



ABAC Adjudication Panel Determination No 230/21

Product: BubbleGum and Mango BubbleGum Gin
Company: GinFinity
Media: Packaging
Date of decision: 4 November 2021
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns the packaging, name and labelling of BubbleGum and Mango BubbleGum Gin (“the Products”) by GinFinity (“the Company”). It arises from a complaint received on 28 September 2021.
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 28 September 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 was not obtained for the marketing communications.

The Marketing Communication

10. The complaint relates to packaging, name and labelling of BubbleGum and Mango BubbleGum Gin, as shown below:



The Complaint

11. The complainant objects to the marketing as follows:

- *Promoting fun Bubblegum Gin*
- *The distillery is promoting a couple types of "Bubblegum Gin" in bright colourful packaging which is very attractive to minors and also being flavoured off a kid's confectionery product.*
- *[The] product and the advertising of it is overtly attractive to minors.*

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 to strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minors 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 email on 30 September 2021. The principal points made by the Company were:

Background

- GinFinity is not a signatory to the ABAC Scheme, however, we fully support the regulatory framework around alcohol marketing in Australia.

- GinFinity is a small family-owned business operated solely by a small team of 5. Currently, 98% of our sales are made via online sales direct to consumers with the remaining 2% being sold by retailers.

Alcohol Advertising Pre-Vetting Service

- We did not submit the label for GinFinity ‘BubbleGum Gin’ or GinFinity ‘Mango BubbleGum Gin’ (collectively, the GinFinity BubbleGum Gins) for pre-vetting.

Date of First Retail Sale

- GinFinity BubbleGum Gin first began to be supplied for bona fide retail sale in the ordinary course of business in Australia in May 2021.
- GinFinity Mango BubbleGum is due to be supplied for bona fide retail sale in the ordinary course of business in Australia in October 2021.

Responsibility Towards Minors

- Although GinFinity is not a signatory to the ABAC Scheme, we take compliance with code seriously and the labels were designed to comply with the Code, including specifically section 3(b)(i).

Label Design

Colour Palette

- We refute the claim that the colours used on the labels are ‘bright colourful’ and ‘very attractive to minors’. Both labels have been professionally designed with the primary intention to appeal to adults, more specifically female adults. The main colour palette used on both labels are analogous colours as opposed to vivid rich contrasting colours which are more likely to appeal to minors.
- The colour palette for the GinFinity BubbleGum Gins are as follows:
 - BubbleGum Gin – light blue, pink and dark purple; and
 - Mango BubbleGum Gin – Pastel yellow, pastel orange, darker orange and muted red.
- These colour combinations are lower contrast combinations that are perceived as more mature.
- The content of the bottle is also a clear liquid, which does not contrast with the colour of the label, making the product appear as a mature product for consumers over the age of 25 (our target audience and rationale is

discussed in detail below). This contrasts with other products within the spirit category, or premix category that are bright colours of Green, Red and Blue (for example, Midori, Sour Monkey and Vodka Cruisers), colours that are particularly attractive to minors. Drinks that are typically marketed towards minors are usually coloured, like cordial, soft drink, and juice. A product containing a clear liquid is not a product that would be considered attractive to minors, nor be confused as something intended for minors.

Design Features

- The label has been designed using clean, simple abstract shapes with floral and cog designs in our logo on the front. The label does not feature any imagery, designs or cartoon characters that might be especially attractive to minors. Additionally, the simple design of clean abstract shapes, most obviously a triangle in the centre of both labels, does not create confusion with confectionary. The use of brighter colours does not detract from this cleaner and simple design. There is no risk that a minor would confuse this product with a product for them.
- The focus of both labels is on the name of our distillery ‘GinFinity’. This is enlarged across the centre of the label in easy-to-read text. This is clearly identifying the product as a Gin. The flavour profile, being BubbleGum, is contained at the bottom of the label. This contrasts with other distilleries who put emphasis on the flavour profile in their label design. Thus, the emphasis on the distillery name disputes the suggestion that the label has been designed to appeal to minors as the main emphasis is not on the flavour profile.
- Additionally, there is nothing contained in the description on the label that would cause any confusion for a minor.
- The GinFinity Mango BubbleGum Gin states: “*GinFinity BubbleGum Gin is one of the most unique gins you will ever get to try. Produced using tried and true methods, this gin borrows heavily from the rum world. The botanicals used in this gin are nothing but juniper, mango and apricot. However, this gin is loaded with juicy fruity aromatics from a healthy dose of dunder.*”
- The GinFinity BubbleGum Gin states: “*GinFinity BubbleGum Gin is one of the most unique gins you will ever get to try. Produced using tried and true methods, this gin borrows heavily from the rum world. The botanicals used in this gin are nothing but juniper, pineapple and mandarin. The magic all happens in the long fermentation leading to incredibly diverse aromas including bubblegum and peach tea.*”
- In conclusion, we submit that the label design of both GinFinity BubbleGum Gins are compliant with the code. The design contains abstract shapes with

analogous colours (as opposed to contrasting colours). Gin is clearly displayed on the label and nothing on the label causes any ambiguity as to what the product is. Including the fact that the bottle contains a clear liquid, common in spirits designed to appeal to mature adults. We do not accept the suggestion that the use of colour in a label design may make minors believe the product is a confectionary product for them, rather than an alcoholic product for an adult.

