



## ABAC Adjudication Panel Final Determination No. 114/20

**Product:** Fairy Floss & Aurora Vodka  
**Company:** Newy Distillery  
**Media:** Packaging & Digital (Website, Instagram & Tik Tok)  
**Date of decision:** 31 August 2020  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Debra Richards  
Professor Louisa Jorm

### Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) concerns the packaging of and digital marketing for Fairy Floss & Aurora Vodka by Newy Distillery (“the Company”) and arises from a complaint received 6 August 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 6 August 2020.
8. Generally, the Panel endeavours to make a decision within 30 business days of the receipt of a complaint but this timeline is not applicable due to the two-part process involved in determinations concerning product names and packaging.
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, namely Aurora Vodka – Pink, Sky Blue, Magic, Ocean Blue, Turquoise, Purple & Green and Fairy Floss Vodka – Raspberry, Bubblegum, Grape, Blueberry, Caramel, Marshmallow, Pineapple, Lime, Banana, Spearmint, Cola & Orange.



11. The following website extracts were supplied by the complainant. The website included an age gate at the time the complaint was received.

WE ARE TRADING BUT DUE TO COVID-19 RESTRICTIONS OUR DISTILLERY IS CURRENTLY NOT OPEN TO THE PUBLIC.

Home About Us Shop Blog Recipes Stockists Contact

# AMAZING SPIRITS

Our Aurora collection is sparking a glitter craze that you simply cannot miss. Get yours today and add some shimmer to your life.

[BUY NOW](#)

WE ARE TRADING BUT DUE TO COVID-19 RESTRICTIONS OUR DISTILLERY IS CURRENTLY NOT OPEN TO THE PUBLIC.

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# GLITTER IS SO GIN RIGHT NOW

Our Aurora collection is sparking a glitter craze that you simply cannot miss. Get yours today and add some shimmer to your life.

[BUY NOW](#)

WE ARE TRADING BUT DUE TO COVID-19 RESTRICTIONS OUR DISTILLERY IS CURRENTLY NOT OPEN TO THE PUBLIC.

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# LOOKING FOR OUR GLITTER GIN & VODKA?

We call it Aurora - our secret recipe that makes our vodka and gin fabulous and unique. You may have seen our social media videos showcasing our Aurora products, so why not try some for yourself?

[BUY NOW](#)

WE ARE TRADING BUT DUE TO COVID-19 RESTRICTIONS OUR DISTILLERY IS CURRENTLY NOT OPEN TO THE PUBLIC.

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Our Vodka is made from Australian Wheat, triple distilled making a very smooth and refined Vodka. The Vodka is light, crisp, and slightly sweet.

Being extremely clean and mild-flavored it mixes beautifully in cocktails.

Our Aurora range of Vodka is carefully coloured to give a truly amazing appearance. When in the light the vodka sparkles and shines like the shining northern lights. Check out the videos under our Aurora Gin range!

**PRODUCTS**

- Gin
- Aurora Gin
- Vodka
- Aurora Vodka
- Pink Flava Vodka
- Gin Tonic
- Limonade
- Whisky
- Hand Sanitizer

