



ABAC Adjudication Panel Final Determination No. 84/20

Product: Bounty Hunter Toasted Coconut Milk Choc Stout
Company: Dainton Brewery
Media: Packaging
Date of decision: 21 July 2020
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Richard Mattick

Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) concerns the packaging for Bounty Hunter Toasted Coconut Milk Choc Stout by Dainton Brewery (“the Company”) and arises from a complaint received 17 June 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 June 2020.
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 is referred to in the complaint.



The Complaint

11. The complainant is concerned that the packaging appeals strongly to minors by:

- references to the beloved Star Wars character, Boba Fett (who is depicted in both live action and cartoon animation form in Star Wars collateral), by both the illustration of Boba Fett in his armour and also the name of the beer "Bounty Hunter" which also describes the Boba Fett character's activities in Star Wars; and
- references to the Bounty bar in the illustration, the name and the ingredients/style, where bounty bars are confectionary and likely to create a strong appeal to minors.

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 26 June 2020. The principal points made by the Company were:

- Dainton Brewery is not a signatory to the ABAC scheme and as such is not contractually required to meet ABAC standards or to comply with the ABAC Adjudication Panel's decisions. However, Dainton Brewery acknowledges the important role of ABAC in the industry and is committed to fully cooperating with the ABAC adjudication process. Furthermore, Dainton Brewery will ultimately accept the ABAC ruling and comply with any determinations made.
- Dainton Brewery denies that the packaging of this product breaches Part 3(b)(i) of the Code as it does not have strong or evident appeal to minors or create confusion with confectionary or soft drinks.
- Name and Imagery is reminiscent of Boba Fett from Star Wars - Dainton Brewery does not deny that there is a reference in the name and imagery to Boba Fett, a character from the popular Star Wars franchise. Though this reference exists, we do not believe that the reference to this character or franchise meets the definition of "strong or evident appeal to minors" as set out in the ABAC Code. We deny that the reference to Boba Fett is "specifically targeted at minors" or that it has "a particular attractiveness for a minor beyond the general attractiveness for an adult." We refute the claim that any reference to Star Wars is in breach of Part 3 (b)(i) of the Code. Research has shown that the average Star Wars fan is a male between the ages of 18 to 44. The imagery on this packaging was intended to predominantly appeal to our target demographic which is males between the ages of 25 and 44 years old.
- The animated image on the can of an action hero shooting at chocolate bars, reminiscent of a comic strip or animated cartoon - Dainton Brewery refutes the claim that using an animated image on packaging automatically implies that there is strong or evident appeal to minors. One only has to peruse a local bookstore or browse through the Netflix library to find innumerable examples of both comic strips and animated cartoons that are not suitable or aimed at minors. In the case of the animated image used on this packaging, we believe that this image does not have "a particular attractiveness for a

minor beyond the general attractiveness it has for an adult.” It is an image that is designed to appeal to our target demographic for males between the ages of 25 and 44 years old.

- The name “Bounty Hunter” which is a play on “Bounty” chocolate bars, reinforced by images of chocolate bars on the can - Dainton Brewery does not refute that the name of the beer was, in part, designed to reference the Bounty chocolate bar due to the shared flavour profile. Whilst the name of the beer does contain this reference, it also references “Stout,” which we believe is a well-recognised alcohol descriptor.
- The product descriptor on the packaging references “choc milk” which is a non-alcoholic drink and flavour that strongly appeals to minors and the term ‘Stout’ not necessarily being recognised as an alcohol descriptor and no other obvious reference on the front of the can that the product contains alcohol - Dainton Brewery denies that the packaging references “choc milk.” The name of the beer is Bounty Hunter Toasted Coconut Milk Choc Stout. The style of the beer is a Chocolate Stout. This is a very well-known and recognised classification in brewing. This is a name given to a Stout beer that has a more noticeable dark chocolate characteristic brought about by the use of darker malts – particularly “Chocolate Malt” in the brewing process. This was shortened to “Choc” to better fit the label. We added ‘Milk’ to the description because we used lactose in the brewing process, which gives the beer a creamy consistency. Dainton Brewery also refutes that ‘Stout’ is not a recognised alcohol descriptor. Stout is a universally known beer style that has been around for centuries. We believe that this term is sufficiently widespread that a reasonable person would recognise this as an alcohol descriptor. Furthermore, Dainton Brewery refutes that there are no other obvious references on the front of the can that the product contains alcohol. Firstly, the ABV % is stated clearly on the front of the can. This is a very clear and obvious reference that the product contains alcohol. Secondly, as discussed above, the name of the beer contains the term “Stout” which we believe is a clear alcohol descriptor.
- For the reasons noted above, we do not believe that the packaging of this product breaches Part 3(b)(i) of the Code as it does not have strong or evident appeal to minors or create confusion with confectionary or soft drinks.

