



## ABAC Adjudication Panel Final Determination No 34/21

**Products:** Various  
**Company:** The Phoenix Brewhouse Pty Ltd T/A Newcastle Distilling Co  
**Media:** Packaging  
**Date of decision:** 12 May 2021  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Jeanne Strachan  
Professor Richard Mattick

### Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 15 March 2021. It concerns the packaging of the following Products (“the Products”) by Newcastle Distilling Co (“the Company”):
  - Turkish Delight Liqueur
  - Lime Seltzer - Easy Street
  - Mango Seltzer - Easy Street
  - Spiced Apple Pie Pre-Mixed Cocktail
  - Cotton Candy Cosmopolitan Pre-Mixed Cocktail.
  
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 15 March 2021.
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.

## Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for the marketing.

## The Marketing

10. This determination relates to packaging of the following Products:



Mango Seltzer - Easy Street



Lime Seltzer - Easy Street



Spiced Apple Pie Pre-Mixed Cocktail



Cotton Candy Cosmopolitan Pre-Mixed Cocktail



Turkish Delight Liqueur

## The Complaint

11. The complainant has the following concerns about the marketing:

*The brand promotes a number of products that are confectionary based products that can easily be viewed as targeting minors. Their packaging and advertising of products does not show the alcohol content or that the product even contains alcohol.*

### **Turkish Delight Liqueur:**

- <https://www.newcastledistillery.com.au/shop/p/hjbolqpmegh5ldyvhs8z61ov2a2oei1-5d7r5-jmjy2-ygtfl-4wfe7-42hw2>

*This product packaging, the description on the website and the promotion of this product does not show the alcohol percentage or even allude to it containing alcohol. In fact most of their products shown on their website and advertised online do not show the alcohol percentage*

- <https://www.newcastledistillery.com.au/shop>

### **Cotton Candy Cosmopolitan, Spiced Apple Pie Cocktail:**

*They also do a range of confectionary based product cocktails in a can such as their Cotton Candy Cosmopolitan, Spiced Apple Pie Cocktail in a can, etc, which for example Cotton Candy is a children targeted confectionary product. All of these cocktails in a can do not show the alcohol percentage on the front of the can, in the product description or even when purchasing on their website, anyone underage who gets on their website can easily purchase these products not aware that they contain alcohol.*

### **Easy Street Sparkling Hard Seltzers:**

*The Seltzers look like a soft drink and not obvious that they contain alcohol*  
- <https://www.newcastledistillery.com.au/shop/seltzers>.

## 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 email on 14 April 2021. The principal points made by the Company were:

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

- Alcohol Advertising Pre-vetting Service Approval was not undertaken for the products.

### **Dates the Products were first offered for sale**

- Turkish Delight - 27 September 2020
- Lime Seltzer - 18 January 2021
- Mango Seltzer - 18 January 2021
- Cotton Candy Cosmopolitan Cocktail Can - 31 May 2020
- Spiced Apple Pie Cocktail Can - 31 May 2020

## Responsibility toward Minors

- We do not believe that any of our products have strong or evident appeal to minors, for the following reasons:
  - The names Turkish Delight, Cotton Candy and Spiced Apple Pie are all common usage in food and beverage industries through Australia, to identify a particular flavour and I have included links below of other similar products on the market. Our products however, clearly indicate that they are alcoholic beverages.
  - Turkish Delight Liqueur - This product clearly identifies that it is an alcoholic liqueur through the use of the word liqueur, the branding of our company Newcastle Distilling Co and also listing the alcohol content of 23% ABV on the bottle.

<https://billsons.com.au/shop/p/vodka-with-turkish-delight>

<https://www.hunterdistillery.com.au/products/liqueurs-and-schnapps/turkish-delight-liqueur.php>

<https://www.nicks.com.au/tamborine-mountain-distillery-turkish-delight-liqueur-375ml>

- Cotton Candy Cosmopolitan Pre-Mixed Cocktail - This product clearly identifies that it is an alcoholic beverage through the use of the words Cosmopolitan and Cocktail, the branding of our company Newcastle Distilling Co and also listing the alcoholic content of 10% ABV on the can. This product is not currently available for sale.
- Spiced Apple Pie Pre-Mixed Cocktail - This product clearly identifies that it is an alcoholic beverage through the use of the words Spiced and Cocktail, the branding of our company Newcastle Distilling Co and also listing the alcoholic content of 10% ABV on the can. This product is not currently available for sale.
- Easy Street Seltzers - This product clearly identifies that it is an alcoholic beverage through the use of the words Hard Seltzer, the branding of our company Newcastle Distilling Co and also listing the alcoholic content of 4.5% ABV on the can.
- Bright, block colours on cans are common within all industries, including the alcohol industry and our products have in no way utilised those design components to be attractive to minors, nor

do we believe their use would be attractive to minors on that fact alone.

