



ABAC Adjudication Panel Final Determination No. 70/20

Product: Choc Milk Stout
Company: Howler Brewing
Media: Packaging
Date of decision: 27 July 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 Choc Milk Stout by Howler Brewing (“the Company”) and arises from a complaint received 29 May 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 29 May 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 about the product using the same label layout and colours as a tin of Milo with his young primary school aged children thinking it was a drink of Milo in the fridge at home.

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 Responses

14. The Company responded to the complaint by letter dated 10 June 2020. The principal points made by the Company were:
- We are not going to argue as to whether our label is aimed to encourage children to drink, because simply IT.... IS ... NOT. We are not trying to expand our customer base into the children and adolescent market. We do not believe our label is going to start an onslaught of underage drinking because one child (maybe, we will never know the motivations of the complainant) looked twice at our can.
 - We of course know what the outcome will be of today's panel, looking at your previous judgements.
 - We believe there are three protections in our society to police underage drinking, that work reasonably well, and that craft beer is not the trojan horse that is going to undermine these protections.
 - A child by law cannot walk into a bottle shop and buy alcohol underage.
 - A child by law cannot walk into a bar and purchase alcohol underage.
 - Parental guidance and care, a simple task of explaining that is not Milo, but a can of stout. A drink that you will in no way enjoy, and if you do open it you owe me \$8, as they are bloody expensive.
 - This brings us to price point. How the craft beer industry is being targeted (and by who? Think about it?) is beyond us when there are drinks out clearly aimed at adolescents and young adults, high in alcohol, cheap and readily available. Craft beer is inherently expensive, one might grab 6 different cans and walk out of a bottle shop with very little change from a \$50 note. WE ARE NOT AIMING OUR BEER AT CHILDREN OR ADOLESENTS.
 - Again, we state, we have not aimed our beer at children, simply. And nor do we believe our label will encourage a child to start drinking.
 - This ABAC process is grossly unfair for the defendant, as one complaint from what could be a disgruntled customer, someone suffering, or an ultra-conservative (maybe the child in the complaint is also suffering) can derail a whole products design. Is the complainant, checked, notified, asked to respond to questions from us? Again, how can they hold all the power? They can (one person) completely change a name, look and marketing of one of our products, and why?
 - You hold all the power, if you decide the complaint justified, then you hang a guillotine over our heads that would virtually compromise any craft beer business from growing their wholesale market. This to us is the kicker, literally. Basically, the ABAC's mandate is "If we do not do what you say – then you will not be able to sell your beer to 65% of bottle shops in Australia". And that percentage is growing. Thanks.

- Finally, we also believe that what we do is Art – beer is art, the production is a scientific artform, the naming, label design and marketing are also a form of art, now we are censoring art, again I go back to the fact based on one complaint.

15. On 22 July 2020 the Company exercised its entitlement to a rehearing and made additional submissions. The principal points made by the Company were:

- We are struggling to find the words to describe our feelings towards the ABAC, the process you employ to deal with complaints and the power you and one person can wield, with no real recourse for us. We do understand there has to be structure and boundaries around marketing towards children, and we say this as we watch sophisticated and constant advertising by on-line gambling companies who groom our children daily.
- We quote this line from your findings "but the test is not the Company's intention but how the marketing communication would be probably understood by a reasonable person". We believe that a reasonable person would understand that the following parameters don't apply to our product:

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.

- Although one could argue that clause (iv) and (v) do relate to our product, we again use your phrase "understood by a reasonable person". We believe any reasonable person would understand that this product does not strongly appeal to minors and believe that this is reflected by the fact you only received one complaint from someone of whom we don't and won't ever know their motivation for complaining.
- A reasonable person would also understand that our beer (and most craft beer) is priced beyond the reach of minors.
- If evidence within the community showed there were minors everywhere getting drunk on Howler Stout and the ABAC received a flood of complaints,

then we would of course accept the ruling, but of course this is not the case at all.

