



ABAC Adjudication Panel Determination No 186/23

Products: Pickle Beer, Spicy Pickle Beer and T-Sauce
Company: Garage Project
Media: Packaging
Date of decision: 8 February 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Louisa Jorm
Ms Jeanne Strachan

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 30 November 2023. It follows a provisional determination made on 8 February 2024 in relation to the packaging of three products by Garage Project (“the Company”), specifically Pickle Beer, Spicy Pickle Beer and T-Sauce.
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 30 November 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.

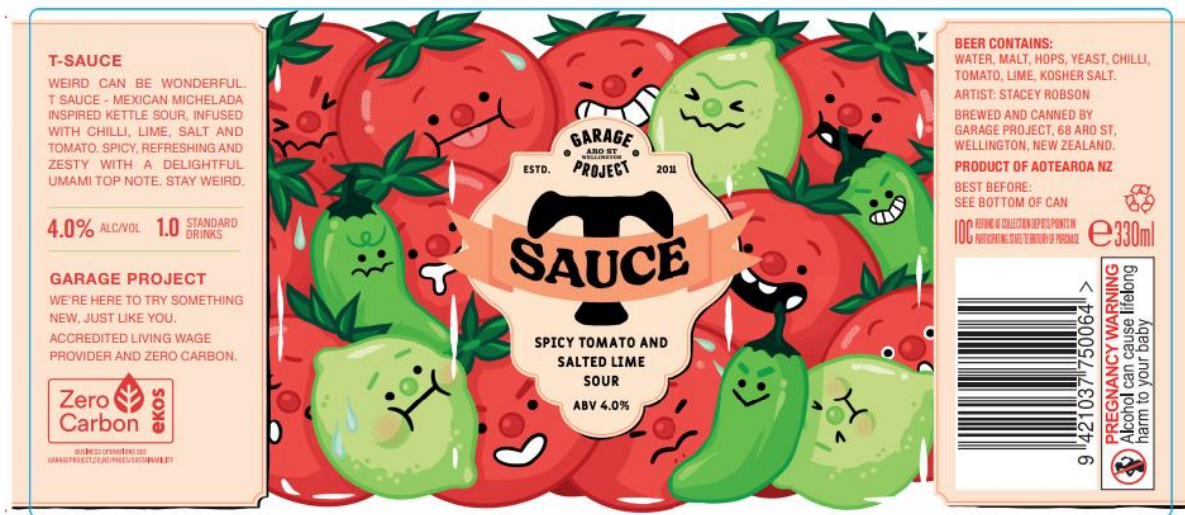
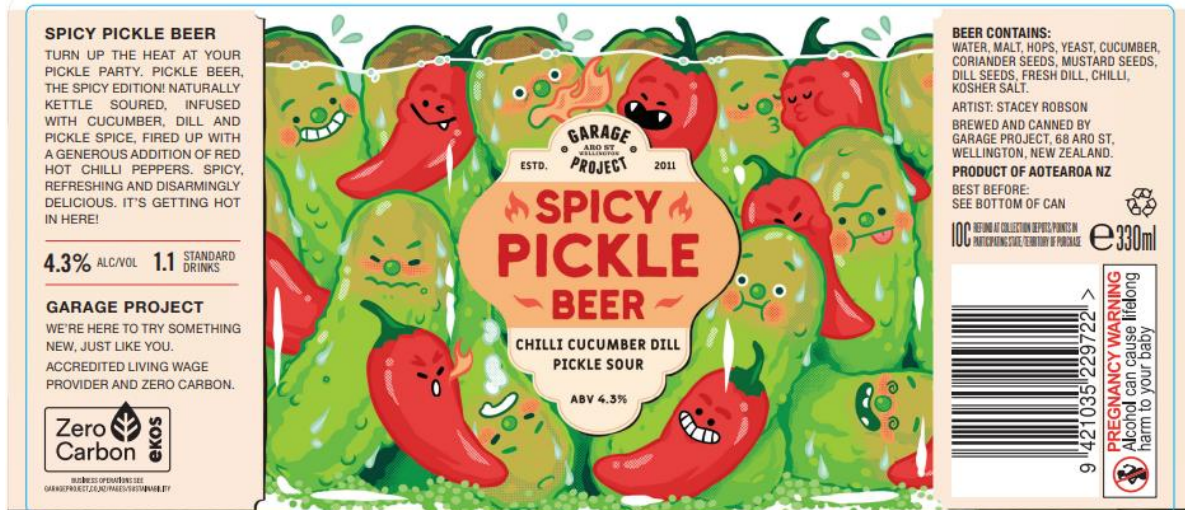
Pre-vetting Clearance