**FILTER**

Aurora Aurora Vodka Green Magic SHOP

Vodka



**AURORA VODKA - PINK**  
\$60.00



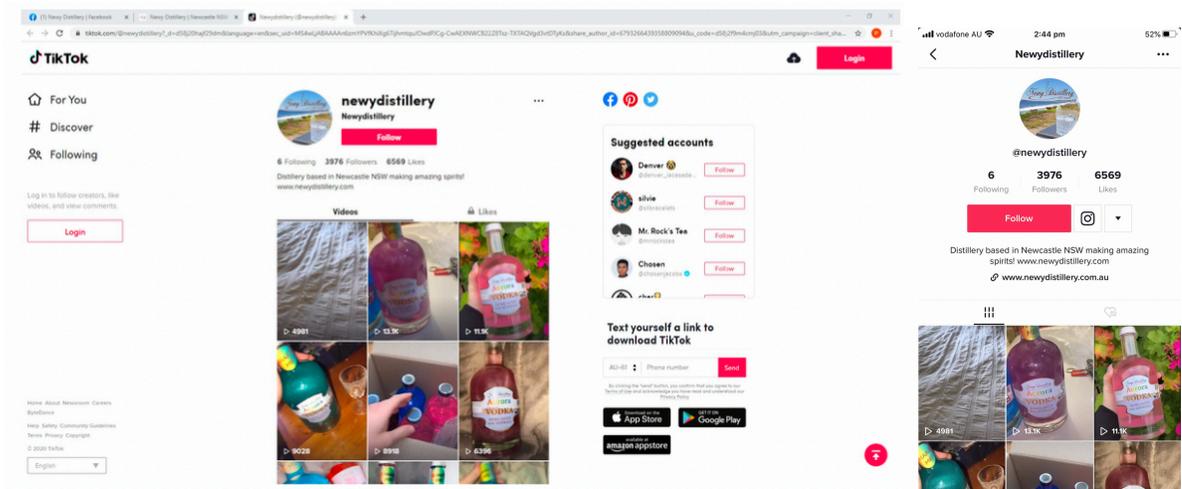
**AURORA VODKA - SKY BLUE**  
\$60.00



**AURORA VODKA - MAGIC**  
\$60.00



12. The Newy Distillery Instagram account was referenced in the complaint; <https://www.instagram.com/newydistillery/>. The Instagram account was not age restricted at the time the complaint was received.
13. A Newy Distillery Tik Tok account was referenced in the complainant (refer below). <https://www.tiktok.com/@newydistillery>



## The Complaint

14. The complainant is concerned that:

- Fairy Floss vodka is a name that is likely to have a strong appeal to children and teenagers. Fairy floss is a confectionary sold at fairs and amusement parks and is popular at children's birthday parties. Flavours such as 'Bubblegum Fairy Floss' are particularly likely to appeal to children.
- Aurora Vodka, which the Newy Distillery website describes using words such as 'glitter' and 'shimmer' is also likely to have strong appeal to kids and teenagers. The product comes in bright colours such as blue and pink and glitters in the light. Prior ABAC determination 88/17 found that props that could reasonably be said to have strong appeal to children include glitter.
- The Newy Distillery Instagram page does not appear to have age restriction controls activated, in breach of placement rule (ii). Anyone below the age of 18 can follow, view and interact with the posts:

<https://www.instagram.com/newydistillery/>

- The Newy Distillery has an official TikTok account. This is concerning as TikTok is an app that is very popular with children around the world, including Australia. Roy Morgan reports 21% of Australian children under the age of 14 use TikTok (refer <https://www.roymorgan.com/findings/8289-launch-of-tiktok-in-australia-december-2019-202002240606>). There does not appear to be any ability for companies on TikTok to introduce age restriction controls to restrict the audience. TikTok's advertising policy prohibits alcohol ads in Australia (<https://ads.tiktok.com/help/article?aid=6685586866860720134>). The Newy Distillery TikTok account functions as advertising for the alcohol producer, putting them in breach of TikTok's advertising policy.

<https://www.tiktok.com/@newydistillery>

## The ABAC Code

15. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:

- (b)(i) have Strong or Evident Appeal to Minors
- (b)(iv) be directed at Minors through a breach of any of the Placement Rules

16. Definition in Part 6 of the ABAC provides:

**Placement Rules** means:

- (i) A Marketing Communication must comply with codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Alcohol Guidelines).

- (ii) A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.
- (iii) If a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, a Marketing Communication may only be placed where the audience is reasonably expected to comprise at least 75% Adults (based on reliable, up to date audience composition data, if such data is available).
- (iv) A Marketing Communication must not be placed with programs or content primarily aimed at Minors.
- (v) A Marketing Communication must not be sent to a Minor via electronic direct mail (except where the mail is sent to a Minor due to a Minor providing an incorrect date of birth or age).

**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**

17. The Company responded to the complaint by letter dated 7 August 2020. The principal points made by the Company were:
- I am very saddened to hear about the complaint, we are a relatively new and only a small family business and honestly feel (to the best of our knowledge) that we have done all we can to ensure that our products do not get presented to minors and cannot directly be sold to minors. We also strongly believe that our products cannot be confused with confectionary or soft drink products. Whilst our products are unique, they are specifically not available or in any direct way visible to minors. I completely disagree that our products are specifically or evidently appealing to minors. If you feel we have breached any requirements we would be more than happy to work with you to resolve this.
  - Our overarching protection from our products getting into the hands of minors is our processes and policies, as recommended by the liquor authorities,

which have been designed to prevent the access and/or direct sale of our products to minors and they include:

- Specialised delivery service “Australia Post Wine Delivery Service” which is a service provided by Australia Post for the specific delivery of alcohol whereby the service requires a signature on delivery and receipt only by a person over the age of 18, as part of this service all of our packages have a special “Wine Delivery Service” sticker clearly indicating that the parcel contains alcohol. The buyer is not allowed to opt out of this and the parcels cannot be left unattended or dropped off at the premises without this signature, otherwise taken to the nearest post office where they too must adhere to a signature collection by a person over 18 verified by a drivers licence or equivalent government approved ID.
- Age gate – we have implemented an age gate to our website where users have to enter their age and only allowed access if they are over 18.
- Advertising – all of our direct advertising (we only do Facebook, Instagram and wine magazine advertising) has targeting and content restrictions applied ensuring that it does not get displayed or is not evidently accessible to minors. Our main reason for sticking to the Facebook/Instagram medium is that it has the ability to not allow any posts (including shares or likes) to be seen by persons under the age of 18, Facebook and Instagram have this function designed for alcohol businesses like ours.
- We did not think that we had to run our small social media posts or product packaging through ABAC for approval, if we are required to do so please advise when we need to and the process required. We did review the advertising guidelines and implemented measures that we believe comply with all requirements.
- Our labels follow:



*Newy Distillery*  
EST. 2018

Using 100% Australian ingredients this vodka schnapps gives your palate a burst of blueberry fairy floss flavour. Made from fairy floss flavouring infused in our amazing triple distilled Australian grain based vodka it is surprisingly smooth and tastes amazing in cocktails.

Produced by:  
Newy Distillery Pty Ltd  
14/17 Aluminium Close  
Edgeworth NSW 2285

Consumer enquiries:  
www.newydistillery.com.au

**Fairy Floss Vodka**

Batch: [ ]

STANDARD DRINKS 20.5 Get the facts DRINK WISE NSW-FCIAU

0 793591 928173

700ml - 37% ALC/VOL

*Newy Distillery*  
EST. 2018

Using 100% Australian ingredients this vodka schnapps gives your palate a nice bubblegum fairy floss flavour. Made from fairy floss flavouring infused in our amazing triple distilled Australian wheat based vodka it is surprisingly smooth and tastes amazing in cocktails.

Produced by:  
Newy Distillery Pty Ltd  
14/17 Aluminium Close  
Edgeworth NSW 2285

Consumer enquiries:  
www.newydistillery.com.au

**Fairy Floss Vodka**

Batch: [ ]

STANDARD DRINKS 20.5 Get the facts DRINK WISE NSW-FCIAU

0 793591 928265

700ml - 37% ALC/VOL

*Newy Distillery*  
EST. 2018

Using 100% Australian ingredients this vodka schnapps gives your palate a nice caramel fairy floss flavour. Made from fairy floss flavouring infused in our amazing triple distilled Australian wheat based vodka it is surprisingly smooth and tastes amazing in cocktails.

Produced by:  
Newy Distillery Pty Ltd  
14/17 Aluminium Close  
Edgeworth NSW 2285

Consumer enquiries:  
www.newydistillery.com.au

**Fairy Floss Vodka**

Batch: [ ]

STANDARD DRINKS 20.5 Get the facts DRINK WISE NSW-FCIAU

0 793591 928258

700ml - 37% ALC/VOL

*Newy Distillery*  
EST. 2018

Using 100% Australian ingredients this vodka schnapps gives your palate a burst of cola fairy floss flavour. Made from fairy floss flavouring infused in our amazing triple distilled Australian wheat based vodka it is surprisingly smooth and tastes amazing in cocktails.

Produced by:  
Newy Distillery Pty Ltd  
Edgeworth  
Newcastle NSW 2285

Consumer enquiries:  
www.newydistillery.com.au

**Fairy Floss Vodka**

Batch: [ ]

STANDARD DRINKS 20.5 Get the facts DRINK WISE NSW-FCIAU

0 793591 928284

700ml - 37% ALC/VOL

*Newy Distillery*  
EST. 2018

Using 100% Australian ingredients this vodka schnapps gives your palate a burst of grape fairy floss flavour. Made from fairy floss flavouring infused in our amazing triple distilled Australian grain based vodka it is surprisingly smooth and tastes amazing in cocktails.

Produced by:  
Newy Distillery Pty Ltd  
14/17 Aluminium Close  
Edgeworth NSW 2285

Consumer enquiries:  
www.newydistillery.com.au

**Fairy Floss Vodka**

Batch: [ ]

STANDARD DRINKS 20.5 Get the facts DRINK WISE NSW-FCIAU

0 793591 928180

700ml - 37% ALC/VOL

*Newy Distillery*  
EST. 2018

Using 100% Australian ingredients this vodka schnapps gives your palate a burst of lime fairy floss flavour. Made from fairy floss flavouring infused in our amazing triple distilled Australian grain based vodka it is surprisingly smooth and tastes amazing in cocktails.

Produced by:  
Newy Distillery Pty Ltd  
Edgeworth  
Newcastle NSW 2285

Consumer enquiries:  
www.newydistillery.com.au

**Fairy Floss Vodka**

Batch: [ ]

STANDARD DRINKS 20.5 Get the facts DRINK WISE NSW-FCIAU

0 793591 928210

700ml - 37% ALC/VOL

*Newy Distillery*  
EST. 2018

Using 100% Australian ingredients this vodka schnapps gives your palate a burst of orange fairy floss flavour. Made from fairy floss flavouring infused in our amazing triple distilled Australian grain based vodka it is surprisingly smooth and tastes amazing in cocktails.

