



ABAC Adjudication Panel Determination No 131/21

Product: Hairyman Pop Ale
Company: Hairyman Brewery (Go Esco Pty Ltd)
Media: Facebook & Packaging
Date of decision: 3 July 2021
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns Facebook marketing for and the packaging of Hairyman Pop Ale (“the Product”) by Hairyman Brewery (“the Company”). It arises from a complaint received on 18 May 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

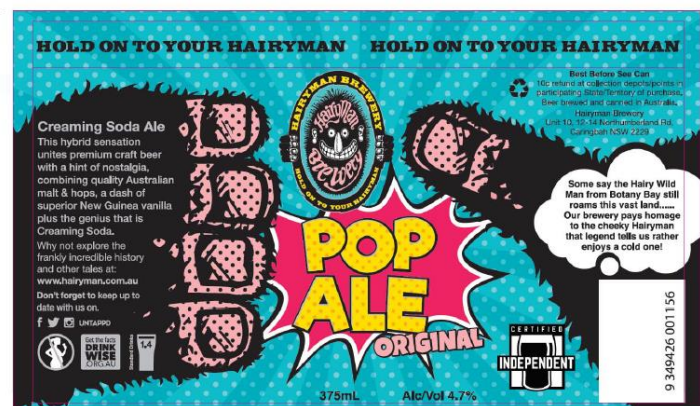
7. The complaint was received on 18 May 2021.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint was not completed in this timeframe due to the demands of finalising multiple determinations at the same time and a delay in sourcing a copy of the Facebook advertisement.

Pre-vetting Clearance

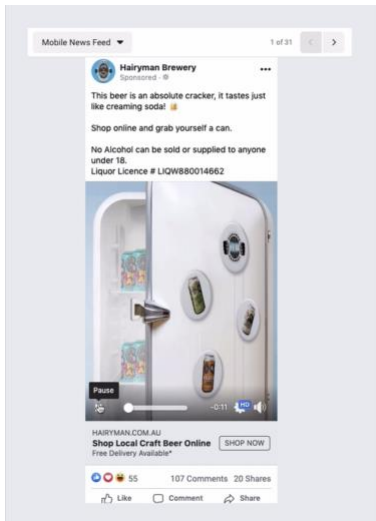
9. The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for the packaging or Facebook advertisement.

The Marketing

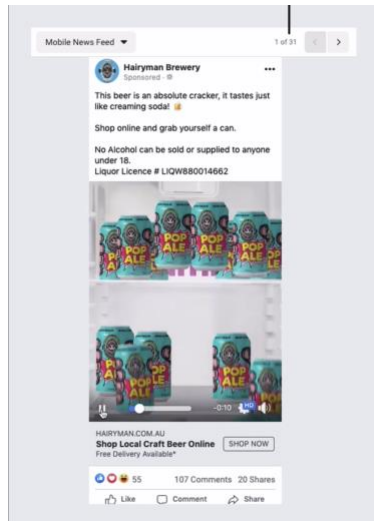
10. The complaint concerns two marketing communications for the product. Firstly, the packaging (can) design shown below.



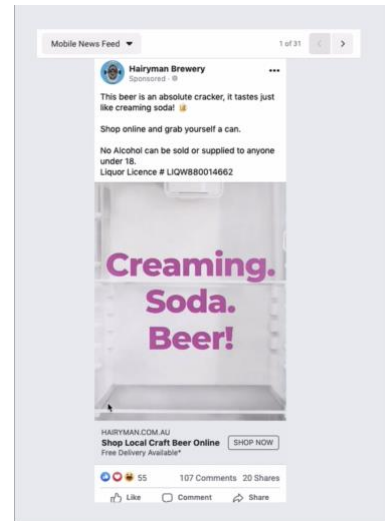
11. The second marketing communication is an advertisement for the product placed on Facebook. This advertisement is a video showing cans of the product in a refrigerator with accompanying text shown below.



