



ABAC Adjudication Panel Determination No 143/23

Product: Ridgeland West Coast IPA
Company: Rocky Ridge Brewing Co
Media: Packaging
Date of decision: 8 November 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Louisa Jorm
Ms Jeanne Strachan

Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 30 August 2023. It follows a provisional determination made on 16 October 2023 in relation to the packaging of Ridgeland West Coast IPA (“the product”) by Rocky Ridge Brewing Co (“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:
 - 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;

- 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 30 August 2023.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline does not apply when making a provisional determination on product packaging. This is because of the two step process involving the opportunity for a company to make additional submissions in response to the provisional determination.

Pre-vetting Clearance

- 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 obtained for the marketing.

The Marketing

- The complaint relates to the packaging of Ridgeland West Coast IPA:



Complaint

- The complainant objects to the marketing as follows:
 - The newly advertised alcoholic product bears strong resemblance to the video game Super Mario Bros. This would have a strong appeal to minors due to the similarities between the packaging as well as the Super Mario Bros franchise. Additionally, this would have strong appeal to minors due to the cartoon style imagery, the use of bright colours and fonts.*
 - The advertising in this packaging is designed to be similar to the popular Nintendo video game franchise "Super Mario Bros.", a best selling and well recognised brand that has large appeal to minors and is most noted for their children's video games of all time. This is a video game series that has a large appeal to minors. Super Mario is most noted for their children's video games. Also of note, the Super Mario franchise recently released a movie for children and young audiences, giving the Mario franchise renewed appeal to minors.*
 - The similarities between the "Ridgeland" packaging and Super Mario is evidenced by:*

- *The two men in the image use hammers to break the title name of the beverage. Hammers are a commonly used item in the Super Mario Franchise.*
- *The rainbow coloured font used in the name of the beverage 'Ridge Lander'. The rainbow coloured title is similarly used in title's and advertising used by the Super Mario Franchise*
- *The three consecutive bricks are seen floating in the background of the cartoon man with green shorts. The Super Mario franchise includes 'item blocks', where players hit brick blocks that have hidden items to collect.*
- *Character wearing a cap, similar to the cap worn by the Super Mario Bros.*
- *Character features facial hair, similar to Super Mario Bros.*
- *There is no clear labelling of the word 'Beer' or implication that this is an alcoholic beverage. The Alcohol By Volume strength is noted as a number however many minors may not understand this meaning. Moreover, the abbreviation 'IPA' may be understood by many adult drinkers, however it is a term that is less likely to be understood by minors.*
- *While the can showcases an '18+' symbol, it appears to be part of the design and is somewhat concealed. This symbol is small compared to the rest of the design, and placing it inside a cartoon explosion may draw away from the idea that this is a warning.*

The ABAC Code

12. On 1 August 2023 an updated version of the ABAC Code came into effect. As the complaint relates to the packaging of a product first made available for purchase after 31 July 2023, it will be assessed against the revised Code. References in this determination are therefore to Code standards as contained in the revised Code.
13. Part 3 of the revised ABAC Code provides that a Marketing Communication must NOT:
 - (b)(i) have Strong or Evident Appeal to Minors, in particular;
 - (A) specifically target Minors;
 - (B) have a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;

(C) use imagery, designs, motifs, language, activities, interactive games, animations or cartoon characters that are likely to appeal strongly to Minors;

(D) create confusion with confectionery, soft drinks or other similar products, such that the marketing communication is likely to appeal strongly to Minors; or

(E) use brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

The Company Response

14. The Company responded to the complaint by letter emailed on 1 September 2023. The principal comments made by the Company were:

- Confirming that the inspiration for this design draws from Super Mario Bros, we believe we have distanced ourselves sufficiently to avoid any appeal to children. We recognise the concerns that have been raised and wish to address them as follows:
 - Super Mario Bros, originating in 1985, is now nearly 40 years old and was initially targeted at individuals who are now aged 30 and above. Much like numerous contemporary movies, it caters to the nostalgia of adult viewers.
 - Hammers: These are clearly represented as kegs.
 - Coloured Font: Employing coloured text is a common practice that aligns with the marketing style of our collaborator, Brewlander. What sets Super Mario Bros apart is its origami-style font, which we have intentionally not utilised. Instead, we have embraced Brewlander's vibrant aesthetic and applied our Rocky Ridge font.
 - Bricks: We acknowledge the presence of bricks in the background, albeit in a distinct style from the original Super Mario Bros. The inclusion of "3" is arbitrary and lacks a cohesive thematic link within the animation. While we recognize that colorful blocks might resonate more with children, bricks, in and of themselves, do not exclusively cater to a younger audience.
 - Characters: The animated depictions of the Rocky Ridge owner (Hamish) and Brewlander owner (John) simply portray these individuals' appearances. Black shirts and hats are standard items for brewers to wear. Refer to our website where you can purchase such items.