Produced by:  
Newy Distillery Pty Ltd  
Edgeworth  
Newcastle NSW 2285

Consumer enquiries:  
www.newydistillery.com.au

**Fairy Floss Vodka**

Batch: [ ]

STANDARD DRINKS 20.5 Get the facts DRINK WISE NSW-FCIAU

0 793591 928227

700ml - 37% ALC/VOL

*Newy Distillery*  
EST. 2018

Using 100% Australian ingredients this vodka schnapps gives your palate a burst of spearmint fairy floss flavour. Made from fairy floss flavouring infused in our amazing triple distilled Australian grain based vodka it is surprisingly smooth and tastes amazing in cocktails.

Produced by:  
Newy Distillery Pty Ltd  
Edgeworth  
Newcastle NSW 2285

Consumer enquiries:  
www.newydistillery.com.au

**Fairy Floss Vodka**

Batch: [ ]

STANDARD DRINKS 20.5 Get the facts DRINK WISE NSW-FCIAU

0 793591 928203

700ml - 37% ALC/VOL

- We believe that whilst Fairy Floss may be considered a confectionary it is not a beverage or liquid and the prominent display of the word vodka ensures it cannot be confused with a confectionary product. We are doing everything we can to ensure that our products are not advertised to minors or can easily be

seen by them as per the above processes implemented. Also our strong opinion, whilst the confectionary “Fairy Floss” is sold at fairs and amusement parks it is a product that is consumed equally amongst adults and children, if not more towards adults in recent times, and due to recent health concerns parents (including my wife and I – parents to 2 young girls) would not see this as evidently appealing towards minors. The term VODKA which we have purposely ensured is clear on the label is not appealing to children or teenagers. The label also has clearly marked the over 18 age logo as required by the alcohol labelling standards. Our products are also not sold with or in connection with confectionary or soft drinks.

- The target of these products is to appeal to adults who love these flavours. It is not evident that these flavours in particular are strongly appealing to minors. I would not regard these flavours as being strongly appealing to minors. We also have specifically not designed our products to be sweet or confectionary like, the sugar content in our 700ml bottle is <2grams per bottle, it is flavour concentrate that gives the flavouring, not sugar and we believe that this ingredient mix is not designed to appeal to minors unless they like the harsher taste of strong vodka. Our products are also not ready to drink products, they are full strength alcohol products and designed for adults to use in cocktails and are not suitable for drinking straight which is of a shared concern for the ready to drink product range which we do not intend on being part of.
- In relation to our labels they are designed not to be fluorescent or appealing to minors, while coloured they really are dull when seen in person and not believed to be “appealing” to minors. We have also changed the colour of the range to boost the flavouring and they all appear very dark in colour, the grape is almost black in colour, due to a heap of flavouring, definitely not appealing to minors. I am confident that our products could not be mistaken for a soft drink or confectionary product.
- If you have any recommendation as to modifications to our labelling such as clearly marking on it “Not a confectionary or soft drink product” we would be happy to comply. We honestly believe that the way we display, advertise and sell our product makes it impossible to confuse with a confectionary or soft drink product. We have also taken all necessary measures to make sure minors cannot access or view our products.
- We believe that the rainbow writing on Aurora Vodka is common on a lot of alcohol products on the market and is not directed towards minors or evidently specifically appealing to them, you can’t get more bright rainbow than this common product in every Bottleshop:



- We have also taken the following measures to ensure that the labelling is not designed to be appealing to minors; the label is relatively plain, featuring a faded out image of a local landmark, the font type is also specifically plain and the shape of the label is not modern or in any way appealing to minors, these more than offset the coloured writing. It is not evident that our labels are appealing to minors. However, should you have any strong concerns we are happy to comply, we do not feel that any modifications are necessary.
- We strongly do not believe and cannot find any evidence that pastel colours would be more appealing to minors over bold colours or any other colours, there is evidence contrary to that to suggest pastel colours are the least attractive to minors, again we also ensure that our products are not visible or accessible to minors.
- Our product labelling clearly displays the word “Vodka” which would eliminate any confusion with confectionary or soft drinks, we also predominately display the alcohol content which also supports this. The use of the cola flavouring is common to a lot of common alcoholic beverages and none of these have any issues? Our bottle also would not get confused with any soft drinks on the market, it is a specifically unique spirit bottle.
- We strongly believe that our products cannot be confused with confectionery or soft drinks, furthermore our products are not displayed, sold or packaged with confectionary or soft drink products.
- We do not believe that the content being referred to is in breach of this code. Our website and social media content are designed such that they cannot be seen by minors so they cannot see any of the content being referred to and therefore not evidently appealing to minors, furthermore our website processes prevent them from purchasing/receiving our product. Our advertisements are specifically designed to not have glittery or child appealing backgrounds or props, e.g. they all have location shots promoting our local region, i.e. the lake, bushland, beaches. Our products do not actually have “glitter” in them however have a natural product in them that creates a reflective illusion that works well in cocktails.
- All of the posts that we have created are designed not to specifically appeal to minors, the imagery used in the background are either plain or of local landmarks e.g. beach, lake or other recognisable local landmarks which reflect our brand. These are not designs evidently appealing to minors.
- Our website is restricted content to individuals 18 years or over and therefore not evidently appealing or visible to minors.
- Referencing the flavours in the posts has not been done in a way that is evidently appealing to minors, we in no way refer to them as confectionary flavours. These references are shown on media that is restricted content to individuals 18 years or over and therefore not evidently appealing or visible to minors.
- The facebook post referred to has a background of a local lake, whilst displayed in a rainbow this is not evidently appealing or directed towards

minors, in addition this image is on a medium (facebook) which is restricted to people over 18, therefore not evidently visible to minors.

- The videos referred to were shared on our Facebook page and are restricted content to individuals over 18, therefore not evidently visible or appealing to minors.
- We had thought that our Instagram page was age restricted, however our IT provider has advised that Instagram had changed their settings at some point and our account hadn't been upgraded to a professional account, so the previous settings weren't working. They've upgraded it now and assured us that the restrictions are working.
- We have not created any content on TikTok, it is all customer created content that they have shared, and we are not familiar with the process of creating or uploading content so unsure of whether or not you can age restrict the content. We have not done any paid advertising on TikTok or generated any content ourselves on it and the account on there was not an "official account" or business account it was just a link to connect the hashtag to our website. However, to alleviate any concerns we have deleted this account and all reference to our business or the @newydistillery tag just to be on the safe side. Due to recent global publicity we also do not feel we need to be associated with this platform. As TikTok is relatively new there isn't any primary source evidence on what the age range usage is.
- We apologise if we have caused any concern of the public and believe that we have taken all necessary precautions to ensure that we do not directly advertise or appeal to children or minors.

## **The Panel's View**

### Introduction

18. Newy Distillery is a small batch distillery located in Newcastle which produces a range of alcohol products such as vodkas, gins and limoncello. The Company was founded by Luke and Kimberly Storey and was established in 2018. The Company markets its range via its website and social media channels such as Instagram. This determination arises from a complaint which raises concerns about the packaging of some of the Company's products, the content of the Company's website and the use of the social media platforms of Instagram and TikTok. The overarching concern expressed in the complaint is about the appeal of the Company's marketing to minors.
19. The Company is not a signatory to the ABAC scheme and as such is not contractually bound to abide by a Panel determination. The Company however has fully engaged in the complaint process and expressed its commitment to good marketing practices and a willingness to work with the ABAC Scheme if it is determined Code requirements have not been satisfied.
20. On 28 August 2020 the Panel made a provisional determination that the product packaging was in breach of Part 3 (b)(i) of the Code and consistent with the rules and procedures applying to decisions concerning product packaging, the Company was afforded an opportunity to seek a rehearing of the provisional determination by

making further submissions. The Company has accepted the Panel's decision and the Panel has proceeded to make a final determination of the complaint.

21. Given the complaint is quite wide ranging, it is convenient to break down this decision into the four individual questions posed by the complaint as follows:
- Are the product names and packaging used on the 'Fairy Floss' vodka range consistent with the ABAC standard on marketing not having strong or evident appeal to minors;
  - Is the 'Aurora Vodka' packaging and related website entries consistent with the ABAC standard on marketing not having strong or evident appeal to minors;
  - Was the Company's Instagram account age restricted as required by the ABAC Placement Rules; and
  - Were the TikTok posts which referenced the Company's products 'marketing communications' to which the ABAC Placement Rules applied, and if so, were the relevant Rules complied with.