The Panel's View

Introduction

16. On 22 June 2020 the Panel made a provisional determination that the packaging (can labelling) of the Howler Brewing Choc Milk Stout was in breach of Part 3 (b)(i) of the ABAC. On 22 July the Company sought a rehearing of this decision as provided under the Rules and Procedures applying to the ABAC Scheme when product packaging is found to be inconsistent with a Code standard. A rehearing means the Panel looks at the complaint afresh and makes a new decision taking into the account the complaint, the packaging and the arguments advanced, both initially and on requesting the rehearing, by the Company.
17. The complaint raises the consistency of the can branding of the Choc Milk Stout with the ABAC standard which provides that an alcohol marketing communication must not have a strong or evident appeal to minors. According to the guidance found in the definition of 'Strong and Evident Appeal to Minors' in the Code definitions, a breach might arise if the packaging:
 - is likely to appeal strongly to minors;
 - specifically targets minors;
 - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult;
 - uses imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to minors or that create confusion with confectionery or soft drinks;
 - uses brand identification, including logos on clothing, toys or other merchandise for use primarily by minors.
18. The complainant contends the strong and evident appeal of the packaging arises because the can uses the same layout and colours of the non-alcoholic milk additive, Milo. The similarity is argued to mean that the product branding may be readily identified by minors, strongly appeal to minors and cause confusion with the non-alcoholic Milo drink.
19. The Company responds to the complaint both in its original submission and second submission seeking a rehearing of the provisional determination, at two levels. Firstly, the Company questions the fairness and utility of the ABAC Scheme and secondly, it contends that a reasonable person would not consider that its product has a strong appeal to minors. It is the second argument rather than the first that falls within the remit of the Panel and will be the focus of this determination - namely does the product packaging have strong or evident appeal to minors. Given, however, the extent of critique by the Company on the ABAC Scheme and its place within the wider regulatory framework applying to alcohol, it is appropriate to provide a brief response on these points.

Does the packaging have strong or evident appeal to minors

20. The complainant contends the Choc Milk Stout can design uses the same label layout and colours as a tin of Milo. The Milo packaging design features:

- a mid-green background colour;
 - a paint palette shaped white background area in which the brand names are placed;
 - the brand name Milo in large font and coloured brown;
 - a smaller font Nestle brand name in red; and
 - typically, a sports image (cricket, netball, cycling, football).
21. Milo is a product familiar to most Australians and was originally developed and manufactured by Nestle in Smithtown near Kempsey in 1934. It is made with malt, barley, milk powder, sugar and cocoa and is drunk mostly with milk or with hot water and milk. It has become a hugely successful product with 6.5 billion glasses or cups of Milo consumed worldwide each year. Australian consumption is estimated to be 480 million serves of the drink annually. Milo is also available as a breakfast cereal and a snack bar.
22. While Milo would be consumed across age groups, its primary market is children. The website for Milo clearly indicates the focus of the product with references such as 'Since 1934 Milo has been giving active kids what they need to get the most out of every day.' The website also details the relationship the brand has with children's sports. Consumption data was not placed on the website, but other sources indicated the largest consumer group for the product is children aged 8 to 14. The Australian Health Survey published by the Australian Bureau of Statistics lends further weight to the conclusion that Milo is heavily consumed by minors. The Survey shows flavoured milk is used most extensively in the 9 to 13 and 14 to 18 age segments.
23. There can be no doubt that the Choc Milk Stout can design is drawn from the Milo packaging. The Company has employed a similar green background colour, similar white paint palette area for brand names, and a similar colour for the 'Stout' and 'Howler' names compared to 'Milo' and 'Nestle' on the Milo packaging. There are differences between the Company's design and the Milo design, but these differences do not distract from the overall impression that the Company's can is a play on the Milo packaging. The issue is whether this homage to the Milo design can be concluded to give the Company's product packaging strong or evident appeal to minors.
24. The Company in its original and rehearing submissions did not purport to argue that its packaging was not based on the Milo design, nor that its purpose was not to bring Milo to mind. Presumably the Company is seeking to emphasise the style of beer and to potentially create a sense of light-hearted nostalgia in adult consumers. Rather the Company arguments (aside from the critique about the operation of the ABAC Scheme) are based on the contention that a reasonable person would not believe the product would strongly appeal to minors. It's arguments can be summarised as follows:
- there was no intention for the can design to encourage underage drinking nor to expand the Company's market to children and adolescents and it is not considered this will happen;
 - the protections against underage drinking are laws which create the legal drinking age and which prohibit alcohol consumption by minors and sales to minors and the responsibility of parents to guide and supervise children about alcohol;

