



ABAC Adjudication Panel Determination No. 97/20

Product: Apple & Guava
Company: Pirate Life Brewing
Media: Packaging
Date of decision: 6 August 2020
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns the packaging for Apple & Guava by Pirate Life Brewing (“the Company”) and arises from a complaint received 13 July 2020.
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 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”) – 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 – which places 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 the other codes as well as meeting the standards contained in the ABAC.
 4. For ease of public access, Ad Standards (AS) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by AS, 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 AS 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 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 13 July 2020.
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 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 communication.

Marketing Communication

10. The following product packaging is referred to in the complaint.



The Complaint

11. The complainant is concerned that the packaging appeals very much to minors by:
- naming it “Apple & Guava” which is a popular juice flavour;
 - no mention of beer or beer style;
 - packaging colours are bright pink and light yellow; and
 - this product could easily be mistaken for a soft drink or juice product.

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. Definition in Part 6 of the ABAC provides:

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 confectionary or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

A **Minor** means a person who is under 18 years of age and therefore not legally permitted to purchase an alcohol beverage in Australia.

The Company's Response

14. The Company responded to the complaint by letter dated 24 July 2020. The principal points made by the Company were:

- Pirate Life frequently creates limited release brews, often in partnership with other entities, that supplement its core range of beers. The panel will be familiar with Pirate Life's core sour beer product, Acai & Passionfruit Sour (ABAC Complaint 84/19, dismissed), as well as its limited release sours: Double Acai & Passionfruit (ABAC Complaint 18/20, dismissed); Kiwifruit & Cherry (ABAC Complaint 40/20, dismissed); and Lemongrass & Ginger. Pirate Life's Apple & Guava Sour is part of this sour beer roster. It was produced in late 2019 in collaboration with [Sneakers & Jeans](#), a Perth-based hospitality group, to celebrate the announcement of a Pirate Life venue in Perth, to be operated by the Sneakers & Jeans group.
- The Apple & Guava Sour artwork is a clear reference to the Acai & Passionfruit Sour artwork. It follows the usual Pirate Life brand family visual identity, with the use of bold colours and the prominent Pirate Life logo. The only substantive difference between the Acai & Passionfruit artwork and the Apple & Guava artwork is the use of lime green and pink as opposed to bright blue and magenta. A direct comparison of the artwork is included below:



- The complainant asserts that:

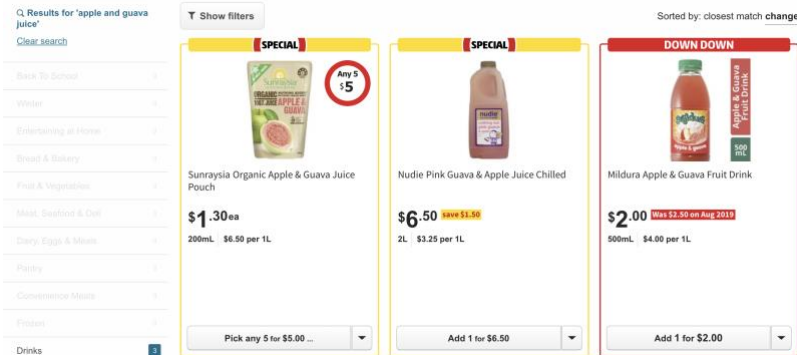
Given it's called "Apple and Guava" a popular juice flavour with. [sic] Mention of beer or beer style this could very much appeal to minors. The colours are bright pink and light yellow I just think if this was in the fridge a child could mistake easily or a soft drink or juice product.

- We reject these assertions. In the first instance, the Pirate Life visual identity and branding is so distinctive that this beverage is instantly clear as part of the Pirate Life family of beers. Anyone encountering the Apple & Guava Sour, in any context, would be instantly able to recognise that it is part of a clear and distinct brand family, brewed and marketed by the same brewing company.
- In response to the complainant's comments with respect to the mention of beer or beer style, we note the label clearly features the words 'fruit sour'. Sours are a recognised, popular and growing style that tend towards fruit-driven flavours. Alcohol by volume is clearly stated on the bottom of the can, noting in particular the clarity of 3.8% ALC/VOL, and the clear reference to BREWING in the Pirate Life logo. As such, even a cursory look at this product would establish that it is alcoholic in nature, even assuming no knowledge of the Pirate Life brand or the fruit sour style.
- Bright and eye-catching colours do not inherently hold appeal to children over and above the appeal they have to adults. We note that the Panel is not bound by its prior determinations, but wish to highlight that this has been extensively tested in ABAC decisions, especially 84/19 Acai & Passionfruit, and 52/18 Coopers TropicAle. We also note the current popularity of the combination of coral pink, lime green and pale yellow colours in graphic and interior design trends. The colours have not been chosen as a result of any likely appeal to children, they have clearly been chosen as a recognisably on-trend graphic design device to represent the constituent fruits in the product. Note the similarity of the pink and green to the colours depicted on the Apple & Guava can to the [Pantone 2019 Colour of the Year](#) suggested palette:



