



## ABAC Adjudication Panel Final Determination Nos 121 & 122/21

**Product:** Blackcurrant Pastille Sour Ale  
**Company:** Currumbin Valley Brewing  
**Media:** Website and Packaging  
**Date of decision:** 9 August 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”) concerns the name and packaging of Blackcurrant Pastille Sour Ale (“the Product”) by Currumbin Valley Brewing (“the Company”), as well as references to the Product on two websites, namely the GABS (Great Australasian Beer SpectAPular) Festival and the trade publication The Crafty Pint.
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 complaints raise concerns under the ABAC Code and accordingly are within the Panel’s jurisdiction.

### **The Complaint Timeline**

7. The complaints were received on 17 May 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

- 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 website and packaging.

## The Marketing

- This determination relates to three separate marketing communications outlined following:

### Product label and rendering:



**Link to GABS Festival website, and screenshot of relevant words:**

<https://www.gabsfestival.com/melbourne-festival-beers-ciders-1>

32: Currumbin Valley Brewing (QLD)  
**BLACKCURRANT PASTILLE SOUR**

**STYLE:** Sour - Berliner Weisse **ABV:** 5 %

**CHARACTER:** Sour/Tart (Fruit or Sweet)

**COMPLEXITY:** Stepping Up

2019's Australian People's Choice Winner is back with another nostalgia lolly hit. This time it's a sour beer with loads of blackcurrants. If you love pastilles, you'll love this.

**Link to article on The Crafty Pint website, and screenshot of relevant words:**

<https://craftypint.com/news/2663/brew-a-currumbin-valley-brewing>

When GABS returns this evening in Sydney, the duo will be heading back to a similar well for inspiration: a blackcurrant sour, inspired by the classic blackcurrant Lifesaver lollies. Luke says the batch has been in the works for some time – it was set to be their 2020 GABS beer before those events were cancelled.

"We wanted to really capture that moment of being a kid and enjoying the lollies you'd get from the milk bar," he says. "I think we've really nailed the flavour... I hope it takes punters back to their childhoods.

"I know I have so many memories of getting these lollies camping with my cousin. I loved them, but my parents didn't love the dentist bills associated."

Smokey's just as excited.

"We want it to taste authentic, while still checking all our boxes in terms of what sort of beer we want to put out there," he says.

## The Complaint

11. The first complaint references an internet advertisement at <https://www.gabsfestival.com/melbourne-festival-beers-ciders-1> and raises the following concern:

*This entry is enticing people to try the beer based on their love of lollies ie Pastilles. This could create an appeal to minors by referencing Lifesavers.*

12. The second complaint references both packaging and a link to <https://craftypint.com/news/2663/brew-a-currumbin-valley-brewing> and raises the following concern:

*The branding of the Blackcurrant pastille Sour Ale from Currumbin creates a direct allusion to Lifesavers Blackcurrent Pastille. This is reiterated in the article listed as the brewers explain the inspiration as Lifesavers. This branding is using lollies brands as inspiration and marketing tools for their beer. This creates an appeal to minors which is inappropriate for alcohol communications and branding.*

### **The ABAC Code**

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

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

14. 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**

15. The Company responded to the complaint by letter emailed on 7 June 2021. The principal points made by the Company were:

#### **Background**

- Thank you for bringing to our attention this complaint made against our product, Blackcurrant Pastille Sour Ale. This letter represents our response to the complaint for the adjudication panel to consider. Currumbin Valley

Brewing is not a signatory to the ABAC Scheme but we fully support the quasi-regulatory framework around alcohol marketing in Australia.

- Currumbin Valley Brewing is a small, family-owned brewery operated solely by co-founders, Peter Wheldon and Luke Ronalds, located on Peter's private residence and farm. We are only permitted to produce a maximum of 40,000L of product per year. Historically, around 30% of our sales are via online direct to consumers with the remaining portion going to retailers. However, during the COVID-19 pandemic, we have had to increase our ratio of product sold to off-premise retail outlets to ensure business sustainability.
- With respect to Currumbin Valley ***Blackcurrant Pastille Sour Ale***:
  - We produced approximately 85 cases of 24 x 375mL cans when the beer was first packaged on 30 April 2021 and the cans have not yet been sold to the public due to the GABS (The Great Australasian Beer Spectacular) Festival embargo.
  - 20 x 20L kegs were sold to GABS (The Great Australasian Beer Spectacular) as part of the festival that they have been running in Sydney, Melbourne, Brisbane and New Zealand. The kegs have been sold to the public as part of the ongoing festival.
  - Our label was designed by Luke Ronalds, one of the co-founders of the brewery. Due to the high cost of outsourcing label design we often design some of our labels in-house. The design is focussed on a retro vintage style that does not have strong or evident appeal to minors, in our opinion.
  - The complainant has referred to online sources (The Crafty Pint and the GABS beer guide) that are beyond our control as a marketer as defined within ABAC code section 6.

#### **Code applicability to externally generated and controlled marketing**

- The marketing communications referred to by the complainant within 121/21 is the marketing material for GABS (The Great Australasian Beer Spectacular) owned by SpecTAPular Enterprises Pty Ltd. We do not have control or ownership of the festival's marketing material and marketing collateral and we cannot comment on if they had the marketing material pre-vetted with ABAC.
- Currumbin Valley Brewing is not aiming or marketing the product to appeal to children or minors and we have included an appropriate alcohol descriptor that is very prominent on the face of the can.