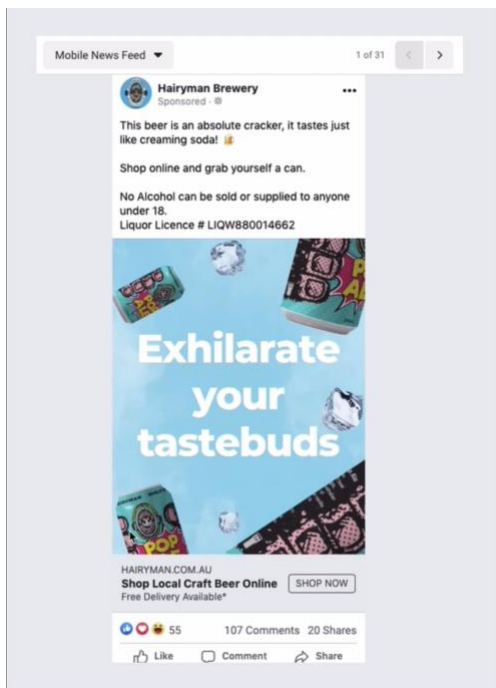
The video commences with footage of a fridge, the door of which opens to reveal shelves stacked full of cans of Hairyman Pop Ale.



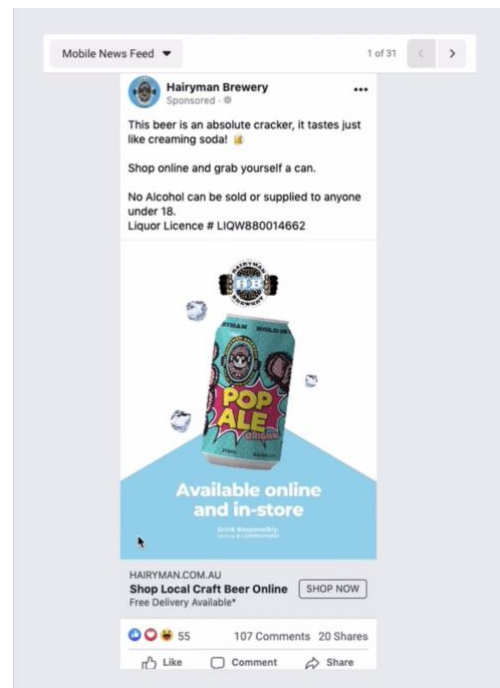
The cans jump out of the fridge.



The words "Creaming. Soda. Beer!" are shown



The cans float around the screen, and the words "Exhilarate your tastebuds" are shown.



The video closes with a shot of a can of Hairyman Pop Ale and the words "Available online and in-store".

The Complaint

12. The complainant has the following concerns about the marketing:

The Pop Ale labelling is clearly a marketing approach to appeal to very young potential drinkers.

The font design, and general colours of the can could easily be confused with a non-alcoholic beverage. The blurb that goes along with it explaining its a beer that tastes like Pop Soda.

The ABAC Code

13. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:

(b)(i) have Strong or Evident Appeal to Minors.

14. 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

15. Thomson Geer Lawyers, acting for Go Esco Pty Ltd trading as Hairyman Brewery, responded to the complaint by letter emailed on 28 May 2021. The principal points made were:

Alcohol Advertising Pre-vetting Service Approval

- Our client did not receive any Alcohol Advertising Pre-vetting Service Approval in respect of the Product's packaging, or Facebook post.
- Hairyman Brewery is aware of their responsibilities under the ABAC Responsible Alcohol Marketing Code (Code). They conduct their own

reviews of marketing materials prior to publication, including checking that their packaging complies with the Code and other relevant Australian laws. The Product (and its packaging) has been on the market for a number of years without complaint and no concerns have been raised (until now) in respect of the Product's packaging or any other marketing communication relating to the Product.

Retail sale history

- The Product was launched in February 2018 with the same designs as shown on the Product in the Images, but with slightly different colours. Originally the packaging used slightly different colours but these have now been changed on the current version, due to colour printing limitations of our client's third party printing provider, Visy. In addition, the colours shown in the Facebook Ad are slightly more vibrant than the actual colours on the Product, due to Visy's limited colour selections available and the limitations with colour layering on the can.