9. A component of the ABAC Scheme is an advice service by which an alcohol marketer can obtain an independent opinion of a proposed alcohol marketing communication against the ABAC standards prior to public release. Pre-vetting advice is separate from the complaint process and does not bind the Panel but represents best practice on behalf of alcohol marketers. Pre-vetting approval was not obtained for the content of the marketing.

The Marketing

10. The complaint relates to the packaging of three products by the Company:





Complaint

11. The complainant objects to the marketing as follows:

- *We submit that the packaging has strong and evident appeals to minors, evidenced by the:*
 - *stylised cartoon imagery used to depict fruit and vegetables; and*
 - *use of bright colours used in the cartoon imagery.*

The ABAC Code

12. A [new ABAC Responsible Alcohol Marketing Code](#) commenced on 1 August 2023. Consistent with the transition arrangements applying to the new Code, marketing communications released prior to 31 July 2023 are to be considered

under the provisions of the previous Code. As Spicy Pickle Beer and Pickle Beer were on the market prior to 31 July 2023, the complaint in relation to these products will therefore be considered under the [previous Code](#). As T-Sauce was first available after 1 August 2023 the complaint in relation to this Product will be considered against the [new Code](#).

13. Part 3 (b) of the new Code provides that a marketing communication must NOT:
 - (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.
14. Part 3 (b) of the previous Code provides that a marketing communication must NOT:
 - (ii) have Strong or Evident Appeal to Minors.
15. Part 6 of the previous 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 Minor 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 Response

16. The Company responded to the complaint by letter emailed on 19 January 2024. The salient comments made by the Company to the complainant's concerns were:
- We are writing to you in response to the complaint received regarding our Pickle Beer, Spicy Pickle Beer and T-Sauce. We appreciate the opportunity to present our case and demonstrate our compliance with the ABAC code.
 - The complaint laid is that we have released several beers with flavour profiles similar to fruit and vegetables, and that the packaging has strong and evident appeal to minors. Fruit Beer, Field Beer and Spice, Herb, or Vegetable Beer are recognised beer styles in the Beer Judge Certification Programme (BJCP), widely acknowledged as a worldwide standard for beer categories in competitions.
 - Archaeological findings have shown that beer brewing incorporating fruit and vegetables goes back 9,000 years to Neolithic China, then to ancient Egypt, through to medieval Britain, and more recently in Belgium over the last 100 years. Beer brewed with fruit, vegetables and spices have been consistently brewed since the dawn of civilisation, and are an important and foundational part of our food and beverage history.
 - Dill Pickle, Spicy Dill Pickle, and Spiced Tomato beers are therefore brewed in well established styles, and fit within a category of beers with a rich and unique history. Accordingly, in our view, the complaint can only be viewed on the grounds of Part 3 (b)(i), that the packaging artwork must not have strong or evident appeal to minors.
 - In our submission, there should be no consideration given to the flavour profile of the beers. Further, we note that Pickle Beer and Spicy Pickle Beer have been continuously available in market before August 2023, and therefore the Feb 26 2021 ABAC Code applies, where Part 3 (b)(i) states a marketing communication must not have strong or evident appeal to minors.
 - Pickle Beer has been available in the Australian market continuously since 26th November 2020, and Spicy Pickle Beer since 30th June 2023. In over three years of availability in the market, this is the first complaint we have received about the label. We also note that we have to date, received no complaint for either label in the New Zealand market.