The Panel’s View

15. The Dainton brewery and Taphouse is located in the Victorian town of Carrum Downs. The facility was opened in 2016 and was founded by Dan Dainton. Mr Dainton first produced his own commercial craft beers in 2013 following some success as an amateur brewer and working as a brewer for James Squires. The Company now brews and distributes an extensive range of core and limited release beers. This determination concerns the packaging (can design) for the limited release Dainton 'Bounty Hunter - Toasted Coconut Milk Choc Stout'.
16. On 6 July 2020 the Panel made a provisional determination that the product packaging was in breach of Part 3 (b)(i) 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 not sought a rehearing and the Panel has proceeded to make a final determination of the complaint.

17. The complainant argues that the packaging appeals strongly to minors through two key themes namely:
 - being based on a depiction of the Stars Wars character Boba Fett; and
 - using 'Bounty Bars' which are a well-known confectionery.
18. The ABAC in Part 3(b) provides that 'strong or evident' appeal to a minor might arise if a marketing communication:
 - specifically targets minors;
 - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; and
 - uses imagery, designs, motifs or cartoon characters that are likely to appeal strongly to minors or that create confusion with confectionary or soft drinks.
19. The Company is not an ABAC signatory but is committed to the responsible service and marketing of alcohol and has cooperated fully with the complaint process. In a thoughtful response to the complaint, the Company contends that the packaging is consistent with the Part 3(b) standard of the ABAC. The Company argues that while the imagery on the can does reference both Boba Fett of the Stars Wars franchise and Bounty Bars, the packaging does not have strong appeal to minors due to:
 - the Boba Fett character not specifically targeting minors or having an appeal to minors beyond the general attractiveness it has for an adult. It is pointed out that the average Star Wars fan is a male aged between 18 to 44 with the target audience for the product being predominately males aged 25 to 44;
 - while the images used resemble animation, many examples of animation are directed towards adults and are not suitable for minors and the images used on the can appeal to the older demographic of 25 to 44 year olds;
 - the product name, in part, alludes to the Bounty chocolate bar because of the shared flavour profile to the beer, and in addition the use of the word 'bounty' is contextualised through the term 'stout' which is a well-recognised alcohol descriptor; and
 - the product uses the descriptor 'toasted coconut milk choc stout' as the style of beer is a chocolate stout which is a well-known classification in brewing. The term milk is used because lactose is used in the brewing process. The term stout will clearly identify the product as alcoholic as does the ABV% on the front of the can.
20. As is clear from the Company's response, the complainant is correct in believing the can design draws inspiration from Boba Fett, a character from the Stars Wars franchise. It is fair to say that Stars Wars has become one of the most successful entertainment franchises of all time. The original movie was released in 1977 and over the decades the popularity of the franchise has been built by subsequent movies, television series, comics, books and merchandise extending from toys to clothing. The franchise is now owned by the Disney Corporation.

