



ABAC Adjudication Panel Final Determination No 91/21

Product: Cream Soda Sour Ale
Company: Currumbin Valley Brewing
Media: Packaging
Date of decision: 16 June 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 the packaging of Cream Soda Sour Ale (“the Product”) by Currumbin Valley Brewing (“the Company”). It arises from a complaint received on 20 April 2021.
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 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 20 April 2021.
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 poster.

The Marketing

10. This determination relates to the packaging of Cream Soda Sour Ale.



The Complaint

11. The complainant has the following concerns about the marketing:
 - *The Cream Soda Sour Ale from Currumbin Valley uses multiple elements of the Kirks design language. Kirks is an Australian soda company that has a design that features diagonal stripes and bold colours depending on their flavour. This Cream Soda Sour Ale is inspired and mimics the Kirks design language.*
 - *This packaging could appeal to children and confuse children into mistakenly drinking it. The colours, design and name all contribute to this aesthetic. The aesthetic is deliberate to match the style of beer. There is an illustration of a creaming soda spider with a cherry on top, an illustration of a soft drink adds to the confusion.*

- *There are no major signifiers to indicate that it is beer. The word Ale could easily be confused with ginger ale.*

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. Part 6 of the ABAC Code provides that:

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.

The Company's Response

14. The Company responded to the complaint by email on 7 May 2021. The principal points made by the Company were:

Background

- Currumbin Valley Brewing is not a signatory to the ABAC Scheme but we fully support the quasi-regulatory framework around alcohol marketing in Australia.
- 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.

- Social media marketing is an important and cost-effective way for us to get our message out to our consumers. Our Instagram account has been operating for almost 5 years and our Instagram account is age restricted to 18+ and the complainant has referred to an Instagram post dated 9 December 2019 which was over a year old at the time of the complaint.
- With respect to Currumbin Valley Cream Soda Sour Ale:
 - We produced approximately 80 cases of 24 x 375mL cans when the beer was first packaged on 9 December 2019 and primarily sold via our online website.
 - Our label was designed by Luke Ronalds, one of the co-founders of the brewery. Due to the high cost of outsourcing label design we often design some of our labels in-house. The design is focussed on a retro vintage style that does not have strong or evident appeal to minors, in our opinion.
 - The complainant has referred to photo on our Instagram account that is age-restricted to 18+
 - The complainant has stated that that label has no major signifiers that the beverage is beer which is incorrect as the label is using the accepted alcohol descriptor “ale” per the ABAC Packaging Guidelines 2019. We also note that the word "ale" is in a large, clearly distinguishable font on the front face of the can.

Alcohol advertising pre-vetting service

- We did not submit the label to ABAC for pre-vetting.

Responsibility toward Minors

- We refute the complainant’s assertions that diagonal striping has an appeal to minors. This is a vintage “retro” stylized pattern that is not unique to creaming soda brands and beverages and is symbolic of the time period where the creaming soda flavour was popular in its heyday.
- We accept that the milkshake or spider drink illustration if shown without an appropriate alcohol descriptor may have an appeal or some confusion to minors. However, the illustration is partially covered by the word “ale” which is a recognised acceptable alcoholic beverage descriptor under the ABAC Alcohol Packaging Guidelines 2019. Due to placement and layering in the design it’s not possible to look at the illustration without reading the acceptable alcoholic beverage descriptor. The typography of the Sour Ale is larger in size in comparison to the Cream Soda typography in order to draw

attention to the alcohol descriptor. The illustration of the spider drink is used to invoke memories of creaming soda in relation to the product's flavour.

- We refute the claim that the illustration of the milkshake or spider drink and eye-catching colours are likely to appeal to children. The front face of the can is primarily the name of the beverage, Cream Soda Sour Ale which is represented as a stylised vintage typography design. Off to the right side of the can layered behind the typography is an illustration of a spider drink which was a popular drink in the early 1980's and has since faded in popularity. The beer has a nostalgia factor which appeals to that generation who are now in that 30-40 age group.
- Partially covering this illustration is the term "Sour Ale" which is a sufficient alcohol descriptor per the ABAC Alcohol Packaging Guidelines 2019 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 Be Excellent Enjoy Responsibly 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 refute the claim that there are limited cues on the packaging that the contents are alcoholic. Prominent on the front face of the can is the term "Sour Ale" which is a sufficient alcohol descriptor under the ABAC Alcohol Packaging Guidelines 2019 as it contains the acceptable alcohol descriptor, "ale" which is used in numerous alcoholic beverages, including but not limited to popular Pale Ales and alcoholic Ginger Ales.
- Combined with the word "beer" on the left side of the can wrap with our Be Excellent Enjoy Responsibly acronym and the recognised "ale" descriptor on the front of the can in larger typography we believe that this is sufficient cues on the packaging to meet the guidelines and the fact that this is an alcoholic product rather than a soft drink.

