



ABAC Adjudication Panel Determination No 30/24

Product: Brain Smiles! Hazy Pale Ale
Company: Behemoth Brewing Company Limited
Media: Packaging
Date of decision: 28 March 2024
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 14 February 2024. It follows from a provisional determination made on 28 March 2024 in relation to the packaging of Brain Smiles! Hazy Pale Ale (“the product”) by Behemoth Brewing Company Limited (“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 14 February 2024.

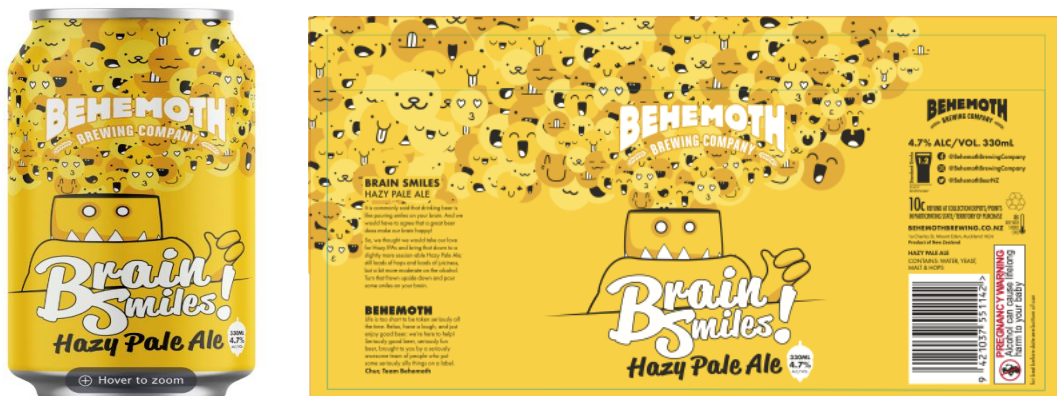
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline does not apply when making a provisional determination on product packaging. This is because of the two step process involving the opportunity for a company to make additional submissions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

Pre-vetting Advice

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 packaging.

The Marketing

10. The complaint relates to the packaging of Brain Smiles! Hazy Pale Ale:



Complaint

11. The complainant objects to the packaging as follows:
- *The can features bright, colourful imagery. There is a central cartoon character that looks like it would appeal heavily to minors.*
 - *Surrounding the character are emoji cartoon characters, something that also will have strong appeal to minors and are used extensively by them day to day.*
 - *This is highly inappropriate for alcohol packaging and looks like a soft drink.*
 - *The beer is called "Brain Smiles!" as well which strongly suggests that consuming this can will lead to a mood improvement, a 'brain smile'. This*

implies that drinking the beer will make you feel happy and has a therapeutic benefit.

The ABAC Code

12. Part 3 (b) of the Code provides that an Alcohol 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
13. Part 3 (c) of the Code provides that an Alcohol Marketing Communication must NOT:
- (i) suggest that the consumption or presence of Alcohol may cause or contribute to an improvement in mood or environment;
 - ...
 - (iv) suggest that the consumption of Alcohol offers any therapeutic or health (including mental health) benefit, is needed to relax, or helps overcome problems or adversity.

The Company Response

14. The Company responded to the complaint by letter emailed on 23 February 2024. Its primary comments were:
- The packaging was not submitted for Alcohol Advertising Pre-vetting Service Approval.
 - This product is available in Liquor Licenced Bottle Shops and pubs served by RSA licensed staff.

Responsibility toward Minors

- There are many Australian Beers that are bright yellow - Zytho Brewing, XXXX Gold, CBco IPA, Larry Pale Ale, Hawkes Patio Ale and the list goes on.
- Emoji characters are very much in the realm of adults, being used in people who text and instant message from the ages of 18-50s in this day and age.
- Nothing about what Behemoth does appeals to children, we make hoppy beer, shown to be incredibly unpopular with even younger drinkers 18-25 in fact our target audience is 30-45 year olds. Our character is very much an adult cartoon in the line of Southpark and Family guy. It has been a central part of our brand for over 10 years.
- As above vibrant colours are used in Australian Beers both mainstream and craft. We believe nothing in our packaging looks like a soft drink. It looks like a Hazy Pale Ale.