- Section 2(a) of the ABAC Responsible Alcohol Marketing Code dated 26 February 2021 states “The Code APPLIES to all Marketing Communications in Australia generated by or within the reasonable control of a Marketer”. The marketing here is not within reasonable control of Currumbin Valley Brewing as we don’t own or control how the festival markets the beers they have purchased.
- We didn’t pay and/or sponsor to have the beer included in the festival and the marketing referred to by the complainant wasn’t written by Currumbin Valley Brewing. We didn’t write the words "2019's Australian People's Choice Winner is back with another nostalgia lolly hit. This time it's a sour beer with loads of blackcurrants. If you love pastilles, you'll love this.", they are words of GABS marketing which we don’t have reasonable control over. This is not Currumbin Valley Brewing’s marketing material or collateral and we didn’t write the advertising description referenced. All beers at the GABS festival are served on tap and no posters, or other marketing material referenced images or illustrations of lollies were present to our knowledge. Even though the beer description is marketing material that Currumbin Valley Brewing did not have control over, we would also like to draw attention to the fact that the marketing material also did not mention or reference Lifesavers within their description.
- Within complaint 121/21 the complainant is referring to the GABS festival beer guide published at <https://www.gabsfestival.com/melbourne-festival-beers-ciders-1> Currumbin Valley Brewing does not have reasonable control over this web site and beer guide and did not provide the description that is referenced by the complaint.
- The marketing material referred to by the complainant within complaint 122/21 is an editorial article from The Crafty Pint. The Crafty Pint is an independent online magazine and resource for anyone interested in craft beer in Australia. They are a reputable publication and media outlet that reports on the latest news in the craft beer industry.
- Currumbin Valley Brewing did not pay and/or sponsor The Crafty Pint for this editorial and we did not hire a public relations firm to seek out public relations in regards to The Crafty Pint or this article. The press article also is not an advertorial. The Crafty Pint reached out to us for an interview regarding the upcoming GABS beer festival and to discuss the people behind the last GABS People's Choice winner in 2019.
- Section 2(a) of the ABAC Responsible Alcohol Marketing Code dated 26 February 2021 states “The Code APPLIES to all Marketing Communications in Australia generated by or within the reasonable control of a Marketer”. The ABAC Code defines Marketer in section 6 of the Code as “Marketer

means a producer, distributor or retailer of Alcohol Beverages.” The complainant within complaint 122/21 has referenced the advertisement location on the following Internet site:

[https://craftypint.com/news/2663/brew\\_a\\_currumbin\\_valley\\_brewing](https://craftypint.com/news/2663/brew_a_currumbin_valley_brewing)

- The Crafty Pint is neither the producer, distributor or retailer of the alcohol beverage, this is a press article and not an advertisement as per the Code definitions. The press article here is not advertising or a marketing communication and it's not within reasonable control of Currumbin Valley Brewing, as we don't own or control what is published on The Crafty Pint's online press platform. We trust that the adjudication panel will dismiss this complaint rather than setting a trend that press articles will be subject to ABAC complaints under section 2(a) of the Code which are typically beyond reasonable control of the marketer.

### **Responsibility toward Minors**

- ABAC asked whether the name “Blackcurrant Pastille”, along with purple colour used on the packaging, brings to mind lollies (such as blackcurrant Lifesaver lollies) which are commonly consumed by Minors, and which would therefore attract Minors to the alcohol product or provide the illusion of a smooth transition from non-alcohol to alcohol drinks?
- The name of the beverage in this instance is Blackcurrant Pastille Sour Ale not Blackcurrant Pastille Sour. As part of the packaging and name of beer is the term “Sour Ale” which is a sufficient alcohol descriptor per the ABAC Alcohol Packaging Guidelines 2019 as it contains the acceptable alcohol descriptor, “ale”. The typography of the Sour Ale is larger in size in comparison to the Blackcurrant Pastille typography in order to draw attention to the alcohol descriptor.
- Within complaint 121/21 the objection is related to the confectionery named “Lifesavers” by the complainant. The word Lifesavers is not mentioned in any marketing material that the complainant has highlighted as a concern in their complaint.
- Furthermore, complaint 122/21 mentions an advertisement description of “The branding of the Blackcurrant Pastille Sour Ale from Currumbin creates a direct illusion to Lifesavers Blackcurrant Pastille. This is reiterated in the article as the brewers explain the inspiration as Lifesavers.” with the objection “This branding is using lollies brands as inspiration and marketing tools for their beer. This creates an appeal to minors which is inappropriate for alcohol communications and branding.”

- As mentioned above The Crafty Pint article is an editorial and not our marketing material. The Code does relate to flavours that an alcoholic beverage may contain or be inspired by, it is subject to the marketing communication as defined within Section 2(a) and 2(b).
- Regarding the name and does “Blackcurrant Pastille”, along with the purple colour used on the packaging, bring to mind lollies (such as blackcurrant Lifesaver lollies) which are commonly consumed by minors. Currumbin Valley does recognise that Lifesavers is not an appropriate name for a beer under the code and has not used this in any of their marketing or advertising in relation to the ABAC Responsible Alcohol Marketing Code dated 26 February 2021 under section 2(a) and 2(b). Lifesavers have not been mentioned on the Currumbin Valley web site or any social media marketing posts which the brewery has reasonable control over.
- The complainant is referring to the following lolly product which is marketed under the Lifesavers brand. Below is a photograph of the product in question. When comparing the two products it is clear to see that the designs do not contain similarities other than the purple shades, which is the colour of blackcurrants and the beer. The Lifesavers product uses pastel colours compared to the more bright vibrant retro colours on the Currumbin Valley Brewing packaging. Furthermore, you can see that the Blackcurrant Pastilles flavour is not a prominent part of the Lifesavers packaging compared to the actual Lifesavers name.