- We refute the claim that the beer resembles a soft drink which a child may believe is for their consumption. The design is a retro, vintage inspired that is more likely to appeal to the older generation that grew up around the popularity of ice cream spiders in the 1980's.
- Currumbin Valley Brewing is not aiming or marketing the product to appeal to children or minors and we have included an appropriate alcohol descriptor that is very prominent on the face of the can. The social media account that the complainant has referenced in the complaint is also age-restricted to 18+ and not viewable by minors.

Final comments

- 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 make suitable changes to the label and possibly the removal of the spider drink illustration from the label. We would appreciate clarity from the ABAC adjudication panel as to exactly what design elements (colours, diagonal stripes, illustrations and positioning of the suitable alcoholic descriptors such as the "ale" term) are not suitable if they do decide to uphold the complaint.
- The brewery did have plans to produce this beer in the next brew cycle after receiving this complaint and we decided that it would be best to delay any production of this SKU until an ABAC decision has been reached. Any current stock of the product is also currently unavailable as the beer is currently sold out.

The Panel's View

15. Currumbin Valley Brewing is a small family owned brewery located on a farm in Queensland. While not a signatory to the ABAC Scheme the Company has expressed their support for the quasi-regulatory framework around alcohol marketing in Australia.
16. On 31 May 2021 the Panel made a provisional determination that the product packaging is 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 re-hearing of the provisional determination by making further submissions. The Company did not seek a re-hearing and the Panel has proceeded to make a final determination on this complaint.
17. The complaint raises a concern that the Company's 'Cream Soda Sour Ale' resembles a Kirk's soft drink and would strongly appeal to minors. This concern brings into play Part 3 (b) (i) of the ABAC which provides that an alcohol

marketing communication (which includes product labels and packaging) must not have strong or evident appeal to minors. This standard might be breached if the branding:

- specifically targets minors;
- has 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 create confusion with confectionery or soft drink.

18. The Company argues that its branding and packaging does not breach the ABAC standard. It is submitted:

- the can uses a vintage “retro” stylized pattern that is not unique to creaming soda brands and beverages and is symbolic of the time period where the creaming soda flavour was popular in its heyday;
- the milkshake or spider drink illustration is used to invoke memories of creaming soda in relation to the product’s flavour and is partially covered by the word ‘ale’ and was a popular drink in the 80’s that has since faded in popularity;
- there is a prominent reference to ‘ale’ and the word ‘beer’ is also included on the side of the can and ‘ale’ is used in numerous alcoholic beverages, including but not limited to popular Pale Ales and alcoholic Ginger Ales;
- the illustration of the milkshake or spider drink and eye-catching colours are not likely to appeal to children as the front face of the can is primarily the name of the beverage, Cream Soda Sour Ale which is represented as a stylised vintage typography design;
- the beer has a nostalgia factor which appeals to that generation who are now in that 30-40 age group; and
- the social media account that the complainant has referenced in the complaint is also age-restricted to 18+ and not viewable by minors.

19. Assessment of the consistency of a marketing communication with an ABAC standard is from the probable understanding of a reasonable person. This means that the life experiences, values, and opinions held by a majority of the community is to be the benchmark. A person who interprets a marketing message in a different way is not 'unreasonable' but possibly their understanding would not be shared by most people.

20. 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.
21. 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.
22. 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 e.g., 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 like that used by soft drinks or fruit juices e.g., prima style juice box.
23. The Company's essential contention is that the packaging appeals to adults as it invokes a nostalgic memory of a soft drink (and imagery) popular decades ago, but which has now faded in popularity. While this might be the belief, the reality is likely a little different. For instance, a brief internet review indicates that:
- creaming soda is the fifth most popular soft drink in Australia - Canstarblue survey 2020; and
 - 14 to 18 year olds are the largest segment of the population regularly consuming soft drinks- Australian Bureau of Statistics.
24. The complainant contended the packaging used elements of the Kirks creaming soda soft drink design. The underlying colour of the Kirks packaging is pink rather than the blue adopted on the Company's product, but both use a stylised milkshake image and a stripe background. An objective assessment is that there is a noticeable similarity between the packaging of the two products even if this was not intended by the Company.
25. The Panel believes the packaging does have a strong or evident appeal to minors. In reaching this conclusion the Panel noted:
- that while the term 'Ale' is a strong signifier of a product being an alcoholic beer, the front of the can label with its depiction of a milkshake, striped background, and descriptor of 'Cream Soda' does raise a real prospect the product might be confused with a soft drink;
 - while the packaging might invoke a sense of nostalgia amongst adult consumers, based upon a memory of drinking soft drinks and milkshakes as a minor, the appeal of soft drinks and milkshakes for minors remains strong and has not 'faded' as contended by the Company;
 - the packaging creates a relatable image for minors and suggests a smooth transition from a non-alcoholic to an alcoholic beverage;
 - the use of bright and contrasting colours would likely be eye-catching for minors;
 - while a milkshake is consumed across the population it is a product consumed more frequently by minors than adults; and

- taken as whole, a reasonable person would probably understand the packaging has a strong appeal to minors.

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