



ABAC Adjudication Panel Final Determination No 68/22

Product: Tawny Grogmouth Pale Ale
Company: Bucketty's Brewing Co
Media: Packaging
Date of decision: 10 October 2022
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Debra Richards

Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 22 August 2022 and concerns the packaging by Bucketty's Brewing Co (“the Company”) of its Tawny Grogmouth Pale Ale (“the Product”).
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

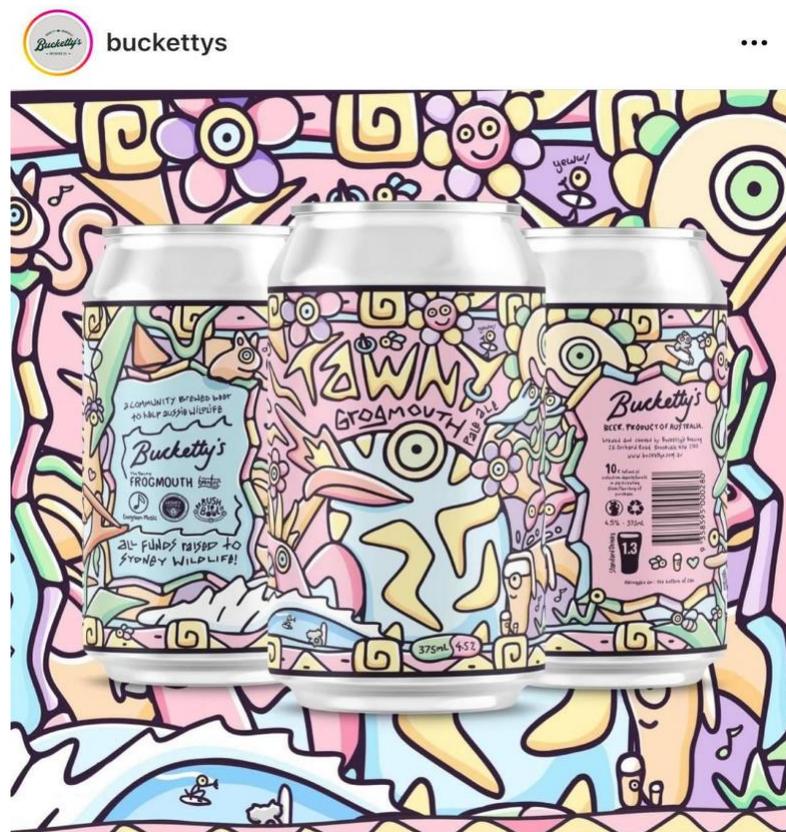
7. The complaint was received on 22 August 2022.
8. Generally, the Panel endeavours to make a decision within 30 business days of the receipt of a complaint but this timeline is not applicable due to the two-part process involved in determinations concerning product names and packaging.

Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverage marketing features 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:
- *The packaging design of this Bucketty Brewery can with its flamboyant, bright colours has a strong appeal to minors.*
 - *If in a household fridge would not instantly recognise that it is alcoholic as not clearly labelled on the front of the can.*

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 email on 25 August 2022. The principal comments made by the Company were:
- The design didn't get pre-vetting approval.
 - The product is going on sale on Saturday, 27th August. It's a limited release run which we expect to sell out within a fortnight.
 - We don't believe the packaging has Strong or Evident Appeal to Minors. The rear of the can states that it's a community brewed beer, and BEER.

Product of Australia. It's also noted as being a Pale Ale and 4.5% ABV on the front of the can. The can is designed to be flamboyant and eye catching, however we don't believe it's significantly different to many other craft beers on the market.

- Hopefully we haven't breached the code, this can design was done by a local artist who donated their time and we're using the funds raised to help Sydney Wildlife Rescue. Last year we did a similar can design and it was voted best in NSW with us raising over \$10k.

15. The Company responded to the provisional determination by email on 19 September 2022. The additional comments made by the Company were:

- I note that in point 27 the panel's opinion is that there's no one element that's decisive which makes the decision subjective.
- We'd also ask that the panel consider the limited release nature of the beer, and the objective of raising money for wildlife research before requesting we destroy the remaining stock. We don't have a lot left, but what does remain will make a big difference in our ability to divert profits to Sydney Wildlife Rescue.
- Since this complaint was raised we've been comparing the Tawny Grogmouth 2.0 to other "cartoonish" craft beer labels and can't see how our beer is substantially different to the vast majority of available products.

The Panel's View

Introduction

16. On 7 September 2022 the Panel made a provisional determination that the product packaging of the Company's Tawny Grogmouth Pale Ale breached Part 3 (b)(i) of the ABAC. Consistent with the rules and procedures applying to decisions concerning product packaging, the Company sought a re-hearing of the provisional determination by making further submissions.
17. A re-hearing of a provisional determination is a fresh consideration of the complaint. The Panel is to consider the materials at hand at the time of the provisional determination as well as the additional submissions made by the Company in response to the provisional determination. The Company's original response to the complaints is detailed at paragraph 14, while its additional submissions in response to the provisional determination are detailed at paragraph 15.