- The Blackcurrant word is referencing the fruit flavour of the Blackcurrant Pastille Sour Ale and the high amount of Blackcurrant fruit that was added into this beer. The purple colours of the packaging is also used to reference the colour of the fruit that was used in the manufacture of the beer. The beer is a very dark purple colour bordering on black colour that features purple hues.
- Currumbin Valley Brewing refutes the word “Pastille” as commonly known or recognised by minors as the complainant has stated and believes that

minors would not even be familiar with the word, Pastille. The word has several different meanings some of which relate to British sweets, aromatic paste burnt as perfume or deodorizer, incense, and sweet or medicinal pill made of a thick liquid that has been solidified and is meant to be consumed by light chewing and allowing it to dissolve in the mouth.

- Oxford Languages defines “Pastille” as:



- Furthermore Wikipedia defines “Pastille” as:

“A pastille is a type of sweet or medicinal pill made of a thick liquid that has been solidified and is meant to be consumed by light chewing and allowing it to dissolve in the mouth. The term is also used to describe certain forms of incense.”

- The can design does mention the word BEER on the left side of the can wrap with our Be Excellent Enjoy Responsibly acronym and campaign which we include on all our beers to promote responsible consumption of alcohol and our products. This can be viewed on a section of the can wrap image that is shown below. We understand that this is not prominent on the front face of the can and may not be noticed by all consumers.



- Currumbin Valley Brewing recognises that the Lifesavers brand does have a flavour called Blackcurrant Pastille, however the confectionery is commonly recognised by minors as Lifesavers rather than by the Blackcurrant name or

the Pastille word. Currumbin Valley Brewing believes that the Blackcurrant and / or Pastille words are not recognisable words by minors that could potentially create confusion with confectionery and minors as per Part 3 (b)(i) of the Code. Furthermore, Currumbin Valley Brewing haven't used the word Lifesavers in any of its marketing material or collateral that is under its control.

- Currumbin Valley Brewing was unable to successfully locate any independent research reports that placed Blackcurrant and/or Pastille as a popular confectionery item among minors. As the beer is not marketed using a recognisable confectionery name it is unlikely that the name and packaging of the beer would bring to mind lollies which would therefore attract minors to the alcohol product or provide the illusion of a smooth transition from non-alcohol to alcohol drinks. Due to these reasons and without suitable statistical evidence that Pastille is a popular and recognised confectionery item among minors we ask the adjudication board to rule that the beer name Blackcurrant Pastille Sour Ale doesn't breach Part 3 (b)(i) of the Code.

#### **Concluding comments**

- As Currumbin Valley Brewing is not a signatory to the ABAC code, there is no requirement for the company to remove this product from the market. However, as stated before, we respect the vital role ABAC plays in the liquor industry.

16. On 28 June 2021 the Panel made a provisional determination upholding the complaint insofar as it related to product packaging. On 13 July 2021 the Company responded to the provisional determination and requested a rehearing of the complaints. The principal points made by the Company were:

- Thank you to the Adjudication Panel for the provisional determination against our product, Blackcurrant Pastille Sour Ale. We would like to thank the panel for their effort and time during the adjudication process. Currumbin Valley Brewing would like to request a rehearing of both complaints and we request that each complaint is adjudicated upon separately with a separate decision made for each of the complaints. The core of these two complaints are related to very different issues and as such individual decisions should be made on each of these complaints. As such we have responded to these complaints below separately in addition to the information provided within our original response.

ABAC Complaint Number	121/21
Complaint Number	CR008410
Date Received	15 May, 2021
Advertisement Subject	
Advertisement Type	Internet
Advertisement Location	<a href="https://www.gabsfestival.com/melbourne-festival-beers-ciders-1">https://www.gabsfestival.com/melbourne-festival-beers-ciders-1</a>
When	
Advertiser Name	GABS Festival/Currumbin Valley Brewing - BLACKCURRANT PASTILLE SOUR
Advertised Product or Service	Alcohol
Advertisement Description	The list of GABS exclusive beers lists a beer from Currumbin Valley Brewing. The entry reads "32: Currumbin Valley Brewing (QLD) BLACKCURRANT PASTILLE SOUR STYLE: Sour - Berliner Weisse ABV: 5 % CHARACTER: Sour/Tart (Fruit or Sweet) COMPLEXITY: Stepping Up 2019's Australian People's Choice Winner is back with another nostalgia lolly hit. This time it's a sour beer with loads of blackcurrants. If you love pastilles, you'll love this."
Advertisement Objection Reason	This entry is enticing people to try the beer based on their love of lollies ie Pastilles. This could create an appeal to minors by referencing Lifesavers.

- The complainant within complaint 121/21 has referenced the GABS festival website guide. The advertisement objection reason is stated as “This entry is enticing people to try the beer based on their love of lollies i.e. Pastilles. This could create an appeal to minors by referencing Lifesavers”. The complainant is referring to the GABS festival guide entry and doesn’t reference our packaging at all. The product packaging was not part of this complaint and was not mentioned within the complaint by the complainant. The Adjudication Panel has then proceeded to review our packaging which was not mentioned in the complaint. We do not believe that the packaging marketing material should have been reviewed as part of this complaint as it was not related to the original complaint. No packaging, branding or imagery was included in the GABS website festival entry.
- Due to this Currumbin Valley Brewing believes that this is a serious overreach and sets a dangerous precedent where alcohol beverage manufacturers are not only responding to complaints which are outside their control but also where ABAC is examining issues not raised by the complainant.
- But-for Currumbin Valley Brewing sending the product packaging images related to the product in question as requested by ABAC and supplied by Currumbin Valley Brewing in good faith, despite the complaint being unrelated to product packaging, the ABAC Adjudication Panel would not have seen the packaging in this complaint as it’s not part of the original complaint in any way.
- Within section 17 of the predetermination decision (dated 28 June 2021), the Adjudication Panel states the following: “In any event, given the placement of the entry in this section of the website and the fact that no image accompanies the entry, the Panel does not believe the website entry has strong or evident appeal to minors.”

