



ABAC Adjudication Panel Final Determination No 235/21

Product: Fairy Cake Oat Cream IPA
Company: Mr Banks Brewing Co
Media: Packaging
Date of decision: 5 November 2021
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 of Fairy Cake Oat Cream IPA (“the Product”) by Mr Banks Brewing Co (“the Company”). It arises from a complaint received on 5 October 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 the 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.

- The complaint raises concerns under the ABAC Code and accordingly is within the Panel's jurisdiction.

The Complaint Timeline

- The complaint was received on 5 October 2021.
- 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

- 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 product packaging.

The Marketing Communication

- The complaint relates to the packaging of Fairy Cake Oat Cream IPA by Mr Banks Brewing Co as shown below:



The Complaint

11. The complainant objects to the marketing as follows:
 - *This can has been advertised and promoted in such a way that it appeals to children.*
 - *The font is curly and cutesy, and the background has a soft pastel colour scheme with sprinkles in the background.*
 - *It looks like fairy bread, a sprinkle doughnut or cake.*

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 confectionery 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 11 October 2021. The principal comments made by the Company were:
 - We would like to notify you that we will accept the panel's decision about this claim.

- The label in question had not received Alcohol Advertising Pre-vetting Service Approval.
- The product was first supplied for retail sale on 9/09/2021.
- We do not believe the product has breached the code - having a strong appeal to Minors:
 - The colours are pastel/dull - not particularly eye-catching to Minors (bright/standing out)
 - Yes, the packaging shows sprinkles like a cake, we cannot really comment on whether this would lead to a transition between non-alcoholic to alcoholic products.
 - The "Oat Cream" is immediately followed by IPA. This puts a beer/alcohol term directly with the oat cream descriptor. I'm not sure any child would associate "Oat cream" with anything they would want to consume (maybe milk) but I wouldn't think Minors would drink milk from a can. Oat cream doesn't really sound like a soft drink term & I have never seen "oat cream" associated with anything other than a beer.
 - The can clearly states IPA and the words oat cream would not likely appeal to Minors as something they would want to consume.
- This product was a limited/one-off release. As of 8/10/2021, there are no more cases of the item left for sale.
- In our opinion, the label clearly states it is an IPA.

The Panel's View

15. Mr Banks Brewing Co was founded by a husband and wife team in 2016 and is based in Seaford, an outlying suburb of Melbourne. The Company is named after a clearly much-loved family dog, Banks. The Company brews an array of styles with a focus on stouts and IPAs and it is the packaging (can design) of the Fairy Cake Oat Cream IPA that has drawn the complaint.
16. On 5 November 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 advised that the beer

is no longer in production, unlikely to be still available in stores due to limited stock, will not be made again and all marketing around it has ceased. As no rehearing is sought, the Panel has proceeded to make a final determination on this complaint.

17. The complaint raises a concern that the Product packaging appeals to young children due to the font and colours used, as well as showing sprinkles, which evoke thoughts of fairy bread, a sprinkle doughnut or cake.
18. 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.
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 are 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;
 - the 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 that 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 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 the 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 argues that the Product packaging does not breach the ABAC standard. It is submitted:
- the colours are pastel/dull – and not particularly eye-catching to Minors - the packaging is not bright and does not stand out; and
 - the packaging clearly states that the product is an IPA and the words “oat cream” would not likely appeal to Minors.
24. Earlier in 2021, the ABAC Scheme commissioned research into public attitudes regarding alcohol marketing and tested the alignment of community opinion with the outcome of Panel determinations. One of the questions posed was the level of community understanding of various alcohol descriptors actually referring to an alcohol beverage. This research tested knowledge of the term ‘IPA’ and revealed that 31% of the population associated the term with an alcohol product, 8% associated it with a non-alcohol product and the majority of 60% were unfamiliar with the term. The research outcome confirmed the Panel’s belief that while IPA is a descriptor that a craft beer drinker may well recognise, a large majority of the community do not associate the term as designating a style of beer.
25. The Panel believes that the packaging does breach the Part 3 (b) standard. In reaching this conclusion the Panel noted:
- there is the potential for the product to be confused with a non-alcoholic beverage as the labelling fails to unambiguously establish the product as being a beer on the front of the can;
 - the name Fairy Cake is far more associated with a non-alcohol product than an alcohol beverage;
 - the pattern of sprinkles and mixed colours would resonate and be familiar to minors;
 - the overall impact of the packaging creates relatable imagery for minors inclusive of the product name and cake decoration pattern; and
 - taken as a whole a reasonable person would probably understand the packaging as having a strong and evident 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.