- Showing the products ingredients on the label is not in any way designed to be attractive to minors, instead clearly identifying what is in the product.
- Easy Street Seltzers do not resemble a soft drink, apart from being in a can, common packaging for many beverage products on the market.

Similar products currently on the market include:

<https://www.bosshunting.com.au/wp-content/uploads/2020/10/FellrSeltzer.jpg>

<https://edge.alluremedia.com.au/uploads/businessinsider/2020/05/Photo-25-5-20-8-42-36-am.jpg>

<https://fortemag.com.au/wp-content/uploads/2020/09/Untitled-2-e1600139321873.png>

[https://res.cloudinary.com/yaffa-publishing/image/fetch/q\\_auto:best,c\\_fit,w\\_630,f\\_auto/http%3A%2F%2Fyaffa-cdn.s3.amazonaws.com%2Fyaffadsp%2Fimages%2FdmImage%2FSourcelmage%2Fpress-release\\_sips-hard-seltzer.jpg](https://res.cloudinary.com/yaffa-publishing/image/fetch/q_auto:best,c_fit,w_630,f_auto/http%3A%2F%2Fyaffa-cdn.s3.amazonaws.com%2Fyaffadsp%2Fimages%2FdmImage%2FSourcelmage%2Fpress-release_sips-hard-seltzer.jpg)

[https://insidefmcg.com.au/wp-content/uploads/2020/11/Actual\\_Facebook\\_1080x1080\\_Underwater-3.jpg](https://insidefmcg.com.au/wp-content/uploads/2020/11/Actual_Facebook_1080x1080_Underwater-3.jpg)

<https://www.bosshunting.com.au/wp-content/uploads/2020/10/Tidal-Hard-Seltzer.jpg>

- All products contain the words liqueur, cocktail or hard seltzer, on the front of the packaging, clearly identifying them as alcoholic beverages.

### **Further comments**

- Further to the information above, we make the following points:
  - All products are sold via online store, at local markets, bottle shops and licensed venues.
  - Our online store has age verification upon arrival.

- Our Facebook and Instagram have age restriction settings activated, preventing any persons under the age of 18 from viewing.
- All staff are RSA certified.
- All face to face sales occur in bottle shops, licensed premises and markets, where customers are served by RSA trained staff and identification is required to taste or purchase.
- We do not consider any of our products to be attractive to minors.
- We have never had a minor attempt to purchase our products.
- We have never had a complaint relating to our designs brought to our attention prior to this complaint.

### **The Panel's View**

15. Newcastle Distilling Company is a small batch producer of a range of products including rum and whiskey, vodka, gin, liqueurs, and alcoholic seltzers. The Company has been operating in Newcastle since 2018. This determination flows from a complaint which argues that several of the Company's product's labels and packaging have strong appeal to minors. The specific products of concern identified by the complainant are:
  - two products in the 'Easy Street' alcoholic seltzer range;
  - two products in the pre-mixed cocktail range; and
  - the Turkish Delight Liqueur.
  
16. On 27 April 2021 the Panel made a provisional determination that the Easy Street Lime and Mango Seltzer product packaging is in breach of Part 3 (b) (i) of the Code. Consistent with the rules and procedures applying to decisions concerning product packaging, the Company was afforded an opportunity to seek a re-hearing of the provisional determination by making further submissions. The Company did not seek a re-hearing and the Panel has proceeded to make a final determination on this complaint.
  