- Given that the Adjudication Panel has stated the GABS website festival entry doesn't have strong or evident appeal to minors, we ask the Adjudication Panel to officially dismiss complaint 121/21. The complaint does not relate to any packaging and the Adjudication Panel doesn't need to overreach outside their mandate here and review any of the Currumbin Valley Brewing packaging.
- The ABAC mandate is not to examine issues that are not detailed in the complaint, this is stated very clearly within ABAC's own website. Does the Adjudication Panel examine issues that are not detailed in a complaint? No. The Adjudication Panel will only examine the issue(s) raised by the complainant. Separate complaints raising different issues will be adjudicated individually. Source: <http://www.abac.org.au/about/faq>
- Furthermore, Currumbin Valley Brewing would like to draw attention again that this wasn't our marketing communications and ABAC should have directed this complaint to SpectAPular Enterprises Pty Ltd who are the marketers of this material in this instance. Given our experience with ABAC we feel that it is prudent that the panel should confirm who is the owner of the marketing communication as part of their initial investigation into each complaint. This was not done in this instance. In addition to seeking information surrounding if the marketing received Alcohol Pre-vetting approval it might be advisable for the panel to ask if the marketing communication was under the alcohol beverage manufacturer's control or if a third party was the marketer.
- We ask that the Adjudication Panel dismiss complaint 121/21 given that the complaint does not refer to our packaging, based on the above facts and the specific content of the complaint. Currumbin Valley Brewing respects the vital role ABAC plays in the liquor industry and trust that improvements will be made in these areas for future processing of complaints.

ABAC Complaint Number	122/21
Complaint Number	CR008412
Date Received	15 May, 2021
Advertisement Subject	
Advertisement Type	Packaging - alcohol only
Advertisement Location	<a href="https://craftypint.com/news/2663/brew-a-currumbin-valley-brewing">https://craftypint.com/news/2663/brew-a-currumbin-valley-brewing</a>
When	
Advertiser Name	Currumbin Valley - Blackcurrant Pastille
Advertised Product or Service	Alcohol
Advertisement Description	The branding of the Blackcurrant pastille Sour Ale from Currumbin creates a direct allusion to Lifesavers Blackcurrent Pastille. This is reiterated in the article listed as the brewers explain the inspiration as Lifesavers.
Advertisement Objection Reason	This branding is using lollies brands as inspiration and marketing tools for their beer. This creates an appeal to minors which is inappropriate for alcohol communications and branding.

- Within complaint 122/21 the provisional adjudication was completed on a complaint that refers to an editorial article by The Crafty Pint. Regarding complaint 122/21 and within section 18 of the predetermination

determination, the panel states the following “The Crafty Pint is an online publication which serves the craft brew industry and those consumers interested in developments in Australia's expanding and quite dynamic craft brew sector. The publication often carries articles about the backstories of individual brewers, their product range, and their physical facilities. The publication is independent of any one brewer and, like all media organisations, is not captured by the ABAC Scheme. The complainant references an article about the Company in which the Company's founders are quoted discussing the product. The media article is not a 'marketing communication' for ABAC purposes, although it does give some background on the Blackcurrant sour ale.”

- The complainant has referenced the Crafty Pint article as the source of their complaint and the Adjudication Panel has ruled that this is not marketing communication within the above statement. ABAC have determined that the source of the complaint is expressly not marketing communication and then proceeded to review packaging that was submitted in good faith as part of the standardised letter concerning the complaint to assist the Adjudication Panel in making a provisional determination.
- By reviewing the product packaging in the context of a media article which the ABAC Adjudication Panel have agreed that it is not 'marketing communication', the Adjudication Panel are effectively examining an issue not subject to the ABAC Code. The ABAC code (dated 26 February 2021) clearly states the following in regards to part 3 of the code. An excerpt is provided below relating to section 3 which is applicable to this complaint.

**ABAC RESPONSIBLE ALCOHOL MARKETING CODE**

**3. STANDARDS TO BE APPLIED**

1. **A Marketing Communication** must NOT:
  - (b) Responsibility toward Minors
    - (i) have Strong or Evident Appeal to Minors.

- The above section of the ABAC code states that a 'Marketing Communication' must NOT be in breach of the ABAC code. Within this instance the Adjudication Panel has stated that the advertisement location within complaint 122/21 is not 'Marketing Communication' for ABAC purposes. If the complaint is not marketing communication as determined by the Adjudication Panel, then complaint 122/21 as per the code must be dismissed as it is not applicable to the code. Instead of dismissing the complaint, the Adjudication Panel has continued to review our packaging by applying the standards in a manner that resembles the ABAC Pre-Vetting Service which is expressly not the role of the ABAC Adjudication Panel.