21. Within the Stars Wars universe of characters Boba Fett is not a principal figure but one which has developed a noticeable following amongst fans. The character first appeared in the second movie 'The Empire Strikes Back' and has been reprised in several of the subsequent movies. Boba's father ,Jango Fett, is the source for the clones which are a backdrop storyline in one of the prequel trilogy of movies and a short origin backstory of Boba Fett is shown in 'Attack of the Clones'. More generally, bounty hunters have become the source of freestanding plots in the Stars Wars franchise with the recent Disney streaming series 'The Mandalorian' based on the experiences of a bounty hunter.
22. While Boba Fett is established within Star Wars lore, the character would not be as instantly recognisable to an average community member compared to the principal characters in the franchise. For instance, the video game and entertainment website IGN rates Boba as the eighth most popular Star Wars character. It is likely that a depiction of Boba would be readily recognised by a committed Star Wars fan and less so to a community member who is certainly aware of Star Wars and its three or four enduring main characters, but less knowledgeable of sub characters.
23. The can design also shows chocolate bars, which the Company does not refute are a nod to the confectionery, Bounty Bars. Bounty Bars were first introduced to the United Kingdom in 1951 and have extended to other markets including Australia. The sweet consists of a coconut filling covered in chocolate with distinctive rounded ends. The chocolate was rated as the 14th most popular chocolate product in Australia in a Roy Morgan research report released in 2016.
24. In assessing if an alcohol marketing communication is consistent with a Code standard the Panel is to adopt the probable understanding of the marketing material by a reasonable person taking its content as a whole. This means that the life experience, values and opinions common in a majority of the community is to be the benchmark. If the message to be derived from the marketing item can be understood in several ways, then it is the most probable interpretation which is to be preferred over a possible but less likely interpretation.
25. Some characteristics within a marketing communication which may make it strongly appealing to minors include but are not limited to:
 - the use of bright, playful and contrasting colours;
 - aspirational themes that appeal to minors wishing to feel older or fit into an older group;
 - illusion of a smooth transition from non-alcoholic to alcoholic beverages;
 - creation of a relatable environment by use of images and surroundings commonly frequented by minors;
 - depiction of activities or products typically undertaken or used by minors;
 - language and methods of expression used more by minors than adults;
 - inclusion of popular personalities of evident appeal to minors at the time of the marketing (personalities popular to the youth of previous generations will generally not have strong appeal to minors);
 - style of humour relating to the stage of life of a minor (as opposed to humour more appealing to adults); and
 - use of a music genre and artists featuring in youth culture.

26. It should be noted that only some of these characteristics are likely to be present in a particular marketing communication and that the presence of one or even more of the characteristics does not necessarily mean that the marketing item will have strong or evident appeal to minors. Each case must be assessed on its own merits and it is the overall impact of the marketing communication rather than an individual element which shapes how a reasonable person will understand the item.
27. The Panel does believe the packaging would have strong or evident appeal to minors. In reaching this decision the Panel noted:
- the Boba Fett character would be recognised by some consumers, including minors, however the character's strongest appeal is likely to be with dedicated Star Wars fans who generally are probably of an older demographic than under 18 year olds. This can be contrasted with the appeal and recognition of enduring principal Star Wars characters such as Yoda, Darth Vader, Kylo Ren and Princess Leia;
 - the 'Bounty Bars' reference would be recognised across age groups, including minors, and brings to mind a confectionery far more than an alcoholic beverage;
 - the can depicts an action scene which would have appeal across age groups;
 - the colour palette is bright and eye catching;
 - the description 'toasted coconut milk choc stout' particularly 'milk choc' would be far more associated with a non-alcoholic drink than a beer;
 - the term 'stout' would be recognised by beer drinkers and the abbreviation 'ABV' is used in small font on the front of the can, however the overall impression created by the most impactful features of the can is not of an alcohol beverage and may create confusion with a soft drink; and
 - while no one element in isolation means the packaging has strong or evident appeal to minors, taken as a whole the packaging would be regarded by a reasonable person as having strong appeal to minors.
28. Accordingly, the Panel makes a final determination that the product packaging is in breach of Part 3(b)(i) of the Code.