Responsibility toward Minors

- Our client has been marketing its POP ALE brand for a number of years without complaint and is strongly of the view that it does not breach any part of the Code, particularly Part 3(b)(i) in relation to "strong or evident appeal to minors". In particular we note the following:

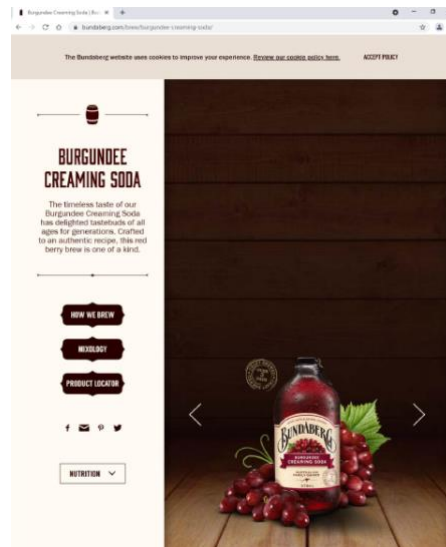
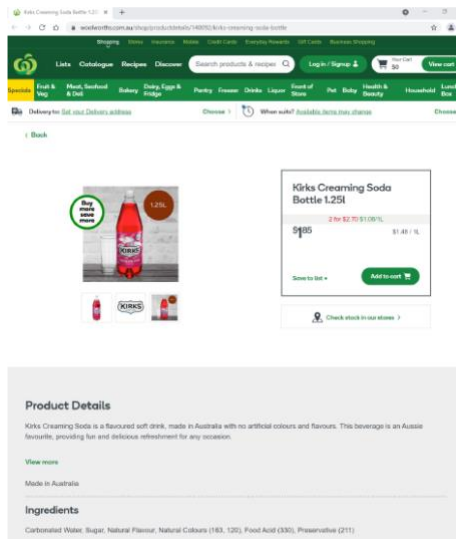
References to creaming soda

- Contrary to the claims made in the complaint, the Facebook advertisement dated 17 May 2021 (Facebook Ad) was not aimed at persons below drinking age or "very young drinkers". The Facebook ad stated that "the *beer*... tastes just like creaming soda!" (italics our emphasis). It is clear that the Facebook Ad was referring to a flavoured beer and as a matter of fact the Product tastes like creaming soda with a beery aftertaste.
- Creaming soda is a flavour, not a soft drink and is used to flavour many different beverages. The Facebook Ad clearly states the beer has the flavour of creaming soda, and in no way implies that it is a soft drink. Flavoured beers are popular with Australian adults and there is increasing demand in the market for such sweet flavoured beers.
- We query the veracity of the complainant's assertion that creaming soda is a "soft drink familiar to and commonly consumed by minors", and instead submit that creaming soda is a flavour enjoyed by all Australians, and has a certain nostalgia for older Australians.

For example, Kirks creaming soda sold by Woolworths is advertised as "an Aussie favourite" and Burgundee creaming soda sold by Bundaberg is advertised as a "red berry brew that has delighted Australian taste buds for generations". Refer to the screenshots below and relevant web pages available at:

<https://www.woolworths.com.au/shop/productdetails/140092/kirks-creaming-soda-bottle>; and

<https://www.bundaberg.com/brew/burgundee-creaming-soda/>.



- Our client specifically chose the flavour creaming soda as it was a dominant soft drink flavour of the 70s to mid-90s in Australia. It is no longer a dominant flavour of choice for younger people. When creating the Product, our client chose creaming soda in order to leverage off the nostalgia associated with this drink, using sensory marketing to interest their older target audience. The Product has in fact been very successful in enacting the kind of nostalgia and recollection that it was designed to do amongst the older demographic. This emotional response has created enormous brand loyalty amongst our client's adult customer base.