- If the complaint is referring to marketing communication then this would be suitable, however the adjudication board have stated that this is not marketing communication so the code is not applicable and does not need to be applied in this instance. We believe that this is an overreach by the Adjudication Panel regarding the complaint and the fact that the product packaging was then reviewed.
- Furthermore, the complaint refers to the Advertising Location of <https://craftypint.com/news/2663/brew-a-currumbin-valley-brewing> along with the Advertisement Type listed as 'Packaging - alcohol only'. The advertisement in respect to what ABAC should be reviewing is an editorial article and not packaging. Reiterating on section 18 within the provisional determination, the Adjudication Panel has stated "The publication is independent of any one brewer and, like all media organisations, is not captured by the ABAC.". Currumbin Valley Brewing acknowledges that ABAC is unable to clarify inaccuracies and errors that a complainant might submit as part of the code, however it's a fine line to cross when the advertisement is not 'Marketing Communication' and not subject to ABAC.
- We urge the Adjudication Panel to not set a precedent where content which is not subject to ABAC will then continue to be reviewed. The onus should be on the complainant and not the Panel to be submitting correct Marketing Communication that is subject to ABAC. With the Adjudication Panel proceeding to review the packaging in this instance it sets a precedent that blurs the line between media and marketing and opens a path for adjudication which falls well outside the control of alcohol marketers.
- We therefore ask that the Adjudication Panel dismiss complaint 122/21 and closely evaluate whether our packaging should have even been reviewed in the first place, based on the above facts and the specific content of the complaint.

#### Additional Packaging Arguments

- Due to the fact that this will be our last opportunity to respond to the Adjudication Panel in response to this complaint we have decided to include arguments based on some of the Panel's statements in that review of the packaging. However, we would like to strongly reiterate that the Adjudication Panel should not have been reviewing the packaging in this instance as the Panel has confirmed that complaint 121/21 is not strongly appealing to minors and that complaint 122/21 is not 'Marketing Communication' that is subject to ABAC. Should the Adjudication Panel decide to set a precedent in reviewing the packaging as part of 'Marketing Communication' that is not subject to ABAC then we would like to present the following arguments regarding the packaging in question.

- Within section 27 of the provisional determination the panel has stated “while a brief internet search did not disclose specific information on the demographics of the consumers of pastilles, it is reasonable to assume the lollies are consumed across age groups and are popular and recognisable to minors”. Currumbin Valley Brewing refutes this claim based on the fact that what the Panel has stated here is a logical fallacy which should not be used to make decisions or statements regarding this complaint. It’s a faulty generalisation that has been used to draw an unjustified conclusion. The sample the Adjudication Panel is dealing with in this statement is the population that consume pastilles, it’s an unjustified leap to assume the wider consumers of lollies are the same group and draw conclusions from that. It is not reasonable and it is in fact incorrect to assume that ALL lollies are consumed across aged groups and are popular and recognisable to minors. It’s not possible for all lollies to be popular and it is a fact that less popular lollies would not be recognisable or relatable by minors. A pastille is a subset type of lolly and assuming that all lollies are popular and recognisable to minors thereby assuming the ‘Pastille’ term would appeal to minors by default. Whilst lollies as a whole are popular and recognisable to minors, this doesn’t provide any evidence that the term ‘Pastille’ is popular and recognisable to minors. Given that there is a lack of evidence online for the demographics of pastille consumers it would be more reasonable to assume that these are not a popular confectionery item.
- Furthermore the Panel has stated the following within section 27 “the blackcurrant pastille name will be recognisable and relatable to minors”. We would like to question the Adjudication Panel as to how they have drawn this conclusion that the words ‘Blackcurrant Pastille’ are recognisable by minors. Is this based on the above faulty generalisation by assuming all lollies are popular? It’s reasonable to assume that popular confectionery items would be recognisable by minors, however there is insufficient evidence that pastilles are a popular confectionery item and if the term is recognisable and relatable to minors. The Adjudication Panel should not be making decisions or statements where there is insufficient evidence to support the given statement.
- Within section 27 the panel has also stated the following “pastille’ lollies including blackcurrant pastilles are a longstanding confectionery sold under several brand names including Lifesavers, Rowntree’s and Wonka. Rowntree’s fruit pastilles have been continuously sold since 1881”. We agree that pastilles are a longstanding confectionary sold under different brand names. Being a longstanding brand or confectionery item doesn’t not provide any evidence that the item is popular and thus strongly appealing and relatable to minors. Given that there is insufficient evidence across these points that pastilles are popular and recognisable by minors it’s not possible to sufficiently determine that the packaging is strongly appealing to minors as

a whole. If it's not possible to have sufficient evidence that the 'pastille' word is recognisable by minors then it's not possible for the Panel to effectively determine if the packaging creates an illusion of a smooth transition to an alcoholic beverage. Due to these facts we ask that the Adjudication Panel dismiss that the packaging is strongly appealing to minors as a whole and that it doesn't create an illusion of a smooth transition to an alcoholic beverage.

- As Currumbin Valley Brewing is not a signatory to the ABAC code, there is no requirement for the company to remove this product from the market. However, as stated before, we respect the vital role ABAC plays in the liquor industry. Thank you for the opportunity to respond to this provisional determination and seek a rehearing.