- T-Sauce Beer was released in Australia after 1st August 2023, and therefore is judged against the revised ABAC code, with a much greater expanded Responsibility to Minors clause that would likely cover a vast majority of craft beer releases in the modern era of brewing. The definitions are extremely broad, and, in our submission, take an overly simplistic view of a complex issue.
- A brewery would be extremely foolish to intentionally attempt to appeal to minors in their packaging designs. A definition of whether a cartoon design is likely to have strong appeal to minors is very subjective. As supported by “Breweries Aren’t Your Mothers’ ” from Beer Nouveau, it argues that all cartoons on alcohol labels do not inherently appeal to minors, especially to older teenagers typically involved in underage drinking. (Beer Nouveau).
- Taking the new ABAC code rules into account, we make no submissions around ‘T-Sauce’. We make the following submissions on Pickle Beer and Spicy Pickle Beer:
 - **Adult-Orientated Flavour Profiles and Prominent Alcohol Labelling:** ‘Spicy Pickle Beer’ and ‘Pickle Beer’ feature sophisticated, adult orientated flavour profiles tied to historic beer styles. Each label features a prominent ‘BEER’ on the front middle of the packaging, with the alcohol content clearly listed. They strongly indicated their alcoholic nature, specifically targeting an adult audience.
 - **Artwork and Appeal to Minors:** The cartoon-style artwork on our packaging is designed for an Adult audience. Cartoon characters, in this case, anthropomorphised pickles do not inherently have strong or evident appeal to minors. We note that anthropomorphism is widely used across adult marketing. The addition of eyes to an inanimate object, does not give it automatic strong or evident appeal to minors. The artwork has been executed with great levels of detail, with intricate designs that remove it from children’s artwork that is more simplistic.
 - **Colour Scheme:** The colours used accurately depict the ingredients of the beer. There is nothing inherently eye-catching or bright around the packaging. It does nothing more than to represent the ingredients of the beer, that a reasonable person would understand as a Pickle Beer or Spicy Pickle Beer. Not something that would have strong or evident appeal to minors.
 - **Consumer Access and Retail Environment:** Our products are only available in adult oriented environments, like bottle stores or licensed premises, where minors are not permitted, or are under adult supervision.

- **Market Positioning and Brand Reputation:** Garage Project is renowned in the Craft Beer market, known for catering to a discerning, adult audience. Our brand is known for championing New Zealand and Australian artists across our labels. Indeed, we have published a book through the renowned Penguin Books on 'The Art of Beer'.
 - Through the 12 year history of the brewery, this is the second complaint we have received around our packaging, with the first dismissed. The code needs to establish there is a 'strong or evident appeal to minors'. Given the history of Pickle Beer and its derivative Spicy Pickle Beer being available continuously on the market for over three years now without complaints or issues raised, there is compelling reason to believe that there has been no issue, nor strong nor evident appeal to minors found in the packaging. Any appeal therefore can only, at its highest, be incidental and certainly not strong nor evident.
 - Through Garage Project's popular social media channels that are 'age-gated' to 18+, we have not observed any comments or commentary around the risk of 'strong or evident appeal to minors'.
 - **Panel Precedents:** We believe there are numerous precedents set in previous panel decisions, that a reasonable person would not find the Pickle Beer or Spicy Pickle Beer to have 'strong or evident appeal' to minors. The flavour profile of Pickle Beer is polarising. Even to a vast majority of adult drinkers it sounds, frankly, quite disgusting. It is a sophisticated taste profile pitched to a very small niche section of an adult audience. We can only imagine what a minor would think about the prospect of 'Pickle Beer' or 'Spicy Pickle Beer', when it is off-putting to a majority of adults.
 - Taken as a complete package, in our submission, Pickle Beer does not have 'strong or evident' appeal to minors through taste profile. The visual look and feel of the can with heavy alcohol cues, sophisticated, stylised artwork that accurately depicts the beer's ingredients in a light manner is something that a reasonable person would think resonates with an adult consumer. For these numerous reasons, we respectfully request that these claims be dismissed.
17. The Company responded to the provisional determination by email on 8 February 2024, advising that it would accept the determination of the Panel.
18. 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