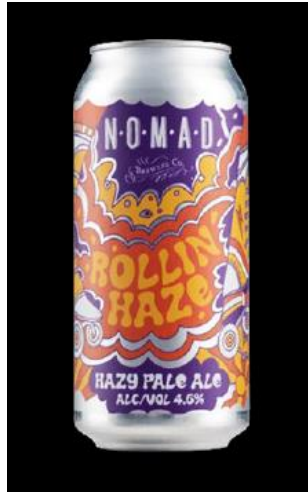
The Product packaging – bright and contrasting colours

- The Product packaging has not used imagery designed to appeal to minors, but instead it has been inspired by pop art. The Product imagery is specifically reminiscent of the type of pop art created by Roy Lichtenstein, a pioneer of the new art movement, that emerged in the 1950s and 60s. Pop art represents disruption of traditional

fine art values, which is perfectly aligned with the Product idea which "disrupts" traditional expectations of beer flavoured beverages. In addition, the pop art inspired imagery is designed to appeal to an older generation that holds some nostalgia towards the pop art era and is familiar with art from this period. Younger audiences are less likely to appreciate the nuanced imagery, which is why the Product appeals to older adult customers.

- Whilst the Product uses bright contrasting colours, this is not in itself problematic for alcoholic beverages. Rather it is the combination of a variety of factors that can create an overall strong or evident appeal to minors, factors that are not present in respect of the Product. From a practical perspective contrasting colours are necessary when conducting colour printing on canned beers due to the limitations on the lithographic process that limits colour layering on the cans. Below are examples of other brightly packaged alcoholic beverages that use colour and contrast to stand out on the shelves. In such a saturated market, we submit that use of colour and contrast is necessary to create product appeal to adults who are trying to distinguish between multiple different brands.





Use of the word "pop"

- We submit that the word "pop" is not generally used in Australian vernacular to describe carbonated drinks. The word "pop" is a distinctly American term. Australians call carbonated beverages "fizzy drink" and "soft drink" but not "pop". According to an article in the Business Insider, the word "pop" is used by Americans in the Midwest and West to describe carbonated beverages. A screenshot of the article is below and the relevant web page is available at:

<https://www.businessinsider.com.au/soda-pop-coke-map-2018-10?r=US&IR=T>

'Soda,' 'pop,' or 'coke': More than 400,000 Americans weighed in, and a map of their answers is exactly what you'd expect

POP vs SODA

A map of the United States is color-coded to show regional preferences for carbonated drinks. The Northeast, Florida, California, and parts of the Midwest are colored yellow, indicating a preference for 'soda'. The Midwest and West are colored purple, indicating a preference for 'pop'. The South is colored green, indicating a preference for 'coke'. Boston is colored red, indicating a preference for 'tonic'.

- Americans have different words for soft drink depending on which region of the United States they're from.
- The three most popular terms are soda, pop, and coke, according to data collected by the site Pop Vs. Soda.
- Linguists have noted other terms people from certain regions use for soft drinks, including tonic and cococa.

People in the United States have different ways of saying things from region to region, from what they call the night before Halloween to how they pronounce the word "crayon."

One of the things Americans can never seem to agree on is what to call fizzy, carbonated beverages: soda, pop, or coke?

That's exactly the question cartographer Alan McConchie sought to answer with his web project, the aptly named Pop Vs. Soda. The site invites visitors to fill out a brief questionnaire asking where they are from and which term they use for soft drinks. To date, more than 400,000 users have submitted answers.

The resulting maps illustrate what linguists have long known:

- Soda** is the preferred term in the Northeast, most of Florida, California, and pockets in the Midwest around Milwaukee and St. Louis.
- Pop** is what people say in most of the Midwest and West.
- And coke**, even if it's not Coca-Cola brand, is what people call it in the South.

Previous research reveals even more regional divides. According to Jason Katz, the graphic artist who wrote "Speaking American: How 'Y'all, Youse, and You Guys Talk," there are even more regionalisms that most Americans may not have heard of. Among them:

- A solid 6% of Americans simply call them **soft drinks**, especially in Louisiana and North Carolina.
- In small pockets of the Deep South, **cococa** is the preferred term.
- And in Boston, **tonic** is what a decent amount of older residents grew up saying, although that term is quickly falling out of favour.

Whether you call it pop, soda, coke, or something else entirely, there's no question that Americans won't be agreeing on its name any time soon.