## **The Panel's View**

### **Introduction**

17. This is the final determination of two complaints submitted against the portrayal of the Company's Blackcurrant Pastille Sour Ale on third party online sites and about the packaging of the product. As the complaints went to the one product, and in accordance with common practice, the Panel has dealt with the two complaints and the three separate 'marketing communications' complained about in a single determination. The Rules and Procedures applying to the ABAC Scheme permit alcohol marketers an opportunity to seek a re-hearing of a finding that product packaging is in breach of an ABAC standard. This has occurred in this case, with the Company seeking a re-hearing of a provisional determination made on 28 June 2021.
18. A re-hearing of a provisional determination is a fresh consideration of the complaints. The Panel is to consider the materials at hand at the time of the provisional determination as well as the additional submissions made by the Company in response to the provisional determination. The Company's original response to the complaints is detailed at paragraph 15, while its additional submissions in response to the provisional determination are detailed at paragraph 16.
19. Both complaints (121/21 and 122/21) have raised Part 3 (b) (i) of the ABAC. This standard provides that alcohol marketing communications must not have strong or evident appeal to minors. The 'marketing communications' considered in the provisional determination were as follows:
  - the description of the product contained within the website for the GABS (The Great Australasian Beer Spectacular) - complaint 121/21

- the description of the product contained within an article published by the Crafty Pint - complaint 122/21
  - the product packaging - complaint 122/21
20. The conclusion of the Panel on the complaints about the three 'marketing communications' reached in the provisional determination can be summarised as:
- GABS website - dismissed
  - Crafty Pint article - dismissed
  - product packaging - upheld
21. Taken as a whole, the Company's arguments in response to the complaints and the Panel's provisional determination are at two levels. Firstly, it is contended that the Panel in its provisional determination has made procedural errors and as a result should not make a finding about the product packaging. Secondly, it is argued that in substantive terms the product packaging does not have strong appeal to minors. Both arguments will be considered in turn.

### **The Procedural Issues**

22. The ABAC is a quasi-regulatory scheme. The Scheme consists of the standards of good marketing practice in the ABAC (the Code), the Pre-vetting service and the public complaints process including the Adjudication Panel. To support the operation of the Scheme is a set of Rules and Procedures. The ABAC website contains the Rules and Procedures as well as other information including 'Frequently Asked Questions'. The Company submits that the Panel's process in dealing with complaints 121/21 and 122/22 has been flawed and amounts to an 'overreach'. The issues identified as shortcomings are:
- the complaints should have been decided separately and not together;
  - the Company was not expressly asked to comment as to its level of control over the GABS entry and the Crafty Pint article;
  - the entities behind the online sites for GABS and the Crafty Pint should have been asked to respond to the complaints;
  - the provisional determination did not explicitly dismiss complaint 121/21;
  - on the Panel's treatment of complaint 122/21 in the provisional determination:
    - the complaint was about the Crafty Pint article which is not an alcohol marketing communication;

- the Panel was mistaken to consider the product packaging as arising from this complaint; and
  - only concerns sourced by a complainant from an alcohol marketing communication should lead to a Panel determination on the concern.
23. While the ABAC Adjudication Panel is not a Court or Tribunal nor a decision-making body which is bound by the rules of evidence, it does operate consistently with the principles of natural justice. This means:
- the Panel is independent and makes findings in an unbiased way and without prejudice towards complainants and respondent alcohol marketers;
  - complainants and alcohol marketers are treated fairly, with marketers given the opportunity to comment on the complaint;
  - that the Panel takes into consideration the concerns of the complainant and the reply of the marketer in making its findings; and
  - findings are made on the merits of the case.
24. Beyond these core principles, the Panel and the complaints process more generally seeks to operate:
- consistently so that like concerns and issues are treated the same over time;
  - expeditiously, effectively, and in an efficient manner;
  - with common sense; and
  - mindful of the spirit and intent of the ABAC Scheme and the public policy goal of the responsible marketing of alcohol.
25. Drawing this together, the core question is whether the complaints have been handled consistently with the ABAC Rules and Procedures and in a way that a fair outcome was possible and achieved. Of the procedural points raised by the Company, the first group can be answered as follows:
- It is usual practice for two or more complaints to be dealt with in a single determination when it is logical and efficient to do so. This is often the case when multiple complaints are received about the marketing of a single product. This practice is consistent with the aims of the Scheme and of itself has no detrimental impact on natural justice requirements.
  - The Company was supplied with the two complaints and invited to make comments in response to the complaints. In addition, the Company was

asked expressly whether the name and the packaging of the product was in breach of Part 3 (b) of the ABAC. Accordingly, the Company was made aware that the Panel would be considering the issue of the product packaging. The Company provided extensive arguments as to why the product packaging did not breach the applicable ABAC standard.

- The Company was not expressly asked about its level of control over the GABS website entry or the content of the Crafty Pint article. It is accepted that better practice would have been to ask the Company expressly this question. That said, the Company did advise its relationship with the two online publications in its response to the complaints and hence this information was before the Panel in making its findings in the provisional determination.
- The ABAC Scheme is directed at alcohol beverage marketers and does not purport to apply to third party entities such as media outlets or event organisers. This means issues arising from complaints are directed to the alcohol brand owner, distributor or retailer rather than third parties. On occasions, information will be sought from third parties to assist the Panel e.g., advice from a social media platform about the technical ability of the platform to age restrict posts about alcohol products, but generally questions are directed to the relevant alcohol company. It was not considered necessary in this case to seek information from GABS or the Crafty Pint to determine the complaints.
- The provisional determination did not expressly state that complaint 121/21 was dismissed, although that the complaint was dismissed was clear from the provisional determination findings about the GABS website.