- a reasonable person would understand that our beer (and most craft beer) is priced beyond the reach of minors;
 - any reasonable person would understand that this product does not strongly appeal to minors and we believe that this is reflected by the fact ABAC only received one complaint from someone of whom we don't and won't ever know their motivation for complaining; and
 - if evidence within the community showed there were minors everywhere getting drunk on Howler Stout and the ABAC received a flood of complaints, then we would of course accept the ruling, but of course this is not the case at all.
25. In assessing if an alcohol marketing communication is consistent with an ABAC standard the Panel is to adopt the standpoint of the probable understanding of the marketing item by a reasonable person taking the content of the marketing as a whole. The notion of the 'reasonable person' is drawn from the common law system and means that the life experiences, values and opinions common in a majority of the community is to be the benchmark.
26. The Panel has made numerous previous decisions concerning the assessment of whether a marketing communication has strong appeal to minors. Some characteristics within a marketing communication which may make it strongly appealing to minors include:
- 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 uses 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 generation will generally not have strong current appeal to minors);
 - style of humour relating to the stage of life of a minor (as opposed to humour more probably appealing to adults); and
 - use of a music genre and artists featuring in youth culture.
27. It should be noted that only some of these characteristics are likely to be present in a specific marketing communication and 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.
28. While the Company has advanced its arguments with force, it has in effect conflated the product branding with the product itself. The Panel is not assessing the physical beverage and the appeal of the beverage to underage drinkers. Nor is the Panel undertaking a market analysis to determine the age and income profile of consumers of the product. The ABAC standards go to 'alcohol marketing communications' and how a reasonable person would probably understand the marketing, which is in this case, the appeal of the can label design to minors.

29. The Panel believes the packaging is inconsistent with the Part 3(b)(i) standard. In reaching this conclusion the Panel noted:
- the product packaging is clearly modelled on the packaging of the non-alcoholic product of Milo;
 - Milo is a product used to flavour milk and is consumed more heavily and appeals directly to minors;
 - the 'choc milk' term while intended to describe the character of the beer is more commonly a term used on non-alcoholic beverages;
 - the packaging (not the actual taste of the physical product) raises a strong inference of an alcoholic product that could be similar to chocolate milk and create a strong appeal to minors;
 - while the term 'stout' would be recognised by beer drinkers, the overall impression created by the packaging is not of an alcohol beverage and may create confusion with a soft drink; and
 - taken as a whole a reasonable person would probably understand the packaging as having a strong and evident appeal to minors.

Alcohol Marketing Regulation and the ABAC Scheme

30. As noted in paragraph 19, the Company's response to the complaint provided a critique of the ABAC process and the wider regulatory framework applying to alcohol marketing. In the Company's view, the ABAC process is unfair as:
- a single complainant can 'derail a whole product design';
 - a respondent alcohol company cannot ask questions of the complainant;
 - complainants 'hold all the power' and the motivation of a complainant is unknown; and
 - label design and marketing is a form of art and the complaint process is 'censoring art'.
31. In wider terms, the Company argues the safeguards against underage drinking are to be found in:
- parental responsibility;
 - liquoring licensing laws which make consumption and supply of alcohol to under 18 year olds illegal; and
 - the price point of Choc Milk Stout would put it out of reach of minors in economic terms.
32. As the Company's response demonstrates, the impact and regulation of alcohol marketing is a contested space within the wider public debate of how best alcohol should be available and used in the community. Views on regulation range from arguments that all alcohol marketing should be prohibited, and plain packaging mandated for alcohol products to the more libertarian view that marketing regulation is akin to unwarranted censorship as espoused by the Company. It is not the Panel's role to decide questions of public policy. Ultimately how alcohol marketing should or should not be regulated is a matter for government.
33. Australian governments have collectively resolved the public policy framework for alcohol via the National Drug Strategy and the associated sub strategies. One of the sub strategies is the National Alcohol Strategy 2019-2028. This sub strategy consists of four priority areas of focus, one of which is about reducing opportunity for the availability, promotion and pricing of alcohol to contribute to risky alcohol consumption. While the detail of the focus area is beyond the scope of this