- There are a number of other websites that explain that whilst "pop" is a term used in the US for soft drink, "soft drink" is the term used by Australians. Screenshots are below and the relevant web page is available at:

<https://sodapopcraft.com/what-do-they-call-soda-in-australia/?nonitro=1>

The screenshot shows a web browser displaying the article 'What Do They Call Soda in Australia? [Pop OR..]' on the Soda Pop Craft website. The page features a navigation menu with links for 'ABOUT ME', 'SECRET RECIPES', 'GENERAL INFO', 'REVIEWS', 'SODASTREAM', and 'BRANDS'. The article is written by Chris Watson and is categorized under 'General Info'. It includes a sub-header 'WHAT DO THEY CALL SODA IN AUSTRALIA?' with a small image of a soda bottle and the Australian flag. The main text explains that in Australia, soda is called a 'soft drink' and that this term is also used in the US, though less common. It also mentions that calling a soda a 'soft drink' is just one of the language differences between Australia and the US. On the right side of the page, there is an 'About Me' section with a photo of Chris Watson and a brief bio. Below the bio, there is a section titled 'This blog aims to bring you everything soda-related...' followed by a grid of four images showing different styles of dresses.

- We note that there are other alcoholic products currently on the market that also use the word "pop, such as "Passion Pop", "Pommery Pop" and "Alcopop". The term Alcopop is commonly used to describe any carbonated beverage that mixes sweet flavours with alcohol. "Pop" alcohol products have a long market history, for example "Passion Pop" has been around since 1977 and is labelled as a carbonated 'flavoured' juice. The drink is 9.5% alcohol, meaning that one bottle contains 5.6 standard drinks. A screenshot of the Passion Pop Wikipedia page is shown below and the relevant web page is available at:

https://en.wikipedia.org/wiki/Passion_Pop

The screenshot shows the Wikipedia page for "Passion Pop". The page title is "Passion Pop" and it is described as an Australian alcoholic beverage. The article text states: "Passion Pop is an Australian alcoholic beverage, labelled as a carbonated "passion flavoured" juice-based beverage. Now an Australian icon and has been a market leader in the Flavoured Sparkling Wine category for over 30 years. Passion Pop's low price made it very popular amongst female Australian grandmothers, students and teenagers. The product was created by Frank (Pop) Miranda in 1977-78 at the C-Sevco winery (Miranda Wines Pty Ltd) in Griffith, New South Wales. The rights for the product were then sold to Australian Vintage. Passion Pop is now owned and produced by Australian Vintage and comes in four different flavours: original (passionfruit), mixed berry, pink (strawberry), and watermelon." The page also includes a "Specifications" section stating "Passion Pop is labelled as a carbonated "flavoured" juice and comes in 750 ml bottles. The drink is 9.5% alcohol, meaning that one bottle contains 5.6 standard drinks. Passion Pop comes in a 750 ml glass "champagne-style" bottle. It was one of the first beverage products in Australia to utilise a plastic stopper (or "cork")." and a "References" section with four citations.

- However there is no concern that the beverage is targeting children because of its name or sugary contents. In addition, despite initial negative connotations the term "Alcopops" has in fact become intrinsically associated with alcoholic beverages in Australia. Further, the word "pop" when used in relation to fizzy alcoholic beverages such as champagne, is associated with the pop of the cork which is why the word has been used successfully with brands such as Pommery Pop shown below:



- Further, even if there is some understanding of an association of the word "pop" with "soft drink" in Australia, we submit that the word "pop" has other meanings that should be taken into consideration in respect of the Product.
- As mentioned above, the name POP ALE was inspired by reference to pop art and the Product imagery has been carefully designed around this theme. Pop art is characterised by bright explosive colours and images, which is how the Product imagery has been designed. Below are two examples of the type of pop art created by Roy Lichtenstein that have inspired the Product label:



- As can be seen when comparing the pop art above to the Product packaging, the Product also uses the same granular dotted effects and the explosive device, to conjure up the association with pop art and appeal to the older adult target audience.



