



ABAC Adjudication Panel Determination No 133/24

Products: Ginger Resistance Hard Ginger Beer
Company: Endeavour Group
Media: Packaging
Date of decision: 10 October 2024
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Louisa Jorm
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 10 September 2024 about the packaging of Ginger Resistance Hard Ginger Beer (“the product”) by Endeavour Group (“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 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, and 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 10 September 2024.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint and this determination was made within the target timeframe.

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 before 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 advice was obtained for the packaging (Approval Number 19942).

The Marketing

10. The complaint relates to the packaging of Ginger Resistance Hard Ginger Beer:



Complaint

11. The complainant objects to the marketing as follows:
- *My complaint is about the packaging. Only after it was pointed out did I realise it contained alcohol - it doesn't clearly specify it on the front and I didn't notice the small % alcohol label. It's not easy to see - needs to be much clearer and bigger. We have children in this household who could make the same error.*
 - *The can does not clearly indicate that it contains alcohol. As a result, I unknowingly consumed this beverage on two occasions at home while taking medication that restricts alcohol consumption. I only became aware of the alcohol content when someone pointed it out to me. This could have caused serious health implications.*

The ABAC Code

12. Part 3 (b)(i) 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.

The Company Response

13. The Company responded to the complaint by letter emailed on 18 September 2024. Its primary comments were:
- Pinnacle thanks the ABAC Adjudication Panel (the Panel) for the opportunity to respond to the Complaint which has been made pursuant to the ABAC Responsible Alcohol Marketing Code and Complaints Management System (ABAC).

- At the outset, Pinnacle would like to note the following:
 - Pinnacle, as part of Endeavour Group, is committed to maintaining our position as an industry leader in the responsible service of alcohol. This is highlighted by the fact that Endeavour Group formalised its status as a signatory to the Alcohol Beverages Advertising Code Scheme in 2013 and it prepares all advertising within its reasonable control in accordance with the ABAC Responsible Alcohol Marketing Code (the Code). As a signatory to ABAC, Endeavour Group commits to the objectives of the Code to ensure that alcohol advertising does not encourage irresponsible or unsafe consumption, or consumption by persons under 18 years of age, and does not target young people.
 - Furthermore, Pinnacle maintains strict internal and external processes in addition to those required by the Code. As part of our community charter 'Our Community, Our Commitment', Endeavour Group has in place a range of industry-leading initiatives to ensure that minors are not served alcohol and to encourage the responsible consumption of alcohol. These include:
 - ID25; we ask for ID if a shopper looks under the age of 25;
 - Our Refusal of Service Policy (Secondary Supply, Intoxication and School Uniform); and
 - Staff training that exceeds legal requirements, including our 'Leading in Responsibility' training module, team talkers, regular refresher and reminder courses.
 - The processes outlined above provide Endeavour Group with a compliance framework to ensure that it serves customers in accordance with its obligations under the various applicable laws.
- For the reasons outlined below, Pinnacle respectfully submits that the Product does not breach any Part of the Code and it therefore requests the Panel to dismiss the Complaint.
- Pinnacle received Final Alcohol Advertising Pre-Vetting Service Approval for the packaging on 10 August 2021, pursuant to approval number 19942.
- The Product clearly and conspicuously refers to its alcohol by volume (**ABV**) of 4.0% on the front label using a character height of 5.873mm, which is significantly larger than the mandatory minimum character height of 3.3mm.

- The Product describes itself as a “HARD Ginger Beer” on the front label. The term “hard” is used to designate alcohol and is a term Pinnacle started to use increasingly on its alcoholic ginger beers and other RTDs over three years ago. We understand that the term “hard” is commonly used by alcohol brand producers in Australia and as a result, Australian consumers are becoming more familiar with its meaning. Whilst there is no mandatory minimum print size defined for the term “hard”, we note that the Product label shows the term “HARD” in uppercase on the front label at a height of 4.2mm, which is larger than the mandatory minimum character height for the ABV metric.
- In addition to describing the Product as a “Hard Ginger Beer”, the label also clearly qualifies the Product as an “ALCOHOLIC BEVERAGE”.
- We consider that the combination of the prominent alcoholic cues applied to the Product’s label immediately identifies the Product as being an alcoholic beverage to consumers.
- We note that this Product has been in the market for approximately three (3) years. We have not received a complaint regarding the Product’s appeal to minors until now.
- In assessing the Product’s compliance with the Code, it must be considered from the perspective of a *‘reasonable person to whom the material is likely to be communicated and taking its content as a whole’* (Part 7 of the Code).
- Pinnacle submits that the orange/ginger colour does not have a strong or evident appeal to minors and further, does not have a particular attractiveness for a minor beyond the general attractiveness it has for an adult. The colour orange was selected by our brand development team to align with the colour commonly used within the alcoholic ginger beer category. The particular tone of orange was chosen as it is distinctive and intended to reflect the colour of a fox’s fur. We submit that the colour orange used on the Product is not particularly bright or playful.
- The image of the fox pictured on the label bears a sinister, unfriendly expression and is not portrayed in a child-like or “cutesy” manner. In response to guidance provided by the ABAC pre-vetter, the brand development team confirms that the image of the fox was adjusted to show more sharp, intense features to emphasise its menacing expression and ensure the image would resonate with a mature audience and not appeal to Minors.
- Taking the content of the packaging as a whole, we submit that the Product would not have a strong appeal to minors. As stated in ABAC determination 119/23 *“the test is not that the product would be mistakenly consumed by a minor due to confusion with a soft drink, but that a minor would want to*

drink the product because its packaging was strongly or evidently appealing”.