Responsible depiction of the effects of Alcohol

- Brain Smiles! refers to hops making people happy, not alcohol in the beer.
 - We disagree that this beer suggests the consumption of alcohol offers any therapeutic or health benefits. It simply is the name of the beer that is very well made with hand selected hops and that hops not alcohol makes people happy.
 - We have a non-alcoholic beer made with great hops that we promote in a similar fashion about its quality made for peoples enjoyment.
 - We do not suggest any improved mood or mental health, only that quality of hops will improve people's enjoyment of the product. This beer has won the GABS Hottest 100 #1 Kiwi beer 2 years running and is made for people's enjoyment.
15. The Company responded to the provisional determination by email on 13 April 2024, advising that it would accept the determination of the Panel.
 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

Introduction

17. New Zealand's Behemoth Brewing Company commenced operations in 2013 firstly using contract brewing facilities and now from its own location in Mt Eden Auckland. The Company has had somewhat of a challenging history in Australia, obliged to trade under the brand name of 'Chur' due to an IP issue with the 'behemoth' name and then forced to stop exports during the Covid pandemic.
18. Despite these obstacles, the Company has built a following in Australia and its Brain Smiles! Hazy IPA has been awarded top place in the GABS Hottest 100 NZ Craft Beers for the last two years. While a feature of the Company is its production of a large number of small batch beers for a limited release, it seems only a few products are available for purchase directly from Australian alcohol retailers. One of these is the Brain Smiles! product.
19. The front of the packaging of Brian Smiles features a predominately bright yellow background and a depiction of the 'Chur' character. Chur is featured on all Company products and is reminiscent of a robot. On the Brian Smiles product Chur is seen with the top of its head removed so that a large number of emoji faces with various expressions and characteristics can flow out. The words "Behemoth Brewing Co" are shown at the top of the can, and the words "Brain Smiles!" towards the bottom, all in white lettering. At the very bottom of the can are the words "Hazy Pale Ale", and in smaller font the capacity of the can and the percentage alcohol by volume is shown, all in black lettering.
20. On the side and rear of the packaging is a product description as follows, "It is commonly said that drinking beer is like pouring smiles on your brain. And we have to agree that a great beer does make our brain happy! So we thought we would take our love for Hazy IPAs and bring that down to a slightly more session-able Hazy Pale Ale, still loads of hops and loads of juiciness, but a bit more moderate on the alcohol. Turn that frown upside down and pour some smiles on your brain."
21. Below this it reads- 'Behemoth Life is too short to be taken seriously all the time. Relax, have a laugh, and just enjoy good beer, seriously fun beer, brought to you by a seriously awesome team of people who put some seriously silly things on a label. Chur, Team Behemoth.'
22. The complainant believes the packaging is irresponsible. It is contended that the packaging imagery and the name "Brain Smiles!":
 - appeals to minors by:

- featuring bright, colourful imagery and a central cartoon character which would appeal to children;
 - surrounding the cartoon characters with emojis which are used extensively by children day to day; and
 - looking like a soft drink; and
 - implies that drinking the beer has a therapeutic benefit and leads to the consumer feeling happy.
23. These concerns raise several Code standards requiring that an alcohol marketing communication (including packaging labels and names) must not:
- have strong or evident appeal to minors – Part 3 (b)(i);
 - suggest that the consumption or presence of alcohol may cause or contribute to an improvement in mood or environment - Part 3 (c)(i); and
 - suggest that the consumption of alcohol offers any therapeutic or health (including mental health) benefit, is needed to relax, or helps overcome problems or adversity - Part 3 (c)(iv).
24. The assessment of whether a marketing communication is consistent with an ABAC standard is through the application of the 'reasonable person' test. This test is sourced from the Australian common law system and means the marketing communication is assessed from the standpoint of the probable understanding by a reasonable person. This means that the benchmark is the values, opinions and life experience shared by most members in the community. If a marketing communication can be interpreted in several ways, the reasonable person benchmark requires that the most probable understanding be adopted over a possible but less likely interpretation.
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. This means information on the side and rear of a can should be noted, but it will be of lesser influence.

Responsibility toward Minors

26. Part 3 (b)(i) of the 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.

27. 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.

28. 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.

29. 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.
30. The Company argues that the packaging design does not strongly appeal to minors. It is submitted:
- vibrant colours are used in Australian beers both mainstream and craft with many being bright yellow;
 - emoji characters are very much in the realm of adults, being used by people who text and instant message from the ages of 18 to in their 50s;
 - we make hoppy beer, shown to be incredibly unpopular with younger drinkers aged 18 to 25. Our target audience is 30 to 45 year olds;
 - our character is very much an adult cartoon in the line of Southpark and Family Guy and has been a central part of our brand for over 10 years; and
 - our packaging does not look like a soft drink, it looks like a Hazy Pale Ale.
31. The Company submits that the taste of its product does not appeal to younger drinkers, under the age of 25. 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.
32. 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 product will not be inherently appealing to minors, but this is not the question that the Panel is to decide.

