



## ABAC Adjudication Panel Determination No 36/21

**Product:** Various Spirits  
**Company:** Newy Distillery  
**Media:** Packaging  
**Date of decision:** 6 April 2021  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Debra Richards  
Professor Richard Mattick

### Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 16 March 2021. The complaint concerns the labelling and packaging of various Newy Distillery products, with the following being considered in this determination (“the Products”):
  - Chilli Mango & Lime Vodka
  - Passionfruit Vodka
  - Mixed Berry Vodka
  - Pink Gin.
  
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 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 meeting 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 16 March 2021.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint was completed in this timeframe.

## Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval (Approval Number 18793) was obtained for the bottle shape and the following label for Pink Vodka (amongst other products not considered in this determination):



## The Marketing

10. This determination relates to the following labels and packaging:



## The Complaint

11. The complainant has the following concerns about the labelling and packaging:

*The company promotes products that advertise fruit flavoured vodkas and gins, the writing is quite bold and with very realistic fruits on the front labels, which I believe that children would find appealing. The bold/bright colours also draw kids' attention. In fact, some of the writing of Vodka and Gin gets lost in the fruit, for example:*

*<https://newydistillery.com.au/collections/shop-gin/products/passionfruit-gin>*

*All this coupled with the sparkling products really promotes to a child's curiosity.*

*I think that all the issues mentioned above are really attractive to a child and in fact have had friends tell me that their children have taken an interest in it before due to the fruits and the sparkle.*

## **The ABAC Code**

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

(b)(i) have Strong or Evident Appeal to Minors.

13. Part 6 of the ABAC Code provides that:

**Strong or Evident Appeal to Minors** means:

(i) likely to appeal strongly to Minors;

(ii) specifically targeted at Minors;

(iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;

(iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; or

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

## **The Company's Response**

14. The Company responded to the complaint by letter emailed on 17 March 2021. The principal points made by the Company were:

- The products have all been offered for retail for over 12 months, first offered between 1-2 years ago.

### **Alcohol Advertising Pre-vetting Service Approval**

- Our labelling template (product name, font style, written label content, labelling standards, warning labels, etc.) has received pre-vetting approval – Approval Number 18793). We have consistently applied the identical template across all of our products, only changing the background images.
- The only thing differing in our products from our pre-vetting approval is the label background. We note that for the Pink Gin in question we have received pre-vetting approval for the identical label in the “vodka” version and we discussed with the ABAC Pre-Vetter the need to also get the matching gin

label pre-vetted and were informed that it is not required if the label is not substantially different in terms of background or font style.

- As discussed with the pre-vetter at the time, so long as we use the approved labelling template there is no need to resubmit for pre-vetting.

### **Responsibility toward Minors**

- The colours used in the background of the labels are not bold, they are faded out to increase the prominence of the text on the label as are the images on the passionfruit and mixed berry labels. The words “Vodka” and “Gin” are also very clear and dominant.
- The colour of the liquid (putting aside the Pink Gin) is natural colouring from the product, these products “Chilli/Mango/Lime, Passionfruit Gin and Mixed Berry” do not have a bright colour liquid and are unlikely to be eye catching to children. In particular, the reference to Chilli is unlikely to be appealing to children.
- To quote our previous ABAC complaint in relation to our products, to which the identical label template has been used “The 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.”<sup>1</sup>
- Whilst the Chilli, Mango & Lime Vodka product appears orange in colour the prominence of the colour is faded compared to orange juice and honestly unlike the appearance of any other orange soft-drink I have seen at the supermarket. Also, as above the glass bottle is typical of alcohol spirit products and the packaging is unlikely to be confused with juice or soft drink. I would also like to highlight that this is a strong Chilli flavoured product which is not going to be liked by children.
- In relation to Passionfruit Vodka and Mixed Berry Vodka the pictures of the fruits are faded but also not designed or in our opinion appear appealing to children. Also, as above, the glass bottle is typical of alcohol spirit products and the packaging is unlikely to be confused with juice or soft drink.
- The identical vodka version of the Pink Gin product has already gone through pre-vetting approval (Approval Number 18793) and deemed appropriate, notably a key reason being “The label does use a clear alcohol descriptor of 'vodka' and employs other cues as to the alcoholic nature of the product.

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<sup>1</sup> ABAC Determination 114/20, para 35 (<http://www.abac.org.au/wp-content/uploads/2020/09/114-20-Final-Determination-Fairy-Floss-Aurora-Vodka-31-August-2020.pdf>)

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.” On the left below is the ABAC approved label and on the right is the Pink Gin label:



- Our labelling template (product name, font style, written label content, labelling standards, warning labels, etc.) has received pre-vetting approval (Approval Number 18793). We have consistently applied the identical template across all of our products, only changing the background images.
- In conclusion, we firmly believe that our products comply with the precedence set by our previous ABAC feedback and that of the pre-vetter, we also do not believe that our products are aimed at children, we have also made all endeavours to ensure that our products and marketing are not accessible to children.

