



ABAC Adjudication Panel Final Determination No. 112/20

Product: Juicebox IPA
Company: Land & Sea Brewery
Media: Packaging
Date of decision: 11 August 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 for Juicebox IPA by Land & Sea Brewery (“the Company”) and arises from a complaint received 5 August 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

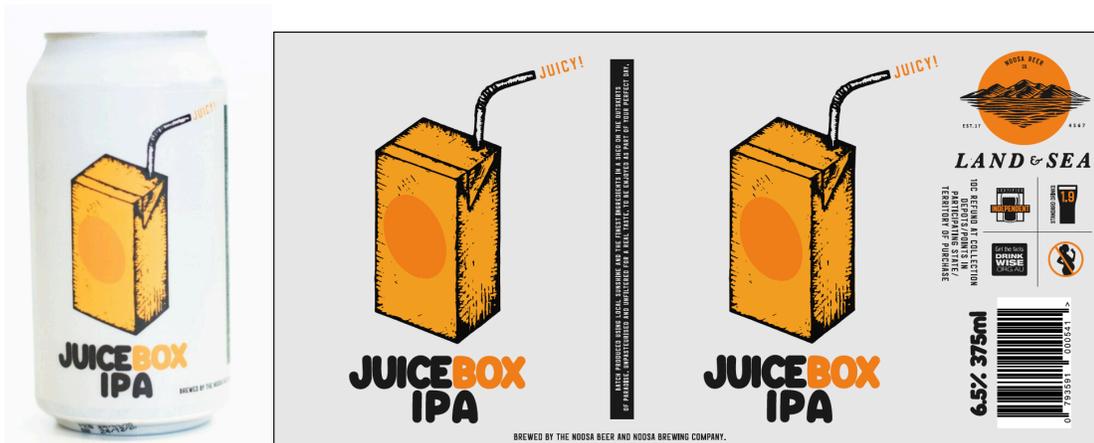
7. The complaint was received on 5 August 2020.
8. Generally, the Panel endeavours to make a decision within 30 business days of the receipt of a complaint but this timeline is not applicable due to the two-part process involved in determinations concerning product names and packaging.

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 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 name and image of a “juice box” on an otherwise blank can implies that the same contents as would be found in a juice box are provided in the can format. Also, a child who is used to drinking juice from a juice box may think that this can also contains non-alcoholic 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 email dated 7 August 2020. The principal points made by the Company were:
 - I can see an argument regarding appeal to minors in some capacity, the rationale behind the design was to promote the presence of citrus style fruit flavours within the beer itself with this style of beer being aimed at the more niche end of the craft beer market where it is important to stand out on a shelf of similar designed bright cans. We used to sell this product as a can similar in design to the rest of our core range (<https://www.landandseabrewery.com/beer>) but for this niche style we were lost in the crowd somewhat so we decided to be a bit more direct and bold with our design and this was the outcome.
 - I would be happy to hear feedback as to what changes we could make to the design in order to make it compliant (if it is deemed to be non-compliant). As we would rather keep and use the concept of the idea than to revert to the standard core range look of our other beers (for niche reasons stated above).
 - I'll await your feedback from the Panel and we will re-design/change accordingly if necessary, obviously there is a cost to do this and also I want to limit the ongoing loss of sales if any new design will have less appeal.

The Panel's View

15. The Land and Sea Brewery is located in Noosaville at the northern end of Queensland's Sunshine Coast. The brewery opened in 2018 and the Company has found success with its range of beers including the award of a gold medal at the Independent Beer Awards in 2019. One beer in the Company's range is a New England style India Pale Ale (IPA) branded as 'Juicebox IPA'. The packaging (product name and labelling) of this product has attracted a complaint leading to this determination.
16. The Company is not a signatory to the ABAC Scheme and hence has not contractually bound itself to abide by the Code or the outcome of the complaint's process. The Company has however fully engaged in the adjudication process and expressed its willingness to modify its packaging if determined to be inconsistent with the relevant ABAC standard.
17. On 10 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 accepted the Panel's decision and the Panel has proceeded to make a final determination of the complaint.
18. The complainant believes the product name and label is irresponsible. It is argued the positioning of an image of a 'juice box' and the name on a plain white can implies

the product would have the same contents as found in a juice box. This is contended to cause confusion with a fruit juice and appeal to children. This concern raises the ABAC standard contained in Part 3(b)(i) which provides that an alcohol marketing communication must not have strong or evident appeal to minors. One way this might be breached is if the packaging uses imagery and designs that are likely to appeal strongly to minors or that create confusion with soft drink.

19. The Company explains the rationale for the packaging design was to promote the citrus style fruit flavours of the beer while attempting to stand out in a crowded market with similarly designed bright cans. An earlier labelling design which followed the Company's overall branding protocols used on its other products became 'lost in the crowd somewhat' and the current product packaging was more direct and bolder to overcome this problem. The Company now accepts that the packaging could appeal to minors in some capacity and feedback to make the design compliant would be welcomed.
20. The packaging design does clearly raise the prospect that the product might be confused with a soft drink. This arises from:
 - the depiction of a juice box image;
 - the colour palette which could well imply that the product contains fruit juice;
 - a failure to clearly identify the product as being an alcohol beverage, particularly on the front of the can (noting a consumer will take most of their cues about a product from the front packaging design as opposed to side and rear of the packaging);
 - reliance on the term 'IPA' which would not have the same recognition factor in the wider community as it does amongst craft beer drinkers; and
 - use of the word 'juicy!' positioned next to the juice box straw image which further suggests the product is a fruit juice.
21. It should be noted that the ABAC does not contain a freestanding standard which requires an alcohol marketing communication to unambiguously identify a beverage as being alcoholic. Rather, the failure to do this comes into play if the marketing causes confusion with a soft drink and in doing so contributes to the marketing material having a strong appeal to minors.
22. The Panel does believe the packaging to be inconsistent with the Part 3(b)(i) standard. In reaching this conclusion the Panel noted:
 - the name 'JuiceBox' and the image of a juice box suggests the product is a fruit juice akin to that found in a prima juice box used extensively by minors;
 - the lack of clear alcohol descriptors on the front of the can could well cause confusion with a fruit juice;
 - even if recognised as an alcohol beverage, the name and juice box imagery give an illusion that the product could be a smooth transition from a non-alcoholic to alcohol beverage for a minor;
 - the imagery used on the packaging is familiar to minors and would likely have an attractiveness to minors beyond its attractiveness to adults; and
 - taken as a whole, a reasonable person would believe the packaging has strong appeal to minors.

23. Accordingly, the Panel makes a final determination that the product packaging is in breach of Part 3(b)(i) of the Code.