26. The most critical procedural point raised by the Company is that the Panel in its handling of the complaints and then the provisional determination 'overreached' and this mistake led to the findings about the product packaging. It is argued that the question of the consistency of the product packaging with the Part 3 (b) standard should not have arisen for determination at all because:

- complaint 121/21 was about the GABS website entry description of the product and not the product packaging; and
- complaint 122/21:
  - was about how the Crafty Pint article described the product and not the product packaging;
  - the Panel introduced the concern about the product packaging and not the complainant;

- the Crafty Pint article was not an alcohol marketing communication; and
  - only concerns about product packaging arising from an alcohol marketing communication can result in a Panel finding about the product packaging.
27. The design of the ABAC Scheme envisages that the Pre-Vetting service provides a comprehensive assessment of the marketing material against all Code standards prior to the marketing being used. The public complaints process acts more as a safety net to address concerns about a marketing communication and the focus is on the particular issue troubling the complainant. As a result, it is not the role of the Panel to conduct a vetting of a marketing communication subject to a complaint against all Code standards. For instance, if a complainant is concerned about the marketing communication encouraging excessive alcohol consumption (Part 3 (a)), the Panel is not able to examine the marketing against the standard going to alcohol use before engaging in activity requiring physical co-ordination to be performed safely (Part 3 (d)), when this was not the concern of the complainant.
28. So, what has occurred in the current case. The complaints were lodged with Ad Standards using the template complaint form. The form asks complainants to:
- identify the 'Advertisement Type';
  - nominate the 'Advertisement Location';
  - name the Advertiser;
  - describe the Advertisement; and
  - give a reason for the objection to the Advertisement.
29. The advertisement type in complaint 121/21 was said to be the 'internet' with the advertiser described as the GABS festival/Currumbin Valley Brewing. The GABS website entry was described with the objection reason related to the description of the product on the website appealing to minors. This complaint does not raise the product packaging and the provisional determination made no finding about the product packaging arising from this complaint.
30. In contrast, complaint 122/22 quite clearly includes the packaging of the Blackcurrant Pastille Sour Ale product. The 'advertisement type' is stated to be 'packaging'. The advertiser is stated to be the Company (not the Crafty Pint). The advertisement description reads 'The branding of the Blackcurrant Pastille Sour Ale'. The objection is stated to be about 'the branding' using lolly brands as inspiration for marketing the beer and this creating an appeal to minors. The

article in the Crafty Pint is referenced as 'reiterating' the concern about the branding. The complaint process considered the product packaging because of the clear expression of concern about the packaging and its appeal to minors in the complaint. There is no basis to conclude that the provisional determination went to the product packaging because the Panel as opposed to the complainant was concerned about the issue.

31. The next limb of the Company's argument is that because the Crafty Pint article was not an alcohol marketing communication, then it is not open for the article to lead to a finding about the product packaging. There are numerous ways in which a person might become aware of an alcohol product. For instance, the product might be served in a friend's home at a BBQ, someone might mention it in conversation, or it might be referenced in one of hundreds of thousands of social media posts made daily by private individuals in Australia. Often, a person might become aware of a product because of a marketing communication.
32. In complaint 122/21 it can be assumed the complainant became aware of Blackcurrant Pastille Sour Ale because of the article in the Crafty Pint. The article featured a picture of the can of the product as well as commentary about the product including statements from the Company's founders. Having become aware of the product and its branding, the complainant lodged the complaint about the product packaging and its argued appeal to minors. There is no basis to exclude consideration of the clear concern expressed in complaint 122/21 about the product packaging because awareness of the product branding did not arise from a marketing communication. Far from being an 'overreach', to adopt the Company's argument would impose a barrier to the public in making complaints which has never existed in the history of the ABAC Scheme.

## **The Substantive Issues**

### **Complaint 121/21 – GABS Website entry**

33. The GABS Festival is a series of craft beer focussed events, which in 2021, were held in Sydney, Melbourne, and Brisbane. The events feature products brewed specifically for the event or publicly released for the first time at the GABS festival. The Company's Blackcurrant Pastille Sour was one of the craft beers available at the 2021 festival. The festival organisers have a website, which in part lists the products available on tap at the event and one entry out of 112 in this part of the website is for the Company's product.
34. The ABAC does not cover all references to alcohol products found in public media but only to marketing communications generated by or under the reasonable control of an alcohol beverage marketer. The Company advises it did not write the entry referring to its product nor did it have any measure of control over the website or description of its product. While the Panel has not made inquiries with the GABS organisers as to what information was supplied by the Company about

its product, it seems clear the entry is not a marketing communication of the Company. In any event, given the placement of the entry in this section of the website and the fact that no image accompanies the entry, the Panel does not believe the website entry has strong or evident appeal to minors.

35. Accordingly, complaint 121/22 is dismissed.

### **Complaint 122/21- Product Packaging**

36. The Complainant contends the product's packaging (can design) branding is using confectionery imagery, specifically Lifesavers lollies as its basis and this creates an inappropriate appeal to minors. Part 3 (b) of the Code provides that alcohol marketing communications must not have strong or evident appeal to minors. This standard might be breached if the branding:

- 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 create confusion with confectionery or soft drink.

37. The Company argues both initially and then in additional submissions upon seeking a re-hearing of the provisional determination that its branding and packaging does not breach the ABAC standard. It is submitted:

- the can uses a retro vintage style that does not appeal strongly to minors;
- the packaging uses an appropriate and prominent alcohol descriptor of 'sour ale' and other alcohol cues which establish the beverage is alcoholic;
- the 'sour ale' typography is larger than that used for 'blackcurrant pastille';
- no reference is made to the lolly brand 'Lifesavers' on the packaging and a comparison with the design of the Lifesaver packaging shows little similarities beyond the use of a purple shade;
- blackcurrant references the flavour characteristic of the product and the fact the fruit is used in brewing the product;
- minors would not recognise the word 'pastille' and the word itself has several meanings beyond references to a sweet;

- while minors might know the lolly 'Lifesavers', the Company could not find any data which supports a conclusion that blackcurrant and/or pastille is a popular item with minors;
- the Panel erred in the provisional determination by extrapolating a general appeal of lollies to minors to a specific appeal of blackcurrant pastilles to minors;
- not all lollies will appeal strongly to minors and it is unsafe to conclude an appeal to minors without direct data supporting such a conclusion;
- there is insufficient evidence that pastilles are a popular confectionery item or to conclude the term is recognisable and relatable to minors; and
- pastilles being a longstanding lolly does not provide evidence that they are popular and recognisable to minors.

