



## ABAC Adjudication Panel Final Determination No. 46/20

**Product:** Peach Lemonade  
**Company:** Boston Brewing Co  
**Media:** Packaging & Instagram Post  
**Date of decision:** 27 May 2020  
**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 the packaging and an Instagram post for Peach Lemonade by Boston Brewing Co (“the Company”) and arises from a complaint received 6 May 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 6 May 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 packaging and Instagram post is referred to in the complaint.



## The Complaint

11. The complainant is concerned that:
- the packaging names the product “Peach Lemonade”;
  - the product looks like a soft drink;

- the front of the can doesn't mention alcohol content or that it is a hard seltzer which is an alcohol category; and
- the product could appeal to children if they saw this in the fridge – 'Peach Lemonade' does not scream adult alcoholic beverage.

### **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 12 May 2020. The principal points made by the Company were:

- The peach lemonade flat can shows that the can does indeed depict the 4%ABV and 1.2 Standards drinks. It also shows the image depicting not to drink when pregnant. This product is an alcoholic lemonade and the description is used to describe the flavour profile of the product.
- The comment that this is advertising to children is not true. Our business is Boston Brewing Co. It is a brewing company and targeted to 18+ only. Children should not be on our Facebook or Instagram pages. I think it raises more concerns relating to parenting and what children are able to access. Regarding whether it is in a fridge at a parent's house this is also a concern around the parents. If a child is able to read the word "lemonade" then they should also be at an age that they are able to understand what they are allowed to drink and what is for their parents or it should be kept out of reach. As discussed above, the information is on the can however I do concede that

the post should say alcoholic lemonade on it and we will change the label on the next print runs to depict this.

- We did not seek approval prior to the release of this artwork as it was a trial run before we move the product to a permanent can. The current artwork is a can wrap which was designed to see how well the product did in the market and gauge its response. The revised can wrap which will be printed on the next run is as follows.



- A more permanent can wrap with artwork will be vetted through you prior to release to ensure it meets all standards. Lastly the post has been amended to say alcoholic as depicted below.



## The Panel's View

15. Denmark in the Great Southern region of Western Australia is the base of the craft beer manufacturer, Boston Brewing Co. After commencing operations in 2011 the Company has expanded with a second location, opening in late 2019 in Victoria Park. The Company produces a range of beer types each presented with a packaging design which features the Company logo of a stylised bird and the Company name. Recently, the Company released a trial run of a 'peach lemonade' product and it is the packaging of this product together with an Instagram post highlighting the beer which has attracted the complaint.
16. On 20 May 2020 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.
17. The complainant contends that the packaging of the product could appeal to children due to the use of the name peach lemonade, the packaging's appearance

(a beer can) and no mention of the product's alcohol content. The ABAC provides that an alcohol marketing communication (which includes a product's name and packaging) must not have strong or evident appeal to minors (under 18 years old). This standard could be breached by the marketing communication:

- specifically targeting minors;
  - having a particular attractiveness for a minor beyond the general attractiveness it has for an adult; or
  - using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to minors or create confusion with a soft drink.
18. The Company argues that there is little likelihood of the product appealing to minors or being confused with a soft drink. It is contended that:
- the product is marketed towards adults and parents have a responsibility to ensure that children understand it is not suitable for them if the product is within the home, such as in the door of a refrigerator;
  - the can does mention its alcohol to volume content (4%) and that it is equivalent to 1.2 standard drinks;
  - the style of the product is an alcoholic lemonade and hence the term lemonade is used to describe the flavour profile of the product; and
  - future print runs of the can label and social media posts will say the product is an alcoholic lemonade.
19. In assessing if an ABAC standard has been complied with, the Panel adopts the probable understanding of the marketing item by a reasonable person taking its content as a whole. This means the life experience, values and opinions common in a majority of the community is the benchmark.

#### The Product Packaging

20. The Panel has considered the 'strong and evident appeal to minors' standard in relation to earlier complaints concerning product packaging and from these decisions some factors to weigh up include:
- the use of names, colours, fonts, imagery and overall messaging that appeal strongly to minors;
  - imagery that creates confusion with a soft drink such as the presence of visual design features that would be commonly used on non-alcoholic beverages like fruit images, bright block colours, and the use of a font style used on soft drinks;
  - names and descriptors commonly associated with soft drinks like orange, lemon, blueberry, pop, smash, milkshake etc; and
  - the physical container used and whether this is often used by soft drinks or fruit juices such as a prima style juice box or a clear plastic used with icy poles.
21. It is noted that the ABAC does not contain an express standard that packaging must unambiguously identify the product as being an alcoholic beverage. A failure to do this, however, will be another factor which may lead to the product being

confused with a soft drink and hence contribute to the packaging having strong appeal to minors.

22. In assessing packaging, such as a beer can, it cannot be expected that a reasonable consumer will study the can in fine detail by turning it around the full 360° and seeking out small print details. Hence, the overall impression of the packaging will be far more influenced by the front of the product's packaging, larger lettering and its prevailing colour scheme and most prominent design features.
23. Drawing all this together, the Panel believes on balance that the packaging does breach the ABAC standard. In reaching this conclusion the Panel has noted:
  - the predominately black colour plate of the can is mature and would not be particularly attractive to minors nor would the design and use of the Company name;
  - on the other hand, the product name, 'peach lemonade', particularly the reference to lemonade would be far more associated with a non-alcoholic drink and lemonade is a common and popular drink for minors;
  - the packaging does not overtly identify the product as alcoholic with references to its alcoholic nature found in smaller print and on the back and side of the can, compared to the more prominent references to lemonade on the front of the can;
  - other cues as to the nature of the product, such as the description of 'sweet, peach, refreshing', are neutral at best and may slightly increase the appeal of the packaging towards minors when combined with the term 'lemonade';
  - taken as a whole, the packaging would be taken by a reasonable person as having evident appeal to a minor.
24. The Company has alluded to its intention to modify the packaging in a subsequent run, to give greater emphasis to the product's alcoholic nature. The Panel, however, is obliged to make its decision on the packaging as it was at the time of the complaint. The Company can seek approval of the ABAC pre-vetting service when modifying its packaging.

### The Instagram Post

25. The complaint also went to an Instagram post which features a picture of the product on a table with a sliced peach and lemon. The accompanying text introduces the product as -'The ever refreshing and tangy Peach Lemonade!'. It follows from the conclusion on the product packaging that the post is also in breach of the Part 3(b) standard. This is further reinforced by the text which, taken with the picture, further downplays that the product is alcoholic and would add to potential confusion with a soft drink and strong appeal to minors.
26. Accordingly, the Panel makes a final determination that the product packaging and Instagram Post is in breach of Part 3 (b) of the Code.