Introduction and context

19. This determination arises from a complaint about the packaging of three Garage Project products, Pickle Beer, Spicy Pickle Beer and T-Sauce. The first two products were released prior to 31 July 2023 whereas the T-Sauce product was released later in 2023. As a result this determination falls within the transition period between the previous and current ABAC Code.
20. The complainant contends that the packaging has strong and evident appeal to minors, which raises the Code standard in Part 3 (b). The revision of the Code does not change the fundamental purpose of this standard with the changes consolidating the meaning of 'strong and evident' into a single place in the Code and incorporating some further illustrations of when the standard might be breached. Accordingly, the fact that the packaging of two of the products are being formally assessed under the previous Code and one under the current Code is not material in the decision.
21. The complainant argues that the packaging of each product has strong and evident appeal to minors, as evidenced by the:
 - stylised cartoon imagery used to depict fruit and vegetables; and
 - bright colours used in the cartoon imagery.
22. The Company argues that the packaging design does not strongly appeal to minors. It is submitted:
 - cartoons on alcohol labels do not inherently appeal to minors, especially to older teenagers typically involved in underage drinking;
 - anthropomorphism is widely used across adult marketing. The addition of eyes to an inanimate object, does not give it automatic strong or evident appeal to minors;
 - the artwork has been executed with great levels of detail, with intricate designs that remove it from children's artwork that is more simplistic;
 - the Pickle and Spicy Pickle labels feature a prominent 'BEER' on the front middle of the packaging, with the alcohol content clearly listed. They strongly indicate their alcoholic nature, specifically targeting an adult audience;
 - the colours used accurately depict the ingredients of the beer. There is nothing inherently eye-catching or bright around the packaging;

- Pickle Beer and Spicy Pickle Beer have been available continuously for over three years without complaints or issues raised, giving compelling reason to believe that there has been no issue, nor strong nor evident appeal to minors found in the packaging. Any appeal therefore can only, at its highest, be incidental and certainly not strong nor evident;
- the flavour profile of Pickle Beer is polarising. Even to a vast majority of adult drinkers it sounds, frankly, quite disgusting. It is a sophisticated taste profile pitched to a very small niche section of an adult audience and with no appeal to minors.

The Packaging - General Considerations

23. Assessment of the consistency of a marketing communication with an ABAC standard is from the probable understanding of a reasonable person taking the content of the marketing material as a whole. This means that the life experiences, values, and opinions held by a majority of the community is the benchmark.
24. Part 3 (b)(i) of the current Code provides that an alcohol marketing communication 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;
 - uses imagery, designs, motifs, language, activities, interactive games, animations or cartoon characters that are likely to appeal strongly to minors; and
 - creates confusion with confectionery, soft drinks or other similar products, such that the marketing communication is likely to appeal strongly to minors.
25. As noted, for current purposes, the differences in the expression of the Part 3 (b) standard between the current and previous Code is not material.
26. 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.
27. 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.
28. 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 similar to that used by soft drinks or fruit juices e.g. prima style juice box.
29. 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.

30. It is important to note that the ABAC Scheme and the Code is directed at the marketing of alcohol beverages. ABAC does not regulate physical beverages, namely the taste, colour, viscosity or alcohol to volume strength.
31. In making this point, the Panel is not saying that the taste of a product is not an important consideration in the appeal of a product to a consumer. It can be accepted as argued by the Company that the taste of the three products will not be inherently appealing to minors, but this is not the question that the Panel is to decide.
32. Hence it is no defence to a concern about the appeal of product packaging to minors to contend that minors won't like the taste of the product. Equally if a product's packaging can be fairly concluded as not strongly appealing to minors, the product packaging won't be in breach of the Code because the product is contended to have a taste that minors would be drawn to.
33. That said, the flavour profile of a product will be relevant in as much as the flavour is referenced and described in the marketing communication. The Part 3 (b) standard assumes, by reference to confusion with soft drinks and confectionery as an example of when a breach of the standard might occur, that soft drinks and confectionery have appeal to minors.
34. It should also be noted that the ABAC standard does not create a freestanding requirement that the branding and packaging unambiguously identify a product as being an alcohol beverage. Rather a failure to do so and the potential for product packaging to be confused with a soft drink could contribute to the packaging having a strong appeal to minors.
35. Equally however, the fact that product packaging might clearly identify that a beverage is alcoholic does not mean there is no potential for the branding and packaging to have strong appeal to minors. In fact, in most instances the packaging of an alcohol beverage does clearly establish the alcoholic nature of the product, but the packaging may nonetheless have a strong appeal to minors due to branding, design aspects and messaging.

