



ABAC Adjudication Panel Final Determination No. 101/20

Product: Breakfast Juice
Company: Currumbin Valley Brewing
Media: Packaging
Date of decision: 25 August 2020
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Louisa Jorm

Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) concerns the packaging for Breakfast Juice by Currumbin Valley Brewing (“the Company”) and arises from a complaint received 17 July 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”) – 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 July 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 if a kid opened the fridge and grabbed a can, it is identical labelling to breakfast juice.

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 July 2020. The principal points made by the Company were:

- Currumbin Valley Brewing is a small, family-owned brewery operated solely by co-founders, Peter Wheldon and Luke Ronalds, located on Peter's private residence and farm. We are only permitted to produce a maximum of 40,000L of product per year. Historically, around 30% of our sales are via online direct to consumers with the remaining portion going to retailers. However, during the COVID-19 pandemic, we have had to increase our ratio of product sold to off-premise retail outlets to ensure business sustainability.
- With respect to Currumbin Valley Breakfast Juice:
 - We produced approximately 200 cases of 24 x 375mL cans.
 - 47% of the 200 cases were sold to independent off-premise retailers with the remaining 53% sold direct to consumers via online sales.
 - Our label was designed by our Brazilian illustrator Pedro Correa. His illustration style is diverse but does not have strong or evident appeal to minors, in our opinion, which is why we chose him for our products. Please see below for examples of his work.



- We refute the complainant's assertions that stylised illustrations of fruit, plants and eyeballs are of strong and evident appeal to minors. The can artwork on Breakfast Juice is simply an illustration of fruit, flowers, hops, malt, eyeballs, plant leaves and does not contain any cartoon-like characters that, if present, would indeed be of strong and evident appeal to minors.
- Breakfast Juice was named so as to describe the hazy, orange appearance and fruity, juicy flavour characteristics imparted by the heavy use of hops in this product. The can design mentions that the product is a Hazy IPA on the right side of the can wrap. IPA is a well known acronym for "India Pale Ale" - a common and popular style of beer sold in Australia - which we believed to be a clear alcohol descriptor. Upon further research of the ABAC Alcohol Packaging Guidelines 2019, we do accept that the use of the acronym IPA is insufficient as an alcohol descriptor and that we should have used the term

“India Pale Ale” which would have been sufficient as it contains the acceptable alcohol descriptor, “ale”.

- The can design does mention the word BEER on the left side of the can wrap with our B e E xcellent E njoy R esponsibly acronym and campaign which we include on all our beers to promote responsible consumption of alcohol and our products. This can be viewed on a section of the can wrap image that is shown below. We understand that this is not prominent on the front face of the can and may not be noticed by all consumers. We do accept that the use of the Breakfast Juice name without a clear alcohol descriptor could potentially be mistaken for a non-alcoholic fruit juice beverage. We accept that there was no clear alcohol descriptor and no prominent reference to alcohol on the front face of the can.



- As Currumbin Valley Brewing is not a signatory to the ABAC code, there is no requirement for the company to remove this product from the market. However, as stated before, we respect the vital role ABAC plays in the liquor industry and if this complaint is upheld, we will retire the Breakfast Juice beer name, label and imagery once we have run through the remaining label stock in our possession (approximately 100 cases). Unfortunately, as a small business, we are unable to endure the financial impact that immediate disposal of labels would have on our business, especially during this economic downturn. We trust that you understand our position.

The Panel's View

15. Luke Ronalds and Peter Wheldon are founders of Currumbin Valley Brewing located in the hinterland of Queensland's Gold Coast. The gentlemen commenced commercial craft brewing in 2016 as 'gypsy brewers' before establishing a permanent facility on Peter's farm in 2017, with a first production run occurring in October 2018. The Company produces a range of different small run craft beers including a New England or Hazy Indian Pale Ale (IPA) named 'Breakfast Juice'. It is the packaging (product name and can label design) of the Breakfast Juice IPA which has attracted a complaint leading to this determination.
16. The Company is not a signatory to the ABAC Scheme and hence has not made a contractual commitment to abide with the Code or the outcome of the complaint process. That said, the Company has fully cooperated with the adjudication process and has expressed its strong commitment to responsible marketing practices. Further, the Company has acknowledged that there are some changes which could be made to the product packaging to bring it into line with ABAC standards.

17. On 8 August 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.
18. The complaint has raised a concern about the appeal of the product packaging to minors (under 18 year olds), particularly its potential to be confused with a non-alcoholic juice or soft drink. The ABAC provides at Part 3(b)(i) that an alcohol marketing communication (which includes a product name and labelling) must not have strong or evident appeal to minors. This standard might be breached if the marketing item:
 - is specifically targeted at minors;
 - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; or
 - uses imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to minors or that create confusion with confectionary or soft drinks.
19. In assessing if a marketing communication is consistent with a Code standard the Panel is to adopt the standpoint of the probable understanding of the marketing item by a reasonable person. This means that the life experiences, opinions and values commonly found in a majority of the community is the benchmark.
20. The Company explains that the artwork used on the product packaging was designed by a Brazilian illustrator Pedro Correa. It is argued that the stylised illustrations of fruits, plants and eyeballs would not appeal to minors. It is conceded, however, that while the labelling does have a number of references to the product being an alcohol beverage, these references are not on the front of the can and may not be sufficiently clear to identify the product as a beer.
21. It should be noted that the ABAC does not contain a free-standing provision that an alcohol product must be clearly identified as an alcohol beverage as such. The Australian New Zealand Food Standard does require that beverages containing more than 0.5% alcohol by volume include on the product label advice as to the alcohol to volume percentage, but this regulatory requirement can be satisfied by small font notations of the alcohol content. This means a failure to prominently identify the beverage as alcoholic will not therefore of itself be a breach of the ABAC, but this failure will be a possible factor in assessing if the product packaging might be strongly appealing to minors by the product being confused with a soft drink.
22. The product uses the name 'Breakfast Juice'. The Panel recognises that 'juice' and 'juicy' are descriptors used for particular craft beer styles such as IPA, but it is also fair to say that in the general community such terms when describing a beverage would be much more readily associated with non-alcoholic beverages such as fruit juice or soft drinks. It means that if such terms are used in alcohol beverage marketing, more work needs to be done to otherwise establish the product is alcoholic or a clear risk arises of the product being confused with a soft drink and with this the potential of the product's packaging appealing to minors is elevated.

23. The Panel does believe the packaging is in breach of the Part 3(b)(i) standard. In reaching this conclusion, the Panel noted:
- the name 'Breakfast Juice' when combined with the stylised fruit images used on the product labelling strongly suggests that the product is non- alcoholic;
 - the cues used on the labelling to identify the product as a beer are not visually prominent, particularly on the front of the can, which a reasonable person will, most likely, most heavily rely on when forming an impression of the product;
 - while the style of the artwork used on the can is not considered of a type which would appeal strongly to minors, this does not sufficiently mitigate from the appeal to minors overall created by the combination of the product name, the fruit images and the failure to clearly identify the product as an alcoholic beverage; and
 - taken as a whole, the packaging is likely to strongly appeal to minors.
24. Accordingly, the Panel makes a final determination that the product packaging is in breach of Part 3(b)(i) of the Code.