(Hamish pictured left)



(John pictured left, Hamish to his right)

- Alcoholic Beverage: The style and alcohol content prominently feature on the front, consistent with the presentation of all beverages within our industry. We acknowledge the observation that children might not understand, but it's important to note that we are not tailoring our advertising to appeal to children. All of our Online and social media presence is Age Blocked - you must be over 18 to view any of our content, our Website requires age verification as does our email and marketing sign-up. We do not engage in advertising outside of online and digital presence. While it is possible that a third party may share this content, we have taken every reasonable step to ensure that this content cannot be viewed by minors in Australia (or abroad), that there is no direct appeal to minors and that our content is strictly monitored to ensure that anyone not of legal drinking age will not be able to access any of our content.
- The can is also prominently labelled with our name, "Rocky Ridge Brewing Co.," and references to "BEER" are abundantly present. This product is exclusively only available at venues restricted to those aged 18 and above.
- 18+ Symbol: We respectfully disagree with the mentioned concerns and wish to highlight that the 18+ symbol stands out distinctly against the design due to its bright yellow background, ensuring a clear contrast. By incorporating this 18+ symbol, we underscore our commitment to adhering to industry standards, which was a paramount consideration during the creation of this design.
- I would also like to note and make clear that this product was only available in the market in a limited capacity, with fewer than 10,000 units made available to trade. We expect that per standard limited releases, this will only be available in stores for a further 4-6 weeks.

15. The Company responded to the provisional determination by email on 3 November 2023. The additional comments made by the Company were:
 - As this product is no longer available, and we do not plan on re-releasing the product (it is effectively archived), we will not be providing an official response to the determination.
16. As the Company has not sought a re-hearing of the provisional determination, under the rules and procedures applying to the Panel the determination now becomes final.

The Panel's View

17. Rocky Ridge Brewing Co operates a taphouse and brewery in two locations in and near Busselton, Western Australia. It has recently collaborated with Singaporean craft brewers, Brewlander, to produce Ridgeland West Coast IPA. It is the 375ml can labelling of the product that has drawn this complaint.
18. The front of the can shows two animated male characters energetically wielding what appear at first blush to be hammers (actually beer kegs with a handle). The Company name Rocky Ridge in larger font with 'collaboration with Brewlander' appear above the characters. Below the characters and being struck with the hammers/kegs is the name "Ridgeland" spelt in varying colours (blue, orange, red, green and yellow). There is a yellow and orange starburst above the "D" in Ridgeland, containing 18+. Beneath Ridgeland is the product descriptor West Coast IPA and the alc.vol %
19. The design style adopted is reminiscent of the well known Nintendo video game Super Mario Bros. The game references include:
 - the dress and caps worn by the characters;
 - the computer graphic style depiction of the clouds;
 - the floating bricks;
 - the flagpole and flag positioned on a brick;
 - the use of a hammer; and
 - the colours used in the Ridgeland name.
20. The complainant contends that the design appeals to children by referencing the characters, activities, and features of Nintendo's Super Mario Bros game, which is popular amongst children. The Company does not dispute the Mario Bros inspiration for the design but submits the can design has been sufficiently distanced from the game to avoid any appeal to minors. Specifically it is argued:

- the animated characters on the label are representations of the Rocky Ridge and Brewlander owners;
- Super Mario Bros, originating in 1985, is now nearly 40 years old and was initially targeted at individuals who are now aged 30 and above. The packaging caters to the nostalgia of adults;
- the 'hammers' are clearly represented as kegs;
- the label does not use the Super Mario Bros origami-style font;
- bricks, in and of themselves, do not exclusively cater to a younger audience.
- the can is prominently labelled with the name, "Rocky Ridge Brewing Co.," and references to "BEER" are abundantly present. The 18+ symbol stands out distinctly against the design due to its bright yellow background, ensuring a clear contrast.