The specific packaging

Pickle Beer

36. The Pickle Beer packaging shows a number of green pickles in brine, with the imagery, to some extent, causing the can to replicate a jar of pickles. The pickles have faces, which are showing different expressions. A white shield shape is shown on the front of the can. At the top of the shield the words

'Garage Project' and 'ESTD 2011' are shown. A lighter green stripe is shown across the middle of the shield, containing the words 'Pickle Beer' in capital letters, beneath which are the words 'Cucumber Dill Pickle Sour' and in smaller font, 'ABV 4.3%'.

Spicy Pickle Beer

37. The Spicy Pickle Beer packaging shows a number of green pickles and red chillies in brine, with the imagery, to some extent, causing the can to replicate a jar of pickles and chillies. The pickles and chillies have faces, which are showing different expressions, and one is shown breathing flames. A white shield shape is shown on the front of the can. At the top of the shield the words 'Garage Project' and 'ESTD 2011' are shown. A lighter red stripe is shown across the middle of the shield, containing the words 'Spicy Pickle Beer' in capital letters, beneath which are the words 'Chilli Cucumber Dill Pickle Sour' and in smaller font, 'ABV 4.3%'.

T-Sauce

38. The T-Sauce packaging shows red tomatoes as well as green limes and chillies, which have faces. There is a large letter 'T' in capital letters in the middle of the front of the can, across which is a light orange ribbon shape with the word 'Sauce' on it. At the top of the can the words 'Garage Project' and 'ESTD 2011' are shown, while at the bottom are the words 'Spicy Tomato Salted Lime Sour', followed by 'ABV 4.3%', in smaller font.
39. The Panel believes this is a case where reasonable minds might disagree as to the appeal of the product packaging to minors. There are elements of the packaging that a reasonable person would probably understand as having some appeal to minors. Specifically, the use of anthropomorphic features on the pickles, chillies and tomatoes does bring to mind depictions in some children's animations.
40. On the other hand, the can design is clearly used (on the two named pickle beer products at least) to illustrate the flavour profile of the product and the impact of this would probably be understood to diminish the appeal to the packaging to minors.
41. The Panel believes the packaging of the Pickle Beer and Spicy Pickle Beer does not breach the Part 3 (b)(i) standard. In reaching this conclusion the Panel noted:
- the packaging sufficiently establishes the products as alcohol beverages particular through use of the term 'beer' on the front of the label and the products would not be confused with a soft drink;

- the vegetable depictions and the clear use of the term 'pickle' identify the flavour profile of the products and unlike say popular soft drinks or confectionery, the flavour as referenced on the packaging is unlikely to be familiar or readily relatable to minors;
- the product packaging is not likely to resonate strongly with minors nor is an illusion of a smooth transition of from a non-alcoholic to an alcoholic beverage created; and
- taken as a whole a reasonable person would probably understand the packaging has possibly incidental but not strong or evident appeal to minors.

42. In contrast the Panel believes on balance the packaging of the T-Sauce product does breach the Part 3 (b)(i) standard. In reaching this conclusion the Panel noted:

- the front of the packaging does not unambiguously establish the product as an alcohol beverage and its overall appearance might be confused with a product such as a tomato sauce or tomato juice;
- the larger anthropomorphic tomato depictions more closely resemble those found in children's books;
- tomato and tomato sauce (as compared to pickles) is a vegetable and product more likely to be familiar and relatable to minors;
- taken as a whole a reasonable person would probably understand the packaging has more than incidental appeal and has strong or evident appeal to minors.

43. The Panel makes a final determination that the packaging for T-Sauce is in breach of Part 3 (b)(i) of the ABAC Code. The complaint in relation to Pickle Beer and Spicy Pickle Beer is dismissed.