33. 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.
34. The Company also submitted that bright yellow colouring on beer packaging is not uncommon. Even if accepted, it does not follow that a product with bright yellow packaging cannot have strong appeal to minors as every item has to be assessed on its own merits and its probable impact in the eyes of a reasonable person also assessed on a case by case basis.
35. The most striking feature of the packaging is the Chur character with the stream of emojis coming from the character's head. The complainant argued that emojis are used extensively by minors and this increased the appeal of the packaging to minors, while the Company refuted this by submitting emojis are in the 'adult realm'.
36. Emojis originated in Japan in the late 1990's and became a worldwide means to convey emotions in 2010's. A brief internet review suggests that their use came hand in hand with the development and widespread adoption of smartphones and hence there is somewhat of a generational difference in their use. For instance, the generations prior to the availability of smartphones ie Baby Boomers and Generation X tend to have a lower use of emojis than later generations that grew up with smartphones and emojis.
37. That said, emoji use is quite ubiquitous with texting and SMS applications and it is a mischaracterisation to believe that their use is notably more prominent with minors than with adults. Further, the emoji images used on the packaging are all variations of the 'smiley', which is the 'ground zero' of emojis and is used by all ages.
38. The Chur character features on all Company products. A review of the Company's website shows Chur on packaging in many different depictions sometimes presented with references to popular culture. For instance, several of the limited release products adopted movie themes with Chur shown as Thelma and Louise or Riggs and Murtuagh of the Lethal Weapon franchise.
39. Taken as a series, it is clear that Chur is depicted in adult settings and/or with references that would be understood and more likely resonate with adults and not minors as such, as the cultural references date from several decades ago. However the Panel is to assess the Brain Smiles packaging as a freestanding marketing communication and it cannot be assumed that a reasonable person coming across the product will be familiar with other uses of Chur.
40. Drawing this together the Panel believes the likely appeal to minors is a balanced decision on which reasonable minds might disagree. On balance

however the Panel does not believe the packaging of Brain Smiles! Hazy Pale Ale breaches the Part 3 (b)(i) standard. In reaching this conclusion the Panel noted:

- the packaging sufficiently establishes the product as an alcohol beverage particularly through use of the term 'ale' on the front of the label and moreover the design does not resemble any well known soft drink and hence the product would not likely be confused with a soft drink;
- the use of emoji imagery will be familiar to minors and adults alike;
- the Chur character is depicted in a style that could be found in some children's orientated material but equally the character is similar to adult themed and directed animation;
- all of the factors combined would lead a reasonable person to probably understand that the product packaging has incidental and not strong or evident appeal to minors;

Responsible depiction of the effects of Alcohol

41. The complainant's second concern was that the name of the product strongly suggests that consuming the product will lead to feelings of happiness and will have a therapeutic benefit.
42. Part 3 (c) of the Code requires that an alcohol marketing communication must not suggest that alcohol may cause or contribute to an improvement in mood or environment (Part 3 (c)(i)) or that its consumption offers any therapeutic or health (including mental health) benefit (Part 3 (c)(ii)).
43. The key concept in the section (c) standards is that of causation. It is permitted to place alcohol use in social settings and with happy, attractive, successful people. It is not permitted to imply that alcohol causes an improvement in mood e.g. from bored to engaged or sad to happy, or that alcohol is a reason why a person is attractive or successful. Equally, it is not permitted to suggest that alcohol provides a health benefit.
44. In response to the complaint, the Company advises that:
 - we disagree that this beer suggests the consumption of alcohol offers any therapeutic or health benefits;
 - Brain Smiles! refers to hops making people happy, not alcohol in the beer; and
 - we do not suggest any improved mood or mental health, only that the quality of hops will improve people's enjoyment of the product.

45. The Company places some weight on the brewing style and the quality of the hops as being important in the consumer's enjoyment of the product. While this might be the intention, it is difficult to see how a reasonable person would take the message from the product packaging. The product description on the side of the can does mention 'loads of hops and loads of juiciness' but the same description states that 'drinking beer is like pouring smiles on your brain' and 'great beer does make our brain happy' and 'Turn that frown upside down and pour some smiles on your brain.
46. As noted the small print on product packaging is less influential than the predominant design features ie the product name - Brain Smiles and the Chur character giving a thumbs up as the smiley emojis flow from the characters head. But the additional description does little to suggest that it is hops as opposed to the alcoholic beer itself which leads to an improvement in mood.
47. It is possible but unusual for a product name alone to lead to a breach of an ABAC standard. More often, it will be a combination of the name and other design elements of the packaging that would lead to a breach. The Panel believes the packaging does breach the Part 3(c)(i) standard. In reaching this conclusion the Panel noted:
- (i) the product name suggests that the use of the product will result in improvement in mood ie the product causes happiness;
 - (ii) this is reinforced by the imagery of the smiley emojis and the thumbs up from the Chur character;
 - (iii) while of less importance, the description on the packaging of 'turn that frown upside down and pour some smiles on your brain' clearly suggests the product causes an improvement in mood; and
 - (iv) taken as a whole a reasonable person would probably understand the packaging as stating that the product will cause or contribute to an improvement in mood.
48. While the Panel believes that the packaging breaches the Part 3 (c)(i) standard it does not believe the packaging is saying the product offers a positive health benefit as such.
49. The Panel makes a final determination that the packaging of Brain Smiles! Hazy Pale Ale is in breach of Part 3 (c)(i) of the ABAC Code.