#### Some General Observations- Remit of the ABAC Scheme within alcohol regulation

22. Before turning to the specific issues, it is helpful to set out a few general observations to frame the determination. The regulation of alcohol as a product and alcohol beverage marketing falls within a shared regulatory space with different and sometimes overlapping roles played by government authorities and industry sponsored schemes such as the ABAC. The ABAC Scheme's remit is on the marketing of alcohol beverages by alcohol producers, distributors and retailers. This means the branding of products and the promotion of products via various marketing methods and use of different media channels.
23. The ABAC does not purport to regulate physical alcohol beverages, i.e. the physical characteristics of a beverage such as its alcohol to volume content, its taste, its colour, if the liquid has effervescent qualities or the viscosity of the beverage. To the extent physical characteristics of alcohol beverages on sale to the public are regulated, either for public safety or other policy reasons, then this rests directly with government agencies. In some respects, the points argued by both the complainant and the Company about the appeal (or lack thereof) of the Company's products to minors go to the contended physical properties of the products rather than the marketing of the products.
24. Equally, the Company in its response to the complaint outlines the measures it adopts to ensure that minors cannot purchase or take delivery of its products, e.g. the Australia Post Wine Delivery Service. Prudent measures by alcohol retailers to ensure under 18 year olds cannot readily purchase or acquire an alcohol product is responsible business practice and reflect State liquor licensing requirements, but these measures are a different question to how an alcohol product is branded and marketed to the community. The consistency of alcohol beverage marketing material with ABAC standards will not be impacted one way or the other by the stringency of purchasing controls or drivers of consumer choice, such as price points.
25. At a strategic level, the public policy framework for alcohol is set by Australian governments collectively through the National Drug Strategy and the associated sub

strategies. One of the sub strategies is the National Alcohol Strategy 2019-2028 which consists of four priority areas of focus including reducing the risk of harmful alcohol consumption being contributed by the availability, promotion and pricing of alcohol. Hence, it is recognised that multiple factors can contribute to harmful alcohol consumption by at risk groups such as youth, and each of these factors need appropriate policy responses. To reduce risk to youths, policy responses and actions are required to support parental guidance and sensible individual choices and responsible marketing plays its role. The ABAC Scheme is an important component in the responsible marketing space.

#### ABAC Standards and how consistency is assessed

26. The ABAC creates two separate sets of requirements with which alcohol marketing communications are to comply. The content standards apply to marketing material irrespective of the medium by which the marketing is transmitted or conveyed. In contrast the ABAC Placement Rules are linked to the medium by which marketing material is communicated, with the policy aim that the medium should be directed towards adults, and to the extent possible, away from minors. The complaint raises issues under both the content standards and the Placement Rules.
27. The complainant argues the Company's vodka range is packaged (name and labelling) and its website contains content which will strongly appeal to minors. Part 3(b)(i) of the Code provides that the content of a marketing communication must not have strong or evident appeal to minors. This is further expanded upon in the Code definitions to include, inter alia, marketing material that:
  - specifically targets minors;
  - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; and
  - uses imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to minors or that cause confusion with confectionary or soft drinks.
28. Assessment of the marketing communication against Code standards is from the probable understanding of the marketing item by a reasonable person taking its content as a whole. The 'reasonable person' benchmark is intended to align the assessment to prevailing community standards and hence the life experiences, values and opinions common in a majority of the community are a touchstone. It's not uncommon that a marketing message could be understood in more than one way, with the reasonable person test requiring that the most probable meaning is to be preferred over a possible, but less likely, interpretation of the marketing material.
29. 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;
  - 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.
30. 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 which shapes how a reasonable person will understand the item.
31. Product packaging can give rise to strong appeal to minors if it creates confusion with confectionary 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 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 eg 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.

Fairy Floss Vodka Packaging (product name)

32. The complainant argues that it is inappropriate to name an alcohol product 'Fairy Floss Vodka' as this name will have strong appeal to children. It is submitted that fairy floss is a confectionery sold at fairs and amusement parks and is popular at children's birthday parties. The Company responds by arguing that:
- the product would not be confused with confectionery or soft drink as fairy floss is not a beverage and the alcoholic nature of the product is established by the prominent use of the term 'vodka';
  - fairy floss is consumed equally by adults and children, if not more by adults;
  - the nature of the product is that it is used in cocktails and is not a 'ready to drink' alcohol beverage; and
  - the product is not available to minors nor marketed towards them.
33. Fairy floss or cotton candy (as it is known most commonly outside of Australia) is produced by melting sugar into a syrup and spinning the concoction at high

revolutions as it rapidly cools so that the sugar is unable to fully recrystallise. The product made its debut at the 1904 St Louis World's Fair and has been associated with fairs and similar events since that time. Fairy floss is sold at supermarkets with other confectionery and can be purchased online. Food colourings are used to produce fairy floss in a range of colours although it is probably most readily thought of as being pink in colour.