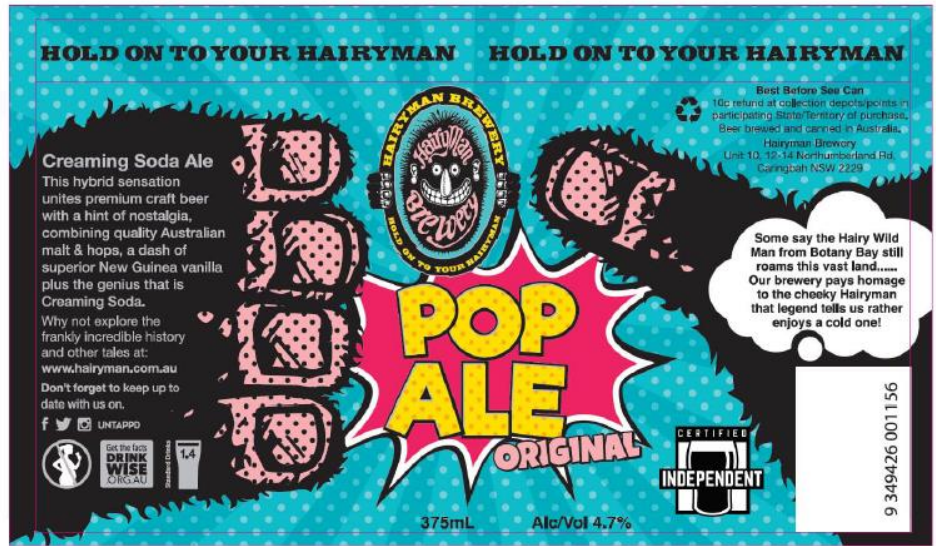
- Further, the word "pop" is defined in the Cambridge dictionary with multiple meanings including, a type of modern popular music, a Father, a short sharp sound like something exploding, a burst of colour, something such as a colour that looks very bright and noticeable next to something else, to move quickly and so on. To this end, the word "pop" was also chosen by our client to signify the explosive flavour of the Product.
- The name POP ALE has been shown on the Product in a "burst of colour" in order to mirror the stylistic elements of the pop art that inspired the label, as set out above. We agree this is an eye-catching design and that pop art utilises images used in comics, but that imagery is relatable to the 1950s and 60s and is aimed at the older adult audience that grew up with pop art that our client is targeting.

Font type

- The font type selected for the Product is clear and bold, as this is important for marketing regardless of who it is aimed at. The font type used on the Product is Open Sans which is a font that is used widely in society, in all types of marketing materials, and is not specifically associated with children or minors.

Facebook post

- The Facebook Ad makes it abundantly clear that the advertisement is about beer and not confectionary or a soft drink for children. The first line states "this *beer* is an absolute cracker" (italics our emphasis), then the required warning is displayed that states "no alcohol can be sold or supplied to anyone under 18." The liquor licence number is also displayed. All the required warnings are displayed on the label, as can be seen by reviewing the Images of the label (below). Obviously in an advertisement where a consumer cannot inspect the whole can, some of the required warnings need to be displayed elsewhere in the advertisement, which is what has happened here. In addition and importantly, the Facebook Ad uses special age targeting technology, which ensures that the ad only appears on pages of users that have confirmed they are over 18 in their account profile.



- We submit that the overall impression created by the Facebook Ad is not of a soft drink targeted at children. The Facebook Ad in no way targets children or indicates that the beverage is suitable for children. Firstly, it cannot be viewed by children due to the age restrictive targeting technology utilised by our client. Secondly the Facebook Ad clearly highlights that the Product is a beer, contains alcohol, should not be supplied to persons under 18 and that the ad is sponsored by a brewery. The Product packaging is also a separate "Marketing Communication" as defined by the Code, however within the context of the Facebook Ad it cannot be said to have "Strong or Evident Appeal to minors". In addition, the label contains the Hairyman Brewery logo, and the alcohol volume 4.7% can be readily viewed and the Product is only sold through licensed premises. Moreover, the word ALE appears in very close proximity to the word POP, is of the same colour and is given identical prominence. We submit that no reasonable person would construe the Product as anything but a beer, and further that no reasonable person would construe the Facebook Ad or the Product packaging in the way that the complainant has.