21. The issues raised enliven the ABAC standard contained in Part 3 (b)(i) of the Code. This standard requires that an alcohol marketing communication (which includes brand names and product packaging) must not have strong or evident appeal to minors. This might occur if the product packaging:

- specifically targets minors;
- has a particular attractiveness for a minor beyond the general attractiveness it has for an adult;
- uses imagery, designs, motifs, language, activities, interactive games, animations, or cartoon characters that are likely to appeal strongly to minors; or
- creates confusion with confectionery, soft drinks or similar products, such that the marketing communication is likely to appeal strongly to minors.

22. The benchmark applied when assessing if an ABAC standard has been satisfied is the 'reasonable person' test. This means the Panel puts itself in the shoes of a person who has the life experiences, opinions and values commonly held by most Australians, and assesses how this reasonable person would probably understand the marketing communication.

23. 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.

24. 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.
25. When assessing a design of a can or bottle, it cannot be expected that a reasonable person will turn the container around the full 360 degrees and study it in fine detail. Rather it is the front of the can/bottle that will be most influential in how the person will probably understand the packaging and impressions will be most strongly shaped by larger font writing and the predominant colours and design features.
26. Super Mario Bros is one of the world's most successful and enduring video console games. Initially a video arcade game, the Nintendo console game was released from 1985 firstly in Japan and then globally by 1987. Since that time the game has been renewed and expanded into over 20 games in the series. Beyond the console platform, the game has been released on Game Boy.
27. The game is reported to have sold 380 million units worldwide as of 2021 and is one of the most popular games of all time. More generally gaming is hugely popular in Australia with the 2022 'Connected by Games' report from Digital Australia showing:

- 8.6 million Australian households have games with 17 million players and gaming is second only to TV and streaming services as an entertainment platform;
- 76% of parents played games with their children;
- the 'average' player is 35 years old with 53% and 46% of players male and female respectively. The average age has been increasing over time as children keep playing games into adulthood. More specifically the percentage of players among age groups are:
 - 39% of 1 to 4
 - 82% of 5 to 14
 - 86% of 15 to 24
 - 78% of 25 to 34
 - 72% 35 to 44; and
- console platforms are the most popular way to play.

28. Beyond the game itself, the Mario Bros have expanded into other mediums. The 2023 'The Super Mario Bros Movie' was, prior to the release of Barbie, the largest box office success of the year. The movie was aimed towards children. Lego has a Mario Bros set and the Mario characters are found on clothing and other merchandise directed towards minors.

29. The Company contends that while the can design is inspired by Mario, it is directed towards adults and appeals to a sense of nostalgia. As the Panel has noted in previous decisions, care needs to be taken with nostalgia themed marketing communications as a product or experience popular when today's adults were minors often is still popular with minors today.

30. The Panel believes that the packaging breaches the Part 3 (b)(i) standard by having strong or evident appeal to minors. In reaching this conclusion the Panel noted:

- while the front of the can label could do more to unambiguously identify the product as an alcohol beverage, there are sufficient cues pointing to the beverage being alcohol and in any event the can design does not resemble any well-known soft drink and is unlikely to be confused with a soft drink;
- the can design does employ imagery and designs that are readily associated with the interactive video game Mario Bros;

- the Mario Bros references would be recognised by persons including minors familiar with the game;
- Mario Bros has an enduring popularity across age ages but notably with minors;
- the familiarity of the Mario Bros imagery to minors has been further developed by the game and its principal characters expanding into other mediums such as children’s movies and products used by minors including Lego;
- the colours used on the can are bright and eye catching to minors; and
- taken as a whole the can creates a relatable image for minors and gives the illusion of a smooth transition to an alcohol beverage as a result.

31. The Panel acknowledges the Company’s advice that its marketing and sales channels for the product are structured in a way to limit the exposure of the product to minors. The ABAC standards however are not constructed so that product packaging that strongly appeals to minors is permitted due to the intended marketing channels. The standards going to the content of alcohol marketing as well as the standard seeking to limit the exposure of minors to alcohol products and their marketing must both be satisfied.
32. The Panel makes a final determination that the packaging for Ridgeland West Coast IPA is in breach of Part 3 (b)(i) of the ABAC Code.