17. Before turning to the each of these products it useful to make some overall comments about the ABAC Scheme and its application to a complaint of this nature:
  - the ABAC applies only to the marketing of an alcohol beverage and not to other factors which might have an influence on whether a particular product is accessible or appealing to minors e.g., the price of the product, the effectiveness of measures to restrict sales/access of the



product to minors and physical characteristics of the beverage such as its taste;

- while the failure of an alcohol beverage's packaging to clearly identify the product as alcoholic can lead to confusion with a soft drink and add to the potential appeal of the packaging to a minor, there is no express ABAC requirement that an alcohol beverage be labelled 'alcoholic' as such;
- the colour alone of a beverage will not result in a breach of an ABAC standard but the colour of the beverage is a factor in assessing the overall impact of a product's packaging; and
- Assessment of the consistency of a product's packaging 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.

18. Part 3 (b) (i) of the Code provides that an alcohol beverage cannot be marketed in a way which has strong or evident appeal to minors. 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.

19. 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.
20. One way in which product labelling and packaging can give rise to strong appeal to minors is 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.
21. The first product argued in the complaint as raising concerns is the Easy Street alcoholic seltzers. The products are vodka based and come in the flavours of lime and mango. The packaging features fruit images, the product name and variety and the descriptor 'sparkling hard seltzer'. The alcohol to volume content is displayed in small font on the front of the can and other alcohol information on the side of the can.
22. The complainant contends the packaging makes the product look like a soft drink and it is not obvious the product is alcoholic. The Company argues:
- the product is identified as alcoholic through the 'hard seltzer' descriptor and other cues;
  - the colour and design are common with industry marketing practice and are not appealing to minors; and
  - showing fruit images identifies what is in the product and is not designed to be appealing to minors.

23. On balance, the Panel believes the Easy Street packaging does breach the Part 3 (b) (i) standard. It is noted:
- the packaging does not clearly identify the product as being alcoholic and it could be easily confused with a fruit flavoured soft drink;
  - the use of fruit images and the terms 'lime' and 'mango' combined with the lack of a highly prominent alcohol term further increases the prospect of confusion with a soft drink; and
  - the packaging imagery is relatable to minors and raises an illusion of a smooth transition from non-alcoholic to alcoholic beverage.
24. The second product range is a pre-mixed cocktail packaged in a can. The two versions identified by the complainant were 'Spiced Apple Pie' and 'Cotton Candy Cosmopolitan'. It is argued the name 'cotton candy' is a children's targeted confectionery and the packaging does not show the alcohol percentage on the can. The Company responds by arguing the packaging does identify the products as alcoholic through use of terms such as 'cosmopolitan' and 'cocktail' and the listing of the ABV %.
25. The Panel does not believe the packaging of the two products breaches the standard. It is noted:
- the background colouring of the cans is black and overall the packaging has a mature and not colourful and eye-catching appearance;
  - the terms 'cocktail' and 'cosmopolitan' and the other cues collectively are most likely sufficient to establish the products as alcohol beverages and it is unlikely the products would be confused with a soft drink; and
  - while 'cotton candy' is a confectionery relatable to minors, the more common expression in Australia for the confectionery is 'fairy floss' and taken as a whole the packaging is not considered strongly appealing to minors.
26. The final product is a 'Turkish Delight' liqueur which the complainant argues is not labelled to identify the product as being alcoholic'. The Company rejects this argument and contends the packaging's use of the term liqueur as well as other cues establish it is an alcohol beverage. Further, it is argued the product type is recognised in industry circles and would not appeal strongly to minors.
27. The Panel does not believe the packaging breaches the ABAC standard. It is noted:

- the packaging is a bottle of a type used for alcohol beverages and not soft drinks;
- Turkish Delight is a well recognised confectionery but the product is clearly a beverage and the flavour is not usually found in soft drinks;
- the label is sedate and does not have design features likely to appeal to minors;
- while the labelling could do more to establish the product as an alcohol beverage, this of itself is not a breach of a Code standard; and
- taken as a whole, the packaging is not considered as having strong or evident appeal to minors.

28. The Panel notes that this case is another example where packaging does not unambiguously identify the beverage as being alcoholic. The Panel recommends that consideration is given when the ABAC is next reviewed to creating a freestanding obligation for packaging to clearly identify products as alcohol beverages.
29. Accordingly, the Panel makes a final determination upholding the complaint about the packaging of Easy Street Lime and Mango Seltzer but dismissing the complaint in relation to the other products.