Concluding comments

- In conclusion, we note that the Facebook Ad and the Product packaging meet all legislative requirements, contain necessary warnings and are only targeted/displayed to adults. The Australian New Zealand Food Standards Code provides that the label of an alcohol beverage containing more 1.15% alcohol by volume must include a statement of the alcohol content. The Product packaging meets this legislative requirement. We also note that previous determinations by the ABAC Adjudication Panel have referred to a

list of factors that may make a marketing communication have strong or evident appeal to minors. These factors 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 appeal to minors);
 - style of humour relating to the stage of life of a minor (as opposed to humour more appealing to adults); and
 - use of a music genre and artists featuring in youth culture.
- ABAC Adjudication Panel Determination No 54/21 (Determination 54/21) notes that only some of these characteristics are likely to be present in a particular marketing communication, and that 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. We accept that the Product displays bright colours on the packaging, however we submit that neither the Product nor the Facebook Ad employ any of the other factors listed above. It is unclear what is meant by "the illusion of a smooth transition from non-alcoholic to alcoholic beverages." We submit that neither the Product nor the Facebook Ad encourage any transition from non-alcoholic to alcoholic beverages. The Product incorporates a creaming soda flavour, which has been enjoyed by older Australians in past generations. It is not a flavour that is sought out by minors, and was selected by our client due to the nostalgia it generated about a time gone by.
 - As stated in Determination 54/21 the overall impact of the marketing communication must be assessed and not individual elements, as it is the overall impact that will shape how a reasonable person will understand the

item. This means that the larger text, colouring and most prominent design features will be most influential. The fact that the Product name prominently includes the word ALE (which is synonymous for beer), should weigh heavily in the assessment. The use of pop art stylistic features that will appeal to an older generation is also important. The use of the Hairyman Brewery logo, which features prominently on the Product, also indicates that the Product is a beer or alcoholic beverage originating from a brewery rather than a soft drink.

- Based on the matters set out above we submit that a reasonable person would not interpret the Facebook Ad or Product packaging in the way contended by the complainant and therefore the complaint should be dismissed.

The Panel's View

16. Andy Orrell founded Hairyman Brewery in 2016 and it operates at Caringbah in the Sutherland Shire of New South Wales. The Company name references the legend of the 'wild hairyman of Botany Bay' and a stylised depiction of the hairyman creature serves as a logo on the Company's range of craft beers. One beer in the range is a 'Pop Ale' which is described as a hybrid of craft beer, and a dash of vanilla which gives a creaming soda flavour. It is the labelling of the product can together with a Facebook advertisement for the beer which has attracted the complaint.
17. The complainant argues the font design and general colours of the can could be easily confused with a non-alcoholic drink and this would appeal to young potential drinkers. The Company, through a legal firm, has provided a very detailed response to the complaint and refutes the product packaging and the Facebook ad would appeal to minors. The relevant ABAC standard is contained in Part 3 (b) and provides that alcohol marketing communications 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. 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.
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);
 - use of a music genre and artists featuring in youth culture.
20. 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.
21. The probable understanding of the labelling of a can will be most influenced by the imagery and design on the front of the can which means the dominant messaging and colouring will have most weight in how the product is understood. While information contained in smaller font on the sides and rear of the can is to be given some weight, it should be borne in mind that an average consumer cannot be expected to turn a can around the full 360 degrees and study it in fine detail. In the current case the dominant imagery is the 'Pop Ale' graphic and the Hairyman logo.
22. With the large increase in the number of Australian craft breweries in recent years, the styles and flavour characteristics of products on the market have exponentially grown. Distinctive branding often applying colourful and elaborate designs is used as a selling point in the craft beer sector. Even if it is accepted that marketers do not intend to attract minors by their packaging designs, the Panel often faces finely balanced decisions in assessing whether packaging (and marketing communications more widely) would be regarded as having strong or evident appeal to minors. The current case shows this, for instance the descriptor 'Pop Ale' in some circumstances might refer to:
- an alcoholic beverage arising from an emphasis on 'ale' relating to beer; or
 - a non-alcoholic beverage such as a ginger-ale; or
 - a soft drink arising from an emphasis on 'pop' relating to soda pop; or
 - an alcopop (ready to drink) alcohol beverage.
23. The principal concern of the complainant is that the product could easily be confused with a soft drink and strongly appeal to minors as a result. While this is not a fanciful concern, a majority of the Panel does not believe it is likely that most consumers, including minors, would think the product is a soft drink, nor does the labelling have strong appeal to minors given:
- the term 'Ale' is well recognised as establishing a product as being a beer and other cues that the product is alcoholic are found on the label;