determination, it is noted that government does believe that alcohol marketing needs to be regulated and that this extends to controls on alcohol promotion to protect at risk groups, including youth. The strategy notes regulation falls in a shared domain between State and Territory liquor licensing regimes and the industry-based codes and schemes including the ABAC. And it is common ground between the government regimes and the ABAC that alcohol marketing must not have strong appeal to minors.

34. As a Victorian based entity, the Company is regulated by the Victorian Commission for Gambling and Liquor Regulation. The Commission has issued a Guide to responsible advertising and promotion of liquor. The Guide articulates 16 principles for responsible marketing which are illustrated by examples of unacceptable practice. The principles and examples include:
 - Principle 14- Advertising or promotion of liquor must not encourage underage drinking. Unacceptable practice includes using characters, imagery, designs, motifs .. that are likely to appeal to minors.
 - Principle 15- The advertising or promotion of liquor must not incorporate images of people who are, or who appear to look under 18 years of age, unless there is no suggestion that they have just consumed or are about to consume liquor.
35. The requirements under the Victorian regime are similar to the Part 3(b) standard within the ABAC. Accordingly, while the Company may be of the opinion that the design of its can labelling is of no material impact on minors and that regulation of this marketing is unwarranted, this is not the position reflected under policy and regulatory regimes. Public policy does recognise the primary role of parents in guiding children in understanding the consequences of alcohol use and the need to make sensible choices. Both government and the alcohol industry however believe parental responsibility should be supported by alcohol marketing occurring consistently with standards of good practice.
36. The ABAC Scheme is at its heart a self-regulatory initiative of the alcohol industry. Alcohol producers and retailers agree to market their products and retail outlets consistently with the Code standards of good marketing practice. The Scheme is in three parts namely the Code, the pre-vetting service and the public complaints process. The Scheme is governed by a Management Committee comprising representatives of the alcohol industry, Communications Council and the Federal Department of Health on behalf of all Australian governments. The terms of the Code itself and the Rules and Procedures to which both the pre-vetting service and the complaint adjudication process abide are set by the Management Committee. Actual decisions on pre-vetting applications and complaint determinations are made completely independently of the Management Committee.
37. The ABAC Scheme and the complaints process has been the subject of several major governmental reviews since its establishment in 1998. In relation to the Company's critique, no review has found that the threshold for triggering a complaint determination should require multiple complaints. Further, it has not been suggested in reports which have reviewed the Scheme that the 'motivation' of a complainant should be subject to testing and questioning by alcohol companies. It might also be noted that in these respects the Australian practice is entirely consistent with international practice in both self-regulatory and direct government

alcohol marketing complaint schemes in New Zealand, Great Britain, European Union and North America.

38. It is recognised that an adverse determination on a product name and labelling is potentially very impactful on a producer. It is for this reason that the Rules and Procedures for the complaint adjudication process involving product packaging ensure that respondent alcohol companies are afforded additional procedural fairness steps than occurs with complaints about a single advertisement through:
- being supplied with the complaint and questions from the Panel so that the issues in contention are clearly identified for response;
 - being supplied with a provisional determination and afforded the opportunity to seek a rehearing;
 - the entitlement to make additional submissions to address the provisional findings; and if product branding is found in breach of the Code
 - the entitlement to gain a 'once and for all' clearance of revised product branding which then cannot be subject to a further complaint process.
39. Finally, it is noted that the Company had available to it the pre-vetting service to gain an independent assessment of its product branding prior to putting the product onto the market. While pre-vetting approval does not guarantee that a subsequent public complaint won't be made or the outcome of the independent complaint process, statistically very few marketing communications which have been pre-vetted against the Code standards are found to be in breach of the Code. It might have been both good practice and prudent risk management to have taken this simple measure.
40. The complaint is upheld.