38. 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.

39. 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.

40. 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 or confectionery 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.
41. In their interview with the Crafty Pint, the Company's founders Luke Ronalds and Pete Wheldon gave some background to the product. Mr Ronalds is quoted as saying - 'We wanted to really capture that moment of being a kid and enjoying the lollies you'd get from the milk bar'. The quote continues - 'I think we've really nailed the flavour. I hope it takes punters back to their childhoods'. While these comments are alluded to by the complainant as indicating the appeal of the packaging to minors, it should be noted:
- the ABAC does not regulate physical beverages and characteristics such as taste and colour of a beverage are generally not relevant in assessing the consistency of product packaging with an ABAC standard unless those characteristics feature as a part of the marketing communication itself; and
  - the intention or inspiration of a marketer in designing a marketing communication is not decisive, but rather the benchmark is how a reasonable person would probably understand the marketing material and this understanding might or might not be consistent with what the marketer was intending.
42. The media interview does highlight however the issue of nostalgia or retro style marketing mentioned in the Company's response to the complaint. The Company

contends the packaging will appeal to older consumers based on invoking memories of childhood experience of pastille lollies, but not strongly appeal to under 18 year olds of today. This can be a fine line to walk. It is a fair observation that popular culture does quickly evolve and what is popular in the youth culture of today may not resonate with minors in a decade or even a few years' time. Equally some things are enduring in their appeal to minors.

43. It is clearly common ground that lollies generically have a strong appeal to minors. The Company's argument from this point is then:
  - that doesn't mean all lollies strongly appeal to minors;
  - to find that the product packaging has strong appeal to minors requires direct evidence or data about the appeal of blackcurrant pastilles; and
  - as no direct data on the appeal of blackcurrant pastilles is available, then the complaint should be dismissed.
  
44. In applying the Code standards, Part 5 of the ABAC states that compliance of a marketing communication with the Code is to be assessed in terms of the probable understanding of the marketing communication by a reasonable person to whom the material is likely to be communicated and taking its content as a whole. There are several key concepts here which are relevant to the Company's argument about the evidence and data required for the Panel in making its findings, namely:
  - the 'reasonable person' test is drawn from the Australian common law system and means that the life experiences, values and opinions found commonly in the community is the benchmark;
  - 'probable understanding' means the understanding most likely to be reached on the balance of probabilities. So, if multiple interpretations of a marketing communication are possible, it is the most probable which is to be preferred over a possible but less likely interpretation; and
  - it also means that a conclusion is not required to be beyond reasonable doubt.
  
45. The ABAC Rules and Procedures provide that when considering a complaint, the Panel should have before it:
  - the complaint;
  - a copy of the marketing communication;

- the response of the marketer to the complaint and questions raised with it by the Chief Adjudicator; and
  - any other materials the Chief Adjudicator deems fit.
46. 'Other materials' will sometimes include publicly available data sources when relevant to the Panel in weighing up arguments and endeavouring to apply the 'reasonable person' test in assessing a marketing communication's compliance with a Code standard. The Panel is however not a research body and specific data on the appeal of a marketing communication to demographic segments will usually not be publicly available. To accept the Company's argument that a lack of specific data on the appeal of blackcurrant pastilles means the complaint must be dismissed, misunderstands the role the Panel. The Panel applies the reasonable person's probable understanding of the packaging, not a 'beyond all reasonable doubt' legal test to the appeal of the packaging.
47. The Panel believes that the packaging does breach the Part 3 (b) standard. The Panel noted:
- 'pastille' lollies including blackcurrant pastilles are a longstanding confectionery sold under several brand names including Lifesavers, Rowntree's and Wonka. Rowntree's fruit pastilles have been continuously sold since 1881;
  - while a brief internet search did not disclose specific information on the demographics of the consumers of pastilles, it is reasonable to assume the lollies are consumed across age groups and are popular and recognisable to minors;
  - there is no basis to believe blackcurrant pastilles were popular with minors say up to the early 2000's and since then to invoke fond childhood recollections for adult consumers, but the lolly is now not popular with minors;
  - the packaging does employ the well-recognised alcohol descriptor of 'ale' with sufficient prominence that combined with other alcohol beverage cues is likely to establish the product as an alcohol beverage to a reasonable person;
  - the packaging uses eye-catching colours likely to attract the attention of minors;
  - the blackcurrant pastille name will be recognisable and relatable to minors;
  - the combined elements of the packaging create an illusion of a smooth transition to an alcoholic beverage; and

- while no one element of itself is decisive, taken as a whole a reasonable person would probably understand the packaging as having strong appeal to minors.

### **The Crafty Pint**

48. The Crafty Pint is an online publication which serves the craft brew industry and those consumers interested in developments in Australia's expanding and quite dynamic craft brew sector. The publication often carries articles about the backstories of individual brewers, their product range, and their physical facilities. The publication is independent of any one brewer and, like all media organisations, is not captured by the ABAC Scheme. The complainant references an article about the Company in which the Company's founders are quoted discussing the product. The media article is not a 'marketing communication' for ABAC purposes.
49. Accordingly, the Panel makes a final determination that complaint 121/21 is dismissed and complaint 122/21 is upheld in relation to the reference to product packaging but dismissed in relation to the reference to The Crafty Pint article.