- in some circumstances the term 'Pop' will connote a soft drink, but generally carbonated non-alcoholic drinks in Australia are popularly referred to and marketed as soft drinks rather than the American expression of soda pop;
 - the 'Pop Ale' graphic references a well-known Pop Art style;
 - the can design does not resemble common soft drinks which tend to use clean bold block colours e.g. Coke Cola, Fanta, Sprite etc and not the busy complicated imagery employed on the product;
 - the small font information on the side of the can is headed 'Creaming Soda Ale' but the same panel does clearly state the product is a craft beer; and
 - the hairyman logo and paw prints of the hairyman creature are not considered likely to appeal to minors.
24. The complainant became aware of the product via a Facebook advertisement. The advertisement is a freestanding marketing communication and needs to be assessed independently from the product packaging as to its consistency against the Part 3 (b) standard. The advertisement takes the form of a video which shows a refrigerator full of cans of the product. The cans move forward and out of the fridge which becomes empty and a large message in bright pink reading, 'Creaming Soda Beer!', is superimposed inside the fridge. This message is then replaced by a second message, 'Exhilarate your tastebuds', with the final scene featuring an image of the front of a single can of the product.
25. The emphasis on creaming soda in the video is reinforced by the text introducing the link to the video which begins, 'This beer is an absolute cracker, it tastes just like creaming soda'. The Company contends that references to creaming soda need to be understood against:
- it is a description of the flavour profile of the product;
 - creaming soda is a flavour and not a soft drink as such;
 - creaming soda soft drink is enjoyed by all Australians (not particularly minors) and invokes nostalgia in older Australians;
 - it was a dominant soft drink in the 70's to mid 90's but is not so now for younger people.
26. The Panel recently considered the product packaging of a 'Cream Soda Sour Ale' in Determination 91/21 dated 16 June 2021. The Panel noted in that Determination that there is no strong evidence to support the view that creaming soda is no longer popular and highly recognisable and relatable to minors and can be viewed largely as a nostalgia flavour for older Australians noting:

- 14 to 18 year olds are the largest segment of the population regularly consuming soft drinks (Australian Bureau of Statistics); and
 - creaming soda is the fifth most popular soft drink in Australia (Canstar Blue Survey 2020).
27. The readily available public data doesn't break down age groups and individual soft drink flavour popularity, but a common-sense conclusion is that:
- 'creaming soda' would often and commonly be taken as a reference to the soft drink of that name;
 - creaming soda cannot be considered simply a nostalgia soft drink which was popular and relatable to Australians under 18 years old up to the mid 1990's but stopped being popular with minors after that time; and
 - creaming soda soft drink remains popular, recognisable, and relatable to minors.
28. Drawing this together, the Panel believes the major and prominent references to creaming soda in the Facebook video advertisement (as opposed to the small font reference on the side of the product can) does tip the advertisement into having strong and evident appeal to minors in breach of the Part 3 (b) standard. The Panel noted:
- the creaming soda references in the advertisement makes the marketing highly relatable and recognisable to minors;
 - the prominent creaming soda references enhance the illusion that the product offers a smooth transition from non-alcoholic to alcohol beverages for minors;
 - the graphics and movement of the cans of the product in the advertisement are eye-catching and emphasise the bright colour of the product can; and
 - while no one element alone is decisive, taken as a whole a reasonable person would believe the ad had strong appeal to minors.
29. Accordingly, by a majority decision, the Panel finds the product packaging not in breach of the standard, but unanimously the Panel finds the Facebook ad in breach of the Part 3 (b) standard. The complaint is upheld in part.