18. The Tawny Grogmouth Pale Ale is a collaboration between the Company and other Sydney Northern Beaches businesses such as the Bush to Bowl nursery at Terry Hills and the artist Brent Turner who works under the name Brentos. It is the art and design of Brentos that is featured on the product packaging and this in turn is based on the Brentos designed cover of the August 2022 edition of the monthly Northern Beaches community magazine the 'Tawny Frogmouth'. It is this packaging design that drew the complaint.
19. The 2022 limited release product is the second 'tawny grogmouth' pale ale packaged by the Company based upon the artwork of Brentos. The '2.0' product version was launched at a food and music event held at the Company's Brookvale venue on 27 August 2022 with proceeds from the sale of the product going to the wildlife charity WIRES. The product is also able to be ordered from the Company's website.
20. The can has an elaborate design that Brentos describes as being inspired by a 'vintage mambo' style. The main image on the can's front is a stylised frogmouth owl accompanied by smaller images of flowers, koalas, insects and stick figure people. The colours used are predominantly pastel pink, blue and yellow.
21. The front of the can has the word "Tawny" in a relatively large pastel yellow font, with the words "Pale Ale" following it in smaller letters. The capacity of the can and the ABV are shown, also in smaller font, at the bottom of the front of the can. Other information pertaining to the product is contained on the side and back of the can, including the name of the brewery, the number of standard drinks, and the words 'a community brewed beer to help Aussie wildlife' and 'all funds raised to Sydney wildlife'.

Complaint and ABAC Standard

22. The complainant is concerned that the packaging design has a strong appeal to minors due to its flamboyant, bright colours. It is further argued that the product is not instantly recognisable as alcoholic, due to not being clearly labelled as such on the front of the can.
23. The complainant's 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.
24. 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.
25. 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.
26. 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.

27. 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.

The Company's submissions

28. The Company submits both in response to the complaint and its request for a re-hearing that the packaging does not appeal to minors and is consistent with the ABAC Standard. It is argued that the packaging:
- contains multiple descriptors making it clear that the product is alcoholic;
 - while the design is flamboyant and eye-catching, it is not significantly different to many other craft beers on the market.; and
 - the provisional determination notes that no one element of the design is decisive in having strong appeal to minors, and therefore the decision is subjective.
29. The Company asks that consideration be given to the fact that the product is a limited release and that the profits from the sales are going to Sydney Wildlife Rescue. The adverse ruling will impact on the benefit that the charity will receive.

Some General Observations

30. Before turning to the consistency of the can design with the ABAC standard on strong appeal to minors, it is useful to address two points raised by the Company, namely that the Company's can design is not greatly different from other products and the weight to be given to the social good from the product's sale.

31. There are a very large number of alcohol products on the Australian market and it is a fair comment that many products adopt bright, eye-catching designs in product packaging and marketing. It is not contrary to ABAC standards for marketing to be eye-catching or innovative, but it is contrary to the standards to fail to model alcohol use in a responsible manner or to employ designs that can be fairly said to have a strong appeal to minors.
32. The ABAC Scheme provides a range of education materials to assist alcohol marketers and most importantly a pre-vetting service to independently assess marketing material prior to use. While pre-vetting is not a guarantee that there will not be a subsequent public complaint and the Panel always makes its own independent decision on marketing material when considering a complaint, pre-vetting is prudent risk management.
33. A Panel determination on marketing material is triggered by a public complaint. Given the sheer size of the Australian alcohol market, it is almost inevitable that at any given time there will be product packaging that would be found in breach of a Code standard if subject to a complaint and Panel decision. It cannot be a justification for having marketing inconsistent with good standards to point to other marketing that had not been complained about any more than it would be a defence to a speeding ticket to say that there are other speeding cars.
34. On the second point, it is readily accepted that the Company's contribution of profits from the sale of the product to WIRES is a worthwhile social and corporate initiative. It is not valid however to trade off responsibility in marketing for another social good. Alcohol is not just another product. The misuse of alcohol is the cause of great health, social and economic harm. Responsible marketing is one element recognised in the National Alcohol Strategy by Australian governments in reducing harm from alcohol misuse.

Consistency with the ABAC Standard

35. It would be fair to say that the front of the can (which is obviously most influential in how a reasonable person forms a view about a product) does not unambiguously identify the product as a beer. The alcohol references such as 'pale ale' and the glass of beer image are not immediately apparent within a complex design. That said, 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. In any event, the ABAC standard does not require that alcohol packaging be clearly identified as an alcohol beverage as such but provides that confusion with a soft drink can be a factor in the appeal of the packaging to a minor.

36. On balance, the Panel does believe the can design does breach the Part 3 (b) standard. In reaching this conclusion the Panel noted:
- the principal image of a stylised owl will have wide appeal, including minors;
 - the use of pastel pink, yellow and blue will be eye-catching to minors, with the images of animals, insects, flowers (including with a smiling face), love hearts, a koala holding a surfboard and a cartoon person surfing being relatable to minors;
 - the anthropomorphism of some of the animal depictions brings to mind children's cartoons and characters in stories directed at children;
 - the overall impression of the packaging through the colour scheme and graphic design creates an illusion of a smooth transition from a non-alcoholic to an alcoholic beverage;
 - the alcohol cues that will direct the product to adults are not immediately apparent due to being lost in the busy design, being in smaller font, or being on the side or back of the can; and
 - while no one element of itself is decisive, taken as a whole, the combination of the colour scheme and the overall impression of the packaging amounts to more than incidental appeal to minors and the appeal can be reasonably considered strong or evident.
37. The Company, in its request for a rehearing, submitted that the final point in the paragraph above, means the Panel's decision is subjective. The point being made is that the decision is based upon an assessment of the packaging's overall impact, with no one single feature by itself being the sole reason.
38. Accordingly, the Panel makes a final determination that the product packaging is in breach of Part 3 (b)(i) of the Code.