- In view of the above, Pinnacle respectfully submits that there is no breach of the Code as the packaging incorporates clear indicators that the Product is alcoholic and does not use a design that has a strong or evident appeal to minors.
- Notwithstanding this, Pinnacle does not seek to diminish the concerns of the complainant and would like to reiterate that we, as part of Endeavour Group, take our responsibility as an industry leader in the responsible service and marketing of alcohol incredibly seriously. As such, the Complaint has been discussed with relevant parts of the business and the concerns have been noted.

The Panel’s View

14. In late 2021, the Company introduced a new Ready to Drink (RTD) alcohol product onto the Australian market branded under the name Ginger Resistance Hard Ginger Beer.
15. The marketing of the product is before the Panel because of a complaint about the product’s packaging (can design). The complainant contends that the packaging fails to clearly establish that it is alcoholic, and this may lead to inadvertent, and potentially dangerous, consumption by both adults and children.
16. The front of the can has a metallic silver background with the words in large font ‘Hard Ginger Beer’ centred on the can. Below this in a relatively large font is ‘4% alc/vol’. Above the Hard Ginger Beer descriptor is an orange circle with the words ‘Ginger G Resistance’. On the rear of the can is an illustrated image of the face of a fox with the words near the bottom of ‘Alcoholic Beverage’. The side of the can displays the product information and pregnancy warning.
17. The principal concern of the complainant is that the packaging fails to establish that the product is an alcoholic beverage. This aspect of alcohol marketing is regulated directly by government. The Australian New Zealand Food Standards Code prescribes the information that must be contained on packaging including the alcohol to volume percentage, the number of standard drinks this amounts to, and the pregnancy warning. As this information is under government regulation, the ABAC requirements do not specify that packaging must identify the product as being alcoholic as such.
18. It is however possible that a product might comply with the government requirements and nonetheless, a consumer might be confused as to whether a product is an alcohol beverage or a soft drink. While this won’t by itself breach any ABAC standard, it is a factor as to whether the packaging might have

strong or evident appeal to a minor and hence breach Part 3 (b)(i) of the ABAC Code.

19. The Part 3 (b)(i) standard provides that an alcohol marketing communication (which includes product packaging) might have strong or evident appeal to minors if it:

- 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.

20. 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 that 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.

21. 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.
22. 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 on 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.
23. An assessment as to the appeal of packaging is based on how a reasonable person will understand the labelling. A 'reasonable person' has the attitudes, values and life experiences shared by most people in the community. Most influential in understanding product packaging will be:
- the front of the packaging rather than the rear and sides;
 - messaging in larger rather than smaller font;
 - the dominant design aspects;
 - the prevailing colour scheme; and
 - the overall impact of these features combined.
24. The Company has provided detailed arguments as to why it contends that the packaging is consistent with the Part 3 (b) standard. Its main points include:
- the product clearly and conspicuously identifies itself as alcoholic, by showing the alcohol by volume (ABV) of 4.0% on the front label and using the descriptors "HARD Ginger Beer" and "Alcoholic Beverage";

- the orange/ginger colour does not have a strong or evident appeal to minors and further, does not have a particular attractiveness for a minor beyond the general attractiveness it has for an adult. The colour orange used on the product is not particularly bright or playful;
- the fox on the label is not portrayed in a child-like or “cutesy” manner; and
- the packaging incorporates clear indicators that the product is alcoholic and does not use a design that has a strong or evident appeal to minors.

25. The Panel does not believe the Part 3 (b)(i) standard has been breached. In reaching this conclusion the Panel noted:

- while ginger beer would be more associated with non-alcoholic beverages, the packaging does establish it is an alcohol product through the use of alcohol descriptors, 4% alc/vol’ on the front of the can and ‘alcoholic beverage’ on the rear of the can;
- in addition, the descriptor ‘hard’ is more commonly being used on alcohol products and while there may be some in the community not familiar with the term, its use with other alcohol descriptors contributes to establishing the product as an alcohol beverage;
- the packaging design does not resemble any well-known soft drink and it is unlikely a reasonable person would confuse the product with a soft drink;
- the use of animal images has the potential to elevate the appeal of a marketing communication to minors, but here the fox image has sharp features and does not resemble characters used in material directed primarily at minors; and
- taken as a whole, the packaging would at its highest have incidental and not strong or evident appeal to minors.

26. The complaint is dismissed.