



ABAC Adjudication Panel Final Determination No. 203/20

Products: Hoppy Passionfruit Sour (Cheeky Christmas Sour), S.A.N.T.A 10% ABV Christmas East Coast IIPA, Three Bears DDH Oatcream IPA and Sherby Summer Ale

Company: Cheeky Monkey Brewing Co

Media: Packaging

Date of decision: 21 January 2021

Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Louisa Jorm

Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) concerns a complaint received on 21 December 2020 about the packaging by Cheeky Monkey Brewing Co (“the Company”) of the following products (“the Products”):
 - Hoppy Passionfruit Sour (Cheeky Christmas Sour);
 - S.A.N.T.A 10% ABV Christmas East Coast IIPA;
 - Three Bears DDH Oatcream IPA; and
 - Sherby Summer Ale.

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:
 - (b) 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;

(c) 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 Code”) – 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 and Policies – which place 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 other codes as well as meeting the standards contained in the ABAC.
4. For ease of public access, Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the Ad Standards, 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 Ad Standards 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 the 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 21 December 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 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. ABAC pre-vetting approval was not obtained for the Products' packaging.

The Marketing Communication

10. The following product packaging is referred to in the complaint.



S.A.N.T.A 10% ABV Christmas East Coast IIPA

Hoppy Passionfruit Sour (Cheeky Christmas Sour)



Three Bears DDH Oatcream IPA

Sherby Summer Ale

The Complaint

11. The complainant objects to the marketing as follows:

- *The various Christmas themed beers, as well as the "Sherby" beer all have a very strong appeal to minors based on the cartoon Christmas character artwork.*
- *If this were in a fridge at home, a child would misinterpret it as a soft drink or children's beverage.*
- *Sherby is a lolly that I don't think has a strong appeal to adults.*
- *The Christmas cartoon themed products are very similar looking to the children's books I've just been reading my kids. If I showed them that artwork not attached to a can they would think it's a page from a children's Christmas themed book.*
- *A child isn't going to know that an IPA is a high strength hoppy beer. They will just see a snowman, Rudolph, Santa Claus and presents and think that it looks like something for a child.*

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. Definitions in Part 6 of the ABAC provide:

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 on 28 December 2020, as follows:

Cheeky Monkey Brewing Co would like to thank ABAC for their services and will take the complaints feedback onboard, however, we will not be responding on this occasion.

The Panel's View

15. Based in Western Australia's Margaret River district, Cheeky Monkey Brewing Co was founded in 2012 by the Burton family. The Company produces a wide range of core and special edition craft beers. In 2020, within the core range, was a session ale branded as 'Sherby'. Within the special editions was a 'surf break' series including an east coast IPA (Indian Pale Ale) branded as 'Santa's Secret Spot' and an oat cream IPA branded

as 'Three Bears'. Another limited release was a Christmas Sour. It is the packaging - can design - of these four beers which has attracted the complaint.

16. On 21 January 2021 the Panel made a final decision to dismiss the complaint in relation to the 'Sherby Summer Ale' and a provisional determination that the packaging of the other three products are in breach of Part 3 (b)(i) of the Code. 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. In response to the provisional determination the Company advised:

We will take this feedback onboard and consider it when designing labels. We don't require a rehearing and will be making no further comment.

17. The complainant contends that the packaging has strong appeal to minors based on the cartoon Christmas character can designs, the three bears theme and the Sherby brand name suggesting a children's lolly. It is argued the products could also be confused with a soft drink or children's beverage. Part 3 (b)(i) of the ABAC provides that an alcohol marketing communication (which includes a brand name and product packaging) must not have strong or evident appeal to minors. This standard might be breached if the marketing material:

- targeted minors;
- had a particular attractiveness for a minor beyond the general attractiveness it has for an adult; and
- 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.

18. Assessment of the consistency of a marketing communication with an ABAC standard is from the viewpoint of the probable understanding of the marketing item by a reasonable person. This means the life experiences, values and opinions held commonly in a majority of the community is the benchmark. When assessing packaging such as a can design, a reasonable consumer cannot be expected to examine the can in fine detail but will be most influenced by the front of the can, its principal design features, overall colouring, and larger font messaging.

19. The Panel has considered the Part 3 (b) standard on many past occasions. While each marketing communication must always be assessed individually, some characteristics within marketing material 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 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 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.
20. 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. It is the overall impact of the marketing communication rather than an individual element which shapes how a reasonable person will understand the item.
21. Product packaging can give rise to strong appeal to minors if it creates confusion with confectionary or a soft drink. Confusion with a soft drink might occur if:
- the packaging fails to clearly identify the product as an alcohol beverage through use of an alcohol term like beer, ale, vodka, style of

wine etc or reliance is made of more subtle alcohol references or terms understood by regular adult drinkers but less likely to be understood by minors eg IPA, NEIPA;

- the packaging has a visual design that resembles a soft drink such as the display of fruit images, bright block colours and the use of a font style or iconography found typically on soft drinks or fruit juices;
- the use of terms commonly associated with a soft drink or fruit juice e.g. orange, lemon, blueberry, pop, smash etc; and
- the type of physical package used and whether this is similar to that used by soft drinks or fruit juices e.g. prima style juice box.

