



ABAC Adjudication Panel Determination No 67/22

Product: White Rabbit Chocolate Stout
Company: Lion
Media: Packaging
Date of decision: 16 September 2022
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Louisa Jorm
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 22 August 2022 and concerns the packaging of a 355 ml can of White Rabbit Chocolate Stout (“the Product”) by Lion (“the Company”).
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 meet 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 22 August 2022.
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 completed in this timeframe.

Pre-vetting Clearance

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

The Marketing Communication

10. The complaint relates to the packaging of the Product by the Company as shown below:



The Complaint

11. The complainant objects to the marketing as follows:

- *Pana Organic, the famous confectionery brand logo is on the can.*
- *Clearly confusing the product with confectionery, also being chocolate flavour even more so makes it appeal to minors.*

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 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 letter emailed on 8 September 2022. The principal comments made by the Company were:

- We reiterate our commitment to the ABAC Scheme and take our obligations to responsibly promote our products very seriously. As a responsible marketer, Lion maintains strict internal and external processes to help ensure this compliance with the ABAC, including taking all reasonable steps to ensure the advertising and packaging does not appeal to minors in any way. In this instance, for the reasons set out below, we submit that complaint 67/22 should be dismissed by the ABAC Panel.
- The packaging referred to in the complaint did not receive Alcohol Advertising Pre-Vetting Service (AAPS) Approval. The ABAC Pre-vetting service is optional for packaging for signatories to the ABAC Scheme pursuant to Rule 5.2 of the ABAC Rules and Procedures. The artwork was reviewed internally for compliance with ABAC standards and is consistent with the packaging style and format of other White Rabbit products that have previously received AAPS approval and been in market since 2016 that have not been subject to a complaint or found to breach the ABAC.
- The Packaging in question is a variation on the standard White Rabbit packaging, which is well-known among craft beer drinkers and uses a colour palette of neutral tones, with dark forest imagery and the brand's namesake, the White Rabbit. The chocolate stout collaboration with Pana Chocolate is produced every year around Easter. Limited quantities are produced (2000-3000 cases) and it generally sells through bottle shops over a 2-3 month period (more than 80% of the volume is sold within two months).
- Pana Organic is positioned as and perceived as a more natural, healthy and environmentally-friendly and premium chocolate brand, primarily aimed at adults. The taste of Pana Organic comes from the highest quality organic ingredients sourced from nature. Pana Organic truly cares about where their food comes from and its impact on the earth. They plant trees every year as part of their give back plan – 60,000 and counting. They aim to use only recyclable or compostable packaging.
- By way of comparison to other confectionery brands, which have far greater appeal to children, using colourful imagery and animated characters as mascots, everything from Pana Organic's colour scheme,

brand positioning, and taste are unmistakably designed for an adult audience.

- In addition to the above, we draw the Panel’s attention to the following characteristics of the artwork that support our case that it does not strongly appeal to minors:
 - Chocolate products are not generally produced in cans, and so it is unrealistic to think a child would mistake this product for confectionary.
 - The packaging will not be confused with confectionery as it is clearly identified as an alcohol beverage through the use of “CHOCOLATE STOUT” as an alcohol description, which is clear and prominent on the front of pack. The packaging includes all other mandatory labelling requirements for alcohol beverages, including the 5.6% alc/vol statement, to indicate it is alcoholic. The romance copy on the side of the pack includes multiple references to beer and alcohol attributes –including Stout; roasted malt & barley; brandy spirit; beer and brewers.
 - Lion voluntarily includes a “NOT FOR MINORS” statement on its back label to support that our products are not for sale to or consumption by minors.
 - The visual design does not include features that would be commonly found on soft drink or confectionary products. In particular, the artwork uses a brown and beige muted colour palette that is not eye-catching to minors, it does not incorporate chocolate or confectionery images and uses a plain, adult-style font.
 - The White Rabbit logo is the dominant image and additionally is significantly larger than the Pana Organics logo.
 - The risk of association with this White Rabbit Chocolate Stout product and a chocolate or confectionery product by a reasonable person in the community is low and unlikely.
 - White Rabbit has been in the market since 2009 and has always used forest illustrations. Each illustration is created specifically for the brand which uses sophisticated, darker, premium colour palettes.

- The Packaging therefore does not breach Part 3 (b) (i) of the Code by having strong or evident appeal to minors.

The Panel's View

15. White Rabbit commenced operations as an independent craft brewery in 2009 in Healesville Victoria before relocating to Geelong. The brewery offers standard and limited release beers with its chocolate stout first offered as a limited release beer in 2017. The brewery is now owned by Lion.
16. Pana Chocolate is a Melbourne based company that commenced operations in 2012. It sells a range of organic chocolate products and has collaborated with White Rabbit in regard to the chocolate stout beer. It is the packaging (labelling) of the stout which includes the Pana brand name which has drawn the complaint.
17. The front of the label is predominately monochromatic, using various shades and hues of brown depicting a rustic scene. The scene shows a white rabbit traversing a path. Centred is the product name 'white rabbit' with 'chocolate stout' in smaller font underneath. Also displayed is a box containing 'made with Pana Organic cacao'. At the bottom, the capacity of the can is shown, along with the alcohol content and the words 'fermentation with imagination'.
18. The complainant is concerned that the packaging design appeals strongly to minors by using the word 'chocolate' to describe the product flavour and also featuring the Pana Organic confectionery company's logo.
19. This concern raises Part 3 (b) of the ABAC. This standard provides that an alcohol marketing communication (including product packaging) must not have strong or evident appeal to minors. The standard might be breached if the marketing:
 - 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 are to be the benchmark.

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;
 - 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.
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 that 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 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 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.

24. The Company argues that the packaging of its White Rabbit Chocolate Stout does not appeal to minors and to support its position explains that:

- the packaging uses a colour palette of neutral tones, with dark forest imagery and the brand's namesake, the White Rabbit, which would have greater appeal to adults;
- Pana Organic chocolates and other products are aimed at and predominantly consumed by an adult market;
- there are a number of clear and prominent alcohol cues on the can, making it clear that the product is alcoholic.

25. The growth of craft brewing has seen more alcohol products using 'chocolate' as a descriptor, although it would be fair to say that chocolate references on beverage packaging is far more commonly associated with non-alcoholic milk drinks. If a marketing communication uses descriptors more usually associated with non-alcoholic beverages, it is important that the overall impression from the marketing does establish the product as being alcoholic. While a failure to unambiguously identify a beverage as alcoholic is not of itself a breach of an ABAC standard, it can contribute to the marketing being confused with a soft drink and potentially giving rise to strong appeal to minors.

26. In this case the Panel does not believe the Part 3 (b) standard has been breached. In reaching this conclusion the Panel has regard to:

- while Pana Chocolate has been a successful business and has wide distribution a reasonable person would not regard it as a longstanding household purchase so as to be likely to be highly recognised by minors (by contrast products from – Cadburys, Nestle and Mars);
- the Pana Organic logo is shown in a similar muted colour to the rest of the label, and does not stand out;

- the can design does not resemble any well-known soft drink brand and it seems unlikely that the product would be readily confused with a soft drink;
- the can design establishes that the product is an alcohol beverage;
- the imagery is mature, and the white rabbit shown is not engaging and does not resemble any popular children's character;
- the label is predominately brown and does not use bright contrasting colours more likely to be strongly appealing to minors;
- taken as a whole, the combination of the colour scheme and the overall impression of the packaging, means a reasonable person would most likely understand the packaging appeals more to an older demographic.

27. The complaint is dismissed.