- Pirate Life acknowledges that the classic apple and guava juice flavour combination is the basis for this limited release fruit sour. Fruit juice inspirations are common in the sour beer category, and apple and guava is also a popular combination in the [fruit-flavoured cider](#) and [RTD](#) categories.
- We do not accept that this product causes confusion with an apple and guava fruit juice. By way of example, Coles and Woolworths retail three apple and guava juice products – by producers Mildura, Nudie, and

Sunraysia – and none of them utilise the colour palette of the Pirate Life Apple & Guava Sour.



- Given the clear differences between the Pirate Life Apple & Guava Sour can artwork and existing apple and guava fruit juice brands, we do not accept that either an adult or a minor could confuse the product with confectionary or soft drinks as per the Code’s definition of ‘Strong or Evident Appeal to Minors’.
- Sneakers & Jeans is a [Perth-based hospitality group](#) that has collaborated with Pirate Life on the opening of a Perth-based Pirate Life venue; this limited release beer was created to celebrate that partnership. The ‘prominent reference to Sneakers & Jeans’ is in fact the use of the Sneakers & Jeans group’s logo:

Sneakers & Jeans ▲

Regardless, sneakers and jeans are hardly clothing items confined to minors, the combination is often considered [characteristic](#) of ‘dad’ style.

- The reference to the product’s ABV is clearly stated on the front the can: ‘3.8% ALC/VOL’ and the can says BREWING in very clear letters. We also contend that ‘FRUIT SOUR’, visible on the front right and front left of the can, is a popular and recognisable beer style; the Dan Murphy’s [website](#) lists 39 results for the search term ‘sour beers’, which speaks to the style’s increasingly mainstream appeal and suggests that a reasonable consumer would be able to identify a ‘fruit sour’ as a beer.
- CUB is committed to ensuring our promotional and marketing material, and that of our associated entities such as Pirate Life, does not promote or encourage any irresponsible consumption of alcohol. Our goal is for consumers to enjoy our products responsibly and in moderation. Accordingly, we have taken all reasonable precautions to ensure this product packaging is in compliance with the ABAC.

The Panel's View

15. Pirate Life is an Adelaide based brewery within the CUB stable of beer brands. The Company produces a variety of beer types and one of its marketing approaches is to partner with non-alcohol entities to produce and market jointly named limited release products. This determination concerns a limited release sour beer which has been produced in collaboration with a Perth based hospitality group Sneakers and Jeans.
16. The complainant believes the packaging of the product (product name and can design) has strong appeal to minors and could be confused with a soft drink or fruit juice on the basis that:
 - the name 'apple and guava' is a popular fruit juice;
 - the packaging makes no mention of beer or beer style; and
 - the colouring of the can.
17. The ABAC in Part 3(b)(i) provides that an alcohol marketing communication (which includes product names and labelling) must not have strong or evident appeal to minors. 'Strong and evident' appeal is further elaborated upon in the Code definitions to mean:
 - likely to appeal strongly to minors;
 - specifically targeted at minors;
 - having a particular attractiveness for a minor beyond the general attractiveness it has for an adult; and
 - using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to minors or that create confusion with confectionary or soft drinks.
18. It should be noted that the ABAC does not contain a free-standing provision that an alcohol product must be clearly identified as an alcohol beverage as such. The Australian New Zealand Food Standard does require beverages containing more than 0.5% alcohol by volume include on the product label advice as to the alcohol to volume percentage, but this requirement usually is satisfied in small font notations of the alcohol content. This means a failure to prominently identify the beverage as alcoholic will not therefore of itself be a breach of the ABAC, but this failure will be a possible factor in assessing if the product packaging might be strongly appealing to minors by the product being confused with a soft drink.
19. The Company mounts a lengthy exposition as to why it believes the product packaging is consistent with the ABAC standard. It is argued:
 - the packaging is not materially different from that considered in Determination 84/19 where the complaint on strong appeal to minors was dismissed;