34. A brief internet search did not disclose any specific data as to the age demographics of the consumers of fairy floss, but the marketing of fairy floss does appear to be far more centred toward minors than adults. It is not unreasonable to think that while fairy floss would be consumed across age groups, it is a confectionery aimed far more directly toward minors than it is toward adults. The Company's website in positioning Fairy Floss Vodka references the product bringing back memories of childhood, Royal Easter Show and the circus which reinforces the association of fairy floss consumption with minors.
35. The Panel believes the name of the product does breach the Part 3(b)(i) standard. In reaching this conclusion the Panel noted:
- fairy floss is a confectionery which is likely marketed toward and consumed more extensively by minors than adults;
  - the use of the name fairy floss on an alcohol product would likely contribute to an illusion of a smooth transition to an alcohol product for a minor;
  - the combination of the name fairy floss with the variety names, such as 'bubblegum' and 'marshmallow', would be highly relatable to minors;
  - while the name is used, in part to invoke a sense of nostalgia in potential adult consumers, this nostalgia stems from memories of childhood use of fairy floss and supports the attraction of the name to minors; and
  - the packaging label does use a clear alcohol descriptor of 'vodka' and employs other cues as to the alcoholic nature of the product. Further a clear glass bottle is typically used with alcohol spirit products and these elements taken together means it is not considered the packaging creates confusion with a soft drink.

#### Aurora Vodka Packaging and website entries

36. The complainant identifies Aurora Vodka products as also likely to have strong appeal to children and teenagers. In large measure the complainant's contentions go to the depictions and descriptions of the product on the Company's website rather than direct arguments about the product packaging itself. The website entries draw attention to the physical characteristics of the products namely their bright colours and that some products 'shimmered' or 'are sparking a glitter craze'. While couched as concerns about the website, the underlying argument of the complainant appears to be that the products themselves are inappropriate.
37. Government authorities including some of the State liquor licensing bodies do have a power to prohibit alcohol products from sale and this power has been exercised to exclude products such as alcoholic ice blocks, alcoholic milk and some alcoholic powders, vapours and aerosol products. The Panel's more limited remit is to assess the consistency of the packaging and website entries as alcohol

marketing communications against the Part 3(b)(i) standard. On this issue, the Company contended the Aurora Vodka packaging and its website material:

- used rainbow colours in the name 'Aurora', which are common on various alcohol products;
- featured a label which was relatively plain, showing a faded out image of a local landmark and using a font and shape which is not modern or appealing to minors;
- clearly identifies the product as a vodka and would not be confused with a soft drink;
- was contained on a website which was age gated; and
- the products do not contain 'glitter' but 'a natural product .. that creates a reflective illusion that works well in cocktails'.

38. The nature of the Aurora Vodka range (and some gin products as well) is that they are brightly coloured and 'sparkle and shine'. As a general proposition the fact that an alcohol beverage is coloured will not mean the packaging in which the beverage is contained will be in breach of the ABAC standards. It is conceivable, however, that the colour of a beverage, which is visible because of the style or type of packaging used, might in combination with other design aspects of the packaging, lead a reasonable person to conclude the packaging as a whole is in breach of a Code standard.

39. In this case the packaging container is clear glass which permits the colours and shimmering properties of the product to be seen. In addition, the packaging consists of:

- a standard bottle type often used with spirits;
- the name 'Aurora', which is presented in rainbow colours;
- the balance of the label which shows Nobbys Head, the Company name and location and other product details; and
- a message on the bottle neck of 'shake me'.

40. The name 'Aurora' might provoke several images. One thought is the polar (either southern or northern) lights, and the Company alludes to the northern lights in its website description of the products. Another thought is Princess Aurora (sleeping beauty) a popular fairy-tale and taken to the screen in a Disney animated movie of 1959 and more recently as a character in the 'Maleficent' movies of 2014 and 2019. Numerous other adaptations of Princess Aurora have occurred on TV and in children's books and products. The name aurora is used by other companies, such as Aurora Energy.

41. The Panel believes on balance that the product packaging has elements when combined with the brilliant colours and shimmering effect of the product would have strong appeal to minors. The elements of the packaging noted by the Panel were:

- the Aurora name which could reasonably invoke Princess Aurora;
- the rainbow colour used for the Aurora name; and
- the 'shake me' message, which is playful and is reminiscent of 'push me' buttons found on some children's toy packaging.

42. The website also uses some descriptions such as 'glitter craze' which have strong appeal to minors and should be revised.

#### Instagram Account – Age Restrictions

43. The complaint advanced that the Company's Instagram account was not age restricted as at the time the complaint was made. This concern enlivens the ABAC Placement Rules. Rule 2 provides that an alcohol marketer must utilise available age restriction controls to exclude minors from viewing its marketing communications.
44. Instagram does have age restriction capacities which an alcohol marketer can use. The Company advised that it had employed age restriction controls but apparently the controls become inoperative when its account had changed in status at some point. It states the age restrictions are now working, although no information was supplied as to when the issue with the account arose.
45. It is the responsibility of an alcohol marketer to maintain its social media channels in a manner which meets the ABAC requirements. While it is accepted that navigating the back of house settings of global media platforms can be challenging, even for sophisticated marketers, it is evident that the Company had not monitored its Instagram account to detect the problem prior to the complaint being lodged. The Panel believes the complaint on this point has been established.