22. The Company has declined to respond to the complaint. Information drawn from the Company's website indicate:

- the Company's overall marketing seeks to celebrate fun and getting up to a little bit of mischief;
- the 'surf series' beers - Santa's Secret Spot and Three Bears- reference beaches and surf breaks in the Margaret River district where the Company is located; and
- the Company's range is available from the brewhouse and restaurant, via on-line sales directly from the Company and selected retail outlets.

Santa's Secret Spot

23. This beer was released on 21 December as the last in the surf break series. The can design combines surfing and Christmas themes and shows a cartoon style Santa riding a candy cane on a wave which is snow coloured. The front of the can also shows various Christmas decorations and presents and a snowman who is saluting Santa. The product is described as 'East Coast IPA' on the front of the can. The side and rear of the can provide additional information including the alc to vol % and Company branding.

24. The Panel believes the packaging of this product is in breach of the Part 3 (b) standard. The Panel noted:

- the can design is based on Christmas imagery which has broad appeal, including but not exclusively for children and adolescents;

- some of the Christmas imagery used would not specifically have appeal to minors but would have general appeal, including for minors, such as Christmas decorations and stylised boxed presents;
- other design features such as the cartoon Santa character and the snowman which would be highly recognised and relatable to minors;
- the product is only ambiguously identified as an alcohol beverage with 'IPA' recognised by craft beer drinkers but not readily recognised by the broader community, including minors, as signifying the product as alcoholic;
- as a result, there is a reasonable prospect that the product could be confused as a soft drink by minors and/or create an illusion of a smooth transition from non-alcoholic to alcoholic beverages; and
- while no one element alone makes the packaging strongly appealing to minors, a reasonable person would assess its overall impact as being strongly or evidently appealing to minors.

Cheeky Christmas Sour

25. This beer is described on the front of the can as a 'Hoppy Passionfruit Sour'. The rear of the can contains more product and Company information including a tasting note about the product. The imagery adopted is a beach scene featuring a cartoon depiction of a snowman figure made with sand wearing a Santa's hat. The scene created adopts beach tropes such as thongs, sunscreen, beach bucket and seagulls. The passionfruit connection is shown by using depictions of the fruit as the buttons on the snowman and some fruit is shown near an esky with drinks. The side of the can shows a dog with reindeer antlers catching a frisbee.
26. On balance, the Panel believes the packaging of this product is on breach of Part 3 (b) standard. The Panel noted:
 - the design combines beach and Christmas themes centred on a snowman made from sand wearing a Santa's hat;
 - such imagery has broad appeal, including but not exclusively for children and adolescents;
 - the beach imagery - a dog with a frisbee in its mouth, bucket and spade, and beachball - are depicted in a cartoon style reminiscent of children's picture books and would be relatable to minors;

- the product is ambiguously identified as an alcohol beverage with 'Sour' recognised by craft beer drinkers but not readily recognised by the broader community, including minors, as signifying the product as alcoholic;
- as a result, there is a prospect that the product could be confused as a soft drink by minors and/or create an illusion of a smooth transition from non-alcoholic to alcoholic beverages; and
- while no one element alone makes the packaging strongly appealing to minors, a reasonable person would assess its overall impact as being strongly or evidently appealing to minors.

Three Bears IPA

27. The Three Bears name is taken from the surf break at Dunsborough in the Margaret River district, and this antecedence is reflected in the principal imagery used on the can design. The three bears are shown riding a wave on a surfboard, standing on each other's shoulders with two of the bears holding cans. There is an esky on the surfboard. The front of the can describes the product as - 'DDH Oatcream IPA.' The side and rear of the can provide more information as to alcoholic nature of the beverage.
28. The Panel believes the packing for this product is in breach of the Part 3 (b) standard. The Panel noted:
 - while the three bears branding relates to the surf break and not children's stories, this background will not be of great significance in how a reasonable person will understand the imagery on the can, particularly the front of the can which shows the bears;
 - the bears imagery is eye-catching and appealing to minors, being reminiscent of common depictions of the Baloo character in the 'Jungle Book' story;
 - the product is only ambiguously identified as an alcohol beverage, with 'IPA' recognised by craft beer drinkers but not readily recognised by the broader community, including minors, as signifying the product as alcoholic;
 - as a result, there is a reasonable prospect that the product could be confused as a soft drink by minors and/or create an illusion of a smooth transition from non-alcoholic to alcoholic beverages; and

- while no one element alone makes the packaging strongly appealing to minors, a reasonable person would assess its overall impact as being strongly or evidently appealing to minors.

Sherby Summer Ale

29. This product's can design adopts a blue striped background of different shades, with the front of the can showing the Company's logo and the name 'Sherby Summer Ale'. The can states the alc to vol % and a message - A refreshing ale brewed for summer - Margaret River Australia.
30. The Panel does not believe the packing for this product is in breach of the Part 3 (b) standard. The Panel noted:
 - the packaging adopts a sedate style which is not eye-catching for minors;
 - there is a lolly called 'Sherbies' and 'Sherbet' is a sweet fizzy powder but neither of these products resemble or would be confused with an alcoholic beverage branded clearly as an ale;
 - the product uses the term 'ale' which is a well-recognised alcohol descriptor and this with other cues mean the product is unlikely to be confused with a soft drink; and
 - taken as a whole a reasonable person would not consider the packaging as having strong or evident appeal to minors.
31. Accordingly, the complaint in relation to the 'Sherby Summer Ale' is dismissed, however, the complaint is upheld in relation to the packaging of the other three products.