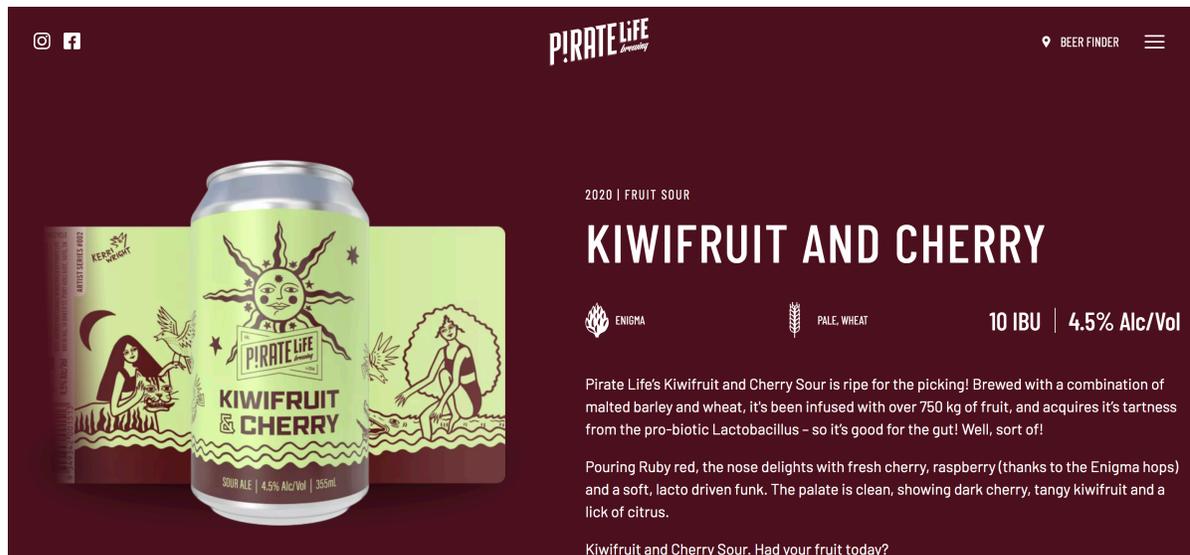
Pre-vetting Clearance

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 this marketing communication.

The Marketing Communication

10. The complaint relates to the following advertisement located at:

<https://piratelife.com.au/beers/kiwifruit-and-cherry/>



The Complaint

11. The complainant objects to the advertisement as it makes several claims and suggestions that the beer is good for your health, in particular:

- the word "pro-biotic" before lactobacillus implies that the beer could improve your gut health as pro-biotic is a word that is used to make health claims for medicines and some foods;
- "so its good for the gut" is an explicit health claim, and while followed up by the caveat "Well, sort of" it is still suggesting that the product could be beneficial to your health; and
- the last line "Had your fruit today?", comes across as a suggestion that the product contributes to daily recommended serves of fruit adding to the overall tone that drinking this beer could be beneficial to your health.

The ABAC Code

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

- (c)(iv) suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation

The Company's Response

13. The Company responded to the complaint by letter dated 7 May 2020. The principal points made by the Company were:

- a) Pirate Life Kiwifruit and Cherry is a limited release sour beer. Pirate Life frequently create limited release and special run brews for sale from their brewery or through select retail channels. These limited release brews are intended to engage and excite Pirate Life’s consumer base of knowledgeable, adventurous beer drinkers with flavour profiles and styles outside the norm. Sour beers are enjoying significant popularity in the craft space at the moment.
- b) The complainant claims that *‘This copy makes several claims and suggestions that the beer is good for your health.’* We reject the assertion that the description of this beer on the Pirate Life website and on Instagram would lead a reasonable consumer to conclude that Pirate Life is making any explicit health claims about its product. Pirate Life takes its obligations with respect to responsible marketing very seriously, and the copy should be read as informative as to the style and contents of the beer, with some humorous marketing puffery highlighting the fact that neither fruit nor lactobacillus are ‘typical’ beer ingredients’.
- c) I will consider each of the claims individually in light of Part 3(c)(iv) of the Code.
- *“It’s been infused with over 750kg of fruit”*
 - No health claim is made in this statement. The copy is describing, in abbreviated detail, the process of making Pirate Life Kiwifruit and Cherry. The beginning of this sentence is, “Brewed with a combination of malted barley and wheat, it’s been infused with over 750 kg of fruit ...” The full context of the sentence makes clear that the copy is stating basic facts about the constituent ingredients of the beer, which in this instance, does include 750kg of fruit. It is quite the stretch to suggest that highlighting the use of fruit adjuncts to achieve fruit flavours in the beer is somehow indicative of a health claim.
 - *“The pro-biotic Lactobacillus – so it’s good for the gut!”*
 - Again, the full context of this sentence is required, as this continues on from the fruit claim dealt with above. In its entirety, the sentence reads, “Brewed with a combination of malted barley and wheat, it’s been infused with over 750 kg of fruit, and acquires its tartness from the probiotic Lactobacillus – so it’s good for the gut! Well, sort of!”
 - The term “probiotic Lactobacillus” is also factual. The term ‘Lactobacillus’ refers to any member “of a group of rod-shaped, gram-positive, non-spore-forming bacteria of the family Lactobacillaceae ... characterised by their ability to produce lactic acid as a by-product of glucose metabolism.” (<https://www.britannica.com/science/Lactobacillus>).
 - Lactobacillus are commonly used in fermentation, for example of milk into yoghurt, cheese, and sour milks like kefir, and in pickles like kimchi and sauerkraut. Lactobacillus species exist in the human gut and are considered to be part of a ‘healthy’ gut microbiome, to the extent that they are often taken in live, unadulterated supplement format to achieve a ‘probiotic’ effect (<https://ods.od.nih.gov/factsheets/Probiotics-HealthProfessional/>).

