



ABAC Adjudication Panel Final Determination No 211A/21

Products:	Culture Kick Sour Ales:- Cherry Berry Choc Sundae, Pine Lime Creamsicle, Blueberry Pastry Sour
Companies:	10 Toes Brewery
Media:	Packaging
Date of decision:	1 November 2021
Panelists:	Professor The Hon Michael Lavarch (Chief Adjudicator) Ms Jeanne Strachan Professor Richard Mattick

Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) concerns the packaging of three products from 10 Toes Brewery (“the Company”). It arises from a complaint received on 3 September 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 3 September 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 marketing communications.

The Marketing Communication

10. The complaint relates to the packaging of three products from 10 Toes Brewery as shown below:

Culture Kick Sour Ale –
Cherry Berry Choc Sundae



Culture Kick Sour Ale – Pine
Lime Creamsicle



Culture Kick Sour Ale –
Blueberry Pastry Sour



The Complaint

11. The complainant objects to the marketing as follows:
 - *They have multiple cans with ice-creams and a pie on which all look appealing to young children.*

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 to strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minors 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 did not respond to the complaint.

The Panel's View

15. 10 Toes Brewery was founded in 2016 on Queensland's Sunshine Coast, where it operates from a custom-built brewhouse. Its products are available to purchase from its brewhouse, online from the 10 Toes website and from various venues and bottle shops in Queensland.

16. The Company is not a signatory to the ABAC Scheme and has not made a prior commitment to abide with the standards of good marketing practice contained in the Code. This of itself is not unusual for smaller craft breweries as many smaller producers have not formally joined the ABAC Scheme. The experience of the complaints process however is that it is very unusual for a Company not to respond to a public complaint. Disappointingly the Company did not respond on this occasion.
17. On 15 October 2021 the Panel made a 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.
18. The complaint raises a concern that three of the Company's Products from its Culture Kick Sour Ale series, namely Cherry Berry Choc Sundae, Pine Lime Creamsicle and Blueberry Pastry Sour appeal to young children as they show pictures of ice creams and pies on the product packaging.
19. 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.
20. 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.

21. 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.
22. 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.
23. Product packaging can give rise to strong appeal to minors if it creates confusion with confectionery 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.

24. The packaging in question is for three sour beers namely:

- Cherry Berry Choc Sundae - that features a picture of a sundae ice cream in a glass dish against a cherry coloured pattern background. The front of the can includes the Culture Kick Sour range name, the Company name and the alc/vol %
- Pine Lime Creamsicle - that features a picture of the recognisable pine lime flavoured ice-block against a lime coloured background. The front of the can includes the Culture Kick Sour range name, the Company name and the alc/vol %
- Blueberry Pastry - that features a picture of a blueberry tart against a blue pattern background. The front of the can includes the Culture Kick Sour range name, the Company name and the alc/vol %

25. When assessing the probable understanding of product packaging more weight is to be placed on the front of a can than information and imagery placed on the sides and rear of the can. This is because it cannot be expected that a typical consumer will examine a product in fine detail, turning the can around the full 360 degrees to read smaller print information. Accordingly, the impression of the packaging will be shaped most strongly by the most prominent imagery, large font messaging and the overall colour scheme and design.

26. It should be noted that the ABAC does not contain a freestanding requirement that beverage packaging unambiguously identify the product as being alcoholic as such. Rather, a failure to use well recognised signifiers of alcohol beverages such as 'beer', 'ale', 'vodka' etc might contribute to the product packaging being confused with a soft drink and hence increasing its potential to be strongly appealing to minors.

27. In this case, the packaging of the three products relies on the brewing designation of 'sour' to establish the product as being a beer. Other cues that the products are alcoholic are provided such as the alc/vol %, but these are of less prominence. While a schooled craft beer drinker may well recognise 'sour' as placing the product as a beer, this is not the case with the majority of the community.
28. To test this proposition, the ABAC Scheme recently included within its periodic community research into attitudes about alcohol marketing and the alignment of Panel Determinations with community attitudes, a question on the recognition of specific alcohol descriptors. The outcome of the research was that only 19% of respondents recognised 'Fruit Sour' as a term associated with an alcohol product with 27% associating the term with a non-alcohol product. 54% of respondents were unsure.
29. Drawing this together, the Panel believes that the packaging is inconsistent with the Part 3 (b) standard. In reaching this conclusion the Panel had regard to:
- the products are not unambiguously identified as being alcoholic;
 - the descriptors 'cherry berry choc sundae', 'pine lime creamsicle' and 'blueberry pastry' would be far more associated with non-alcoholic products than an alcoholic beverage;
 - the principal imagery on each of the packaging evokes an impression of desserts popular across age groups and recognisable and relatable to minors;
 - the imagery and name of the products create an illusion of a smooth transition from non-alcoholic products to an alcohol beverage;
 - the packaging employs bright colours that are likely to be eye-catching and appealing to minors; and
 - while no one factor of itself is decisive, taken as a whole, a reasonable person would probably understand the packaging has a strong and evident appeal to minors.
30. Accordingly, the Panel makes a final determination that the product packaging is in breach of Part 3 (b)(i) of the Code.