### The Panel's View

15. A key standard in the ABAC is the obligation that alcohol marketing does not have strong or evident appeal to minors. The complainant contends that the Company's range of vodka and gin is packaged in a way which offends this standard. Given that the Company's range of products is quite extensive, this determination reviews the packaging of four separate products which collectively provides a fair representation of the concerns raised by the complaint. The product packaging reviewed are:
  - Passionfruit Vodka and Mixed Berry Vodka;
  - Chilli Mango & Lime Vodka; and
  - Pink Gin.
16. The complainant argues that several features of the product packaging would be appealing to children namely:
  - the labelling of some products shows 'very realistic fruits';

- the writing used on the labels is 'quite bold';
  - identification that the products are alcoholic can be lost in the fruit images;
  - bold bright colours are used which would draw the attention of children; and
  - the physical product is sparkling.
17. The Company believes its product packaging is consistent with the ABAC standard. It argues:
- its labelling template has received pre-vetting approval;
  - the labels don't use overly bright colours and the products are clearly identified as being alcoholic; and
  - glass bottles are generally used for gin and vodka products and the physical beverage (aside from Pink Gin) is the product's natural colouring.
18. An alcohol marketing communication (which includes product packaging) might have strong or evident appeal to minors if:
- it specifically targets minors;
  - it has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; and
  - it uses imagery, designs, motifs, animations, or cartoon characters that are likely to appeal strongly to minors or create confusion with confectionery or soft drink.
19. Assessment of the consistency of a marketing communication with an ABAC standard is from the probable understanding of a reasonable person. This means that the life experiences, values and opinions held by a majority of the community is to be the benchmark. A person who interprets a marketing message in a different way is not 'unreasonable' but possibly their understanding would not be shared by most people.
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 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.
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 which 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 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 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 like that used by soft drinks or fruit juices e.g., prima style juice box.
23. It should be noted that the ABAC Scheme is concerned with the marketing of alcohol beverages and does not regulate physical alcoholic beverages themselves. This means that the alcohol content of a product, or properties such as its taste or colour or viscosity do not fall within the remit of the ABAC.

Accordingly, the fact that a beverage is brightly coloured and is visible because of a glass container will not as a general proposition mean that the packaging is in breach of the ABAC standards. It is conceivable, however, that the colour of the beverage when assessed in combination with the design features of the packaging might lead a reasonable person to conclude that the packaging as a whole is in breach of a Code standard.

24. Turning to the various product packaging examples, the Passionfruit and Mixed Berry Vodkas both adopt a similar labelling style. Each label displays images of the fruit and the product name is shown in a cursive writing style. The alcohol to volume content is shown on the front of the label with the side of the label containing text describing the product. The Panel does not believe the packaging of these two products is in breach of the Part 3 (b) standard. In reaching this conclusion the Panel noted:

- the bottle type used is typical of that found in alcoholic spirit beverages and does not resemble packaging commonly used for fruit juices or other soft drinks;
- the displayed fruit image is lifelike and does not employ design features considered to be targeting minors or as having an appeal to minors beyond a general appeal to adults e.g., there is no animation or child-like writing used;
- the labelling uses the term 'vodka' and employs other cues that it is an alcoholic beverage, and the product would not be confused with a soft drink;
- while the beverage is coloured, this of itself is not a breach of the ABAC standard; and
- taken as a whole, the packaging is not considered as being highly relatable to minors.

25. The Chilli Mango Vodka employs a coloured label with stylised writing. The term 'Vodka' is displayed prominently on the front of the label. The sides of the label contain text describing the product and other information. The deep yellow colour of the beverage is clearly seen through the glass bottle. The Panel does not believe the Part 3 (b) standard has been breached. The Panel noted:

- the bottle type used is typical of that found in alcoholic spirit beverages and does not resemble packaging commonly used for fruit juices or other soft drinks;
- the labelling uses the term 'vodka' and employs other cues that it is an alcoholic beverage, and the product would not be confused with a soft drink;
- while the beverage is coloured, this of itself is not a breach of the ABAC standard; and

- taken as a whole, the packaging is not considered as being highly relatable to minors

26. The Pink Gin packaging uses a swirling pattern as the background on a pink coloured label. The writing is cursive style in white. Product information is contained in text on the side of the label. The beverage is brightly coloured with a sparkling effect. This is visible through the glass bottle. The Panel does not believe the packaging breaches the Part 3 (b) standard. The Panel noted:

- the bottle type used is typical of that found in alcoholic spirit beverages and does not resemble packaging commonly used for fruit juices or other soft drinks;
- the product clearly uses the well-recognised term of 'gin' and other cues to establish it is an alcoholic beverage;
- the product colour is eye-catching and would draw the attention of adults and minors, and could give an impression of a smooth transition to the use of alcohol;
- however, taking the packaging as a whole, it is unlikely the product would be confused with a soft drink or would be considered by a reasonable person as having an appeal to minors beyond its general appeal to adults.

27. The complaint is dismissed.