This is not to suggest that the beer will have a probiotic effect, but rather that there is a probiotic organism used as an ingredient.

- In the sour beer category, lactobacillus is commonly used at the fermentation stage as it confers a specific taste and flavour profile. As noted, consumers can expect a characteristic tartness. Noting this is a niche product, consumed by beer aficionados familiar with concepts like lacto-fermentation, in the context of the sentence it is clear we are describing the presence of the lactobacillus as well as alluding to its mechanism of action, in order to give sour beer lovers some detail about the sort of flavours they can expect from this beer (<https://blackhops.com.au/sour-beers-and-how-we-brew-them/>).
 - The phrase 'So it's good for the gut!' is not intended to read as a claim of therapeutic benefit. There is no call to action urging potential consumers to choose this beer if they wish to improve their gut health. It's clear in the context of the sentence that the copy is playing on the common understanding of probiotics as something that might be taken in a medicinal form to promote gut health, but ultimately the copy has an evidently jovial tone. The humour is in the irony that a product which is taken for a health-enhancing purpose, is also used in the creation of this alcoholic beverage – which can have negative health consequences if not consumed responsibly and moderately. We would not expect any consumers of this product to seriously consider the beer to confer any gut health benefits, as it is well known that alcohol overconsumption can disrupt the gut microbiome (<https://www.arcr.niaaa.nih.gov/arcr382/article01.htm>)
 - “*Had your fruit today?*” - Likewise, there is no suggestion here that the product confers any health benefits because of its fruit content. The statement is intended to emphasise the sheer volume of fruit contained in the brew, as well as once again highlighting and emphasising the fruit flavour characteristics of this beer. The implication is not that the beer will count towards a person's fruit intake, but rather that it takes what anyone can see is quite a large volume of fruit to create this beer.
- d) 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, while also educating them on what tastes and flavour profiles they can expect from our beers. Accordingly, the descriptive copy on this website is not intended to imply any therapeutic benefit; it has been written to ensure that consumers understand that (1) this beer is fruit-driven in terms of its taste and flavour profile, and that (2) it uses lactobacillus to create a tart sour beer style.

The Panel's View

14. This determination concerns an entry on the Company's website which is promoting a limited release sour beer - Pirate Life Kiwifruit and Cherry. The marketing item provides a description of the product including that it is brewed with a combination of malted barley and wheat and that it's been 'infused with over 750kg of fruit'. It is

stated that the tart taste of the beer is derived from pro-biotic lactobacillus. The marketing description then goes on to say - 'so its good for the gut! Well sort of!'

15. The complainant takes issue with these descriptions of the product arguing that it claims that the product is good for your health. Specifically, it is contended the use of the term 'probiotic' implies that the beer could improve your gut health. Further, the marketing copy ends with a reference to 'Had your fruit today?' which is argued to imply that the product contributes to a daily recommended serve of fruit and this adds to an 'overall tone' that the product is beneficial to health.
16. The ABAC provides that an alcohol marketing communication must not suggest that the consumption of alcohol offers any therapeutic benefit. In assessing if a standard has been breached the Panel adopts the probable understanding of the marketing material by a reasonable person having regard to the content of the marketing as a whole. The concept of the 'reasonable person' is drawn from the common law system and means that the life experiences, values and opinions held commonly in a majority of the community is to be the benchmark.
17. The Company argues that the marketing copy is consistent with the ABAC standard. It is pointed out that the description of the brewing method of the product is accurate and fruit is added to malted barley and wheat. Further this method does involve probiotic lactobacillus in the fermentation process. It is acknowledged that lactobacillus bacteria are found in a healthy human gut, but it is contended the reference to 'so it's good for the gut' is a humorous play on the common understanding of a probiotic being taken to promote gut health and wouldn't be taken as a serious suggestion that beer would offer such a health benefit. This is reinforced by the words - 'Well sort of!'. The later mention of 'Had your fruit today?' is explained to be a reference to the fruit content in the brewing process and wouldn't be taken as offering any health advice.
18. Evidently the marketing description has been understood by the complainant quite differently from that intended by the Company. The Company believes the marketing will be appealing to an audience of 'knowledgeable, adventurous beer drinkers' looking for styles and flavours of beers outside the norm. To the Company, its audience will readily understand the marketing is humorous highlighting that neither fruit nor lactobacillus are typical beer ingredients. The complainant seems to take the description without seeing any intended humour and hence the '-so its good for the gut' statement (even with the conceded caveat of '-well sort of') is to be interpreted literally.
19. Humour in marketing is a common technique and is a relevant consideration in how a reasonable person will probably understand a marketing communication. Australians have a robust sense of humour and will generally understand when a serious claim is being made and distinguish this from an item which is light-hearted or ironic. That said, humour is not an antidote to an alcohol marketing communication which is evidently inconsistent with an ABAC standard. In other words, it is quite possible for an advertisement to be funny and clever while promoting a message about alcohol which is a breach of a required standard.
20. The Panel believes the reference in the final sentence of the copy to 'Had your fruit today' would be understood as a sum up of the entire ad and refers to the product as a whole and wouldn't be taken as making or implying any health benefit claims.

The statement reading – ‘so its good for the gut! Well sort of! - is more finely balanced. If it was taken literally and in isolation to the balance of the description in the ad, it would suggest the consumption of the product might have a positive health benefit to the gut. However, the Panel believes the more probable interpretation is that it is a tongue in cheek reference to the brewing method using probiotic lactobacillus, which brings to mind products like yogurt, but a reasonable person would not take that a claim about the product offering positive health benefit is being made.

21. The complaint is dismissed.