- the packaging follows the usual 'brand family visual identity' through bold colours and prominent Pirate Life logo and this distinctive branding means the product is 'instantly clear as part of the Pirate Life family of beers';
- the label clearly features the term 'fruit sour' and this places the product within the 'popular and growing' fruit driven beer flavours;
- that the product is an alcohol beverage is reinforced by the 'clarity' of the 3.8% alc/vol notation on the bottom of the can and the reference to 'brewing' in the Pirate Life logo;
- bright and eye-catching colours do not inherently hold appeal to minors over and above the appeal they have to adults and the can colours have not been chosen to appeal to minors but to 'represent the constituent fruits in the product';
- the packaging will not cause confusion with apple and guava fruit juice as the product packaging bears no similarity to the packaging and colour palette used in the popular types of fruit juice stocked at major supermarkets; and
- 'sneakers and jeans' references the collaboration with the Perth hospitality group and in any event aren't clothing items confined to minors and are often considered 'dad' style clothing.

20. Some of the Company's arguments can be accepted but others have less force. Given that Pirate Life is relatively new brand, it may be somewhat overstated to claim that a new addition to the Company's range will be immediately recognised by a reasonable member of the community as an alcohol beverage absent clear labelling to that effect. Further, while a 'fruit sour' might be recognised by dedicated beer drinkers as a distinct beer variety, the term might have less resonance as an alcohol type in the wider community and could be confused, absent other packaging cues, as a soft drink descriptor. Equally, while the term 'brewing' might point to a product being an alcoholic beer, the descriptor of 'brewing' is also associated with non-alcoholic beverages such as ginger beer and kombucha.

21. As mentioned by the Company, the Panel has considered the packaging of a related product in the Company's range in Determination 84/19 dated 29 October 2019. In that case the product was an 'Acai and Passionfruit' sour beer with the can having a predominantly pale blue colour scheme. Beyond the different colour background, the other material differences between the two can designs are the name and the reference to 'Sneakers and Jeans' on the can in the current case. A number of the observations in the earlier decision are equally applicable in this case namely:

- the packaging does not unambiguously establish that the product is an alcohol beverage. The cues on the packaging that the product is alcoholic are present but these cues are not the most prominent features on the can;
- the descriptor of 'apple and guava' like 'açai and passionfruit' would not immediately be generally recognised (beyond craft beer drinkers) as flavour characteristics of a beer and tend to suggest the product is a fruit juice or soft drink.

22. More generally, the Panel has considered in previous determinations some characteristics within a marketing communication which may make it strongly appealing to minors including:
- the use of bright, playful and contrasting colours;
 - aspirational themes that appeal to minors wishing to feel older or fit into an older group;
 - 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 appeal to minors);
 - style of humour relating to the stage of life of a minor (as opposed to humour more appealing to adults); and
 - use of a music genre and artists featuring in youth culture.
23. It should be noted that only some of these characteristics are likely to be present in a particular marketing communication and that 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. Each case must be assessed on its own merits and it is the overall impact of the marketing communication rather than an individual element which shapes how a reasonable person will understand the item.
24. It is the probable understanding of a reasonable person which is the benchmark the Panel is to apply when assessing the consistency of a marketing communication with a Code standard. This means the life experiences, values and opinions commonly held in a majority of the community are to guide the Panel. Further the marketing material is to be assessed as a whole with a single feature or element to be understood within the overall impact of the marketing item.
25. The Panel believes that while the packaging does not unambiguously establish the product as an alcohol beverage, on balance the product name and can design cannot be fairly concluded as breaching the Part 3(b) standard. In reaching this conclusion the Panel noted:
- While the 'apple and guava' name lends weight to the product being confused with a soft drink (fruit juice) this is mitigated by the use of the packaging container (a can) whereas fruit juices are commonly packaged in plastic bottles or prima packs;

- the colour palette of the can does not resemble those used in popular soft drinks and fruit juices;
 - the colours used are muted and not the sharp and contrasting colours more likely to appeal to minors; and
 - the overall impact of the name and packaging is not likely to draw the attention of minors and is reasonably sedate and adult in tone and appearance.
26. It is noted that the Company has not taken the opportunity to have its packaging pre-vetted. Pre-vetting is highly recommended and in particular on avoiding designs with any potential confusion with soft drinks.
27. The complaint is dismissed.