#### TikTok Account - Placement Rules

46. TikTok is a relatively recent addition to the social media platform environment having been available outside of its origins in China only from August 2018. The basic facility of the platform is the creation and sharing of short videos. The platform has grown enormously in popularity and by August 2020 had surpassed 1 billion worldwide users. This is the first occasion that a complaint has raised the use of TikTok by an alcohol company. Official age demographic data is not available for TikTok.
47. Advice from TikTok to the ABAC Scheme is that:  
  
*We acknowledge that alcohol advertising is not prohibited in Australia; however, with a view to maintaining a safe and positive environment for our user base, many of whom are aged 13-18, we have taken a conservative approach and do not currently allow any ads promoting alcoholic beverages or associated services in this market.*
48. The complainant contended the Company had an 'official TikTok account' and this was disturbing given that users cannot age restrict their audience, the relative preponderance of minors on the platform and that the Company appeared to be in breach of the TikTok policy prohibiting alcohol advertising. The Company responded to these concerns by stating:

- the Company had not created any content for TikTok with any content on the platform referencing the Company's brands and products being created by others;
- the Company did not have an 'official account', it was unfamiliar with the protocols of the platform and it had not placed paid advertising on TikTok; and
- there was a hashtag link to the Company's website which upon receiving the complaint has been removed.

49. Drawing this together the position seems to be:

- The Company did not place paid advertising on the platform, which in any event would not have been accepted by TikTok given its Australian operating protocols;
- the ABAC however captures 'alcohol marketing communications' which is wider than 'paid advertising' and can include posts on TikTok which reference the Company's products and branding if the posts have been 'generated by or are within the reasonable control' of an alcohol marketer;
- the Company did not create the posts, which are TikTok user generated content;
- there is no information before the Panel to indicate that the Company took positive steps to generate the creation of the posts e.g. endeavouring to utilise social influencers by supplying products to influencers with the hope the influencer would create content referencing alcohol products; and
- the Company did engage with TikTok, at least to the extent of placing a TikTok icon on its website, that directed users of its website to either a hashtag search or an account on TikTok that included user generated TikTok videos relating to its product.

50. The ABAC Placement Rules do not mandate which of the various social media platforms can or cannot be used for alcohol marketing communications. Rather the Rules create a cascading set of requirements on marketers which are related to the technical capacity of the particular communication medium to target marketing towards adults and away from minors. With digital platforms, the applicable rules are:

- available age restriction controls to exclude minors are to be utilised (Rule 2);
- if there are no age restriction controls, then a marketing communication may only be placed where the audience is reasonably expected to comprise at least 75% adults (Rule 3); and
- no placement of a marketing communication with programs or content primarily aimed at minors (Rule 4).

51. TikTok does have some options for minors (alone or in conjunction with parents) to choose safety settings to enable a curating of the posts which will be fed to the user e.g. Family Pairing and Restricted Mode. There does not however appear to be 'age restriction controls' available to an alcohol marketer seeking to engage with the platform which enables minors to be excluded from posts made by the marketer. As mentioned, paid alcohol advertising is not permitted on TikTok.

52. Official demographic data on the age of Australian users of TikTok is not available. Public data, however, from Australia and overseas indicates that compared to other social media platforms, TikTok has a younger user profile with significant user numbers aged under 18. This public information together with TikTok's position on alcohol advertising means it is not reasonable to expect that the current audience of posts on TikTok would be at least 75% adult as required by Placement Rule 3.
53. Accordingly, the Panel finds that the Company's engagement with the user generated TikTok posts through the link to its website and use of a hashtag is inconsistent with Placement Rule 3.

## Conclusion

54. This has been a complex determination given the issues raised. The Panel accepts that the Company had no intent to market its product to minors but believes that several Company marketing communications have not met ABAC standards and rules. In some instances, the breaches have been immediately addressed by the Company upon receiving the complaint, in the case of the product packaging some amendment will be required to meet the ABAC standards. In summary the Panel has concluded:
  - the packaging (product name) of Fairy Floss Vodka is inconsistent with Part 3(b)(i);
  - the packaging (label elements) of Aurora Vodka and some references to the Aurora product range on the Company website are inconsistent with Part 3(b)(i);
  - the Company's Instagram account, as at the time of the complaint, did not utilise available age restriction controls in breach of Placement Rule 2; and
  - the Company's engagement with TikTok through use of a link to posts on the platform from the Company's website and use of a hashtag was in breach of Placement Rule 3.