Use of the Word 'BubbleGum'

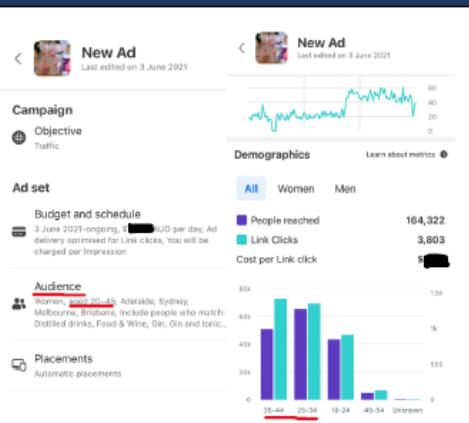
- We refute the claim by the complainant that the GinFinity products are 'flavoured off a kid's confectionary product'.
- The GinFinity BubbleGum Gins are an artisanal craft product distilled using an old-world distillation method inspired by Jamaican Rum production. Dunder, a traditional flavour source created during a long fermentation process, is added to the gin before the distillation. As a result, the product has a high ester count. These esters happen to be some of the same esters used to flavour bubblegum and produce the unique flavour profile of the GinFinity BubbleGum Gins.
- GinFinity BubbleGum Gins are a Rum/Gin Hybrid, developed to appeal to a female audience. Within Australia, the rum market is relatively young with very few producers targeting females and therefore, rum appears as a very masculine product to consumers. BubbleGum Gin bridges this gap between Gin and Rum.
- The term 'BubbleGum' is used to describe a combination of distinctive fruity esters, which are also used in the production of chewing gum. Esters are organic chemical compounds with distinctive fruit-like odours and mimic well known flavours. What are commonly described as BubbleGum esters can include a wide variety of flavour profiles, or characteristics which include, but are not limited to, the following:
 - Allyl hexoanoate – which produces a pineapple flavour;
 - Benzyl acetate – which produces pear, strawberry and jasmine flavours;
 - Butyl acetate – which produces apple and honey flavours;
 - Ethyl benzonate – which produces cherry, grape and fruity flavours; and
 - Ethyl Butyrate – which produces banana, pineapple and strawberry flavours.

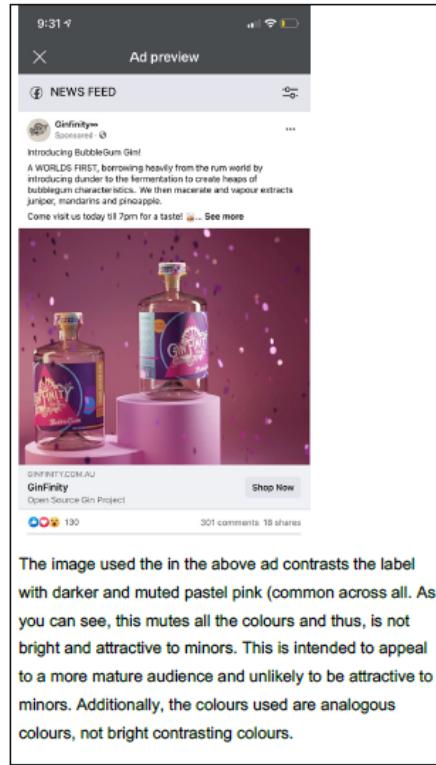
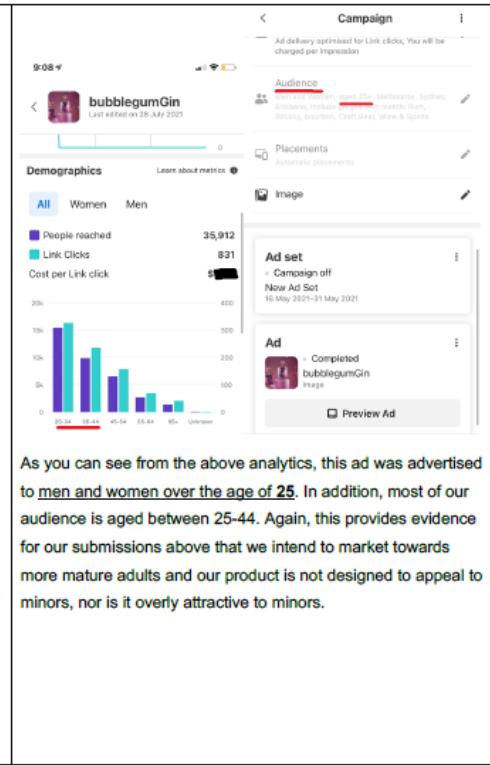
- The esters described above are collectively described as ‘BubbleGum’ esters across the alcohol production industry. BubbleGum characters or flavours are not unique to confectionary products. BubbleGum esters, or BubbleGum characteristics, are frequently referred to in rum, wine and beer production to describe a combination of esters that produce unique fruity flavours. Thus, the reference to Bubblegum is not a reference to the confectionary product but a reference to a collection of organic chemical compounds. The reference to BubbleGum in gin is unique as GinFinity BubbleGum Gin is the first of its kind in the world. However, it would not be surprising if the use of the descriptor
- ‘BubbleGum’ increases in usage within the beverage industry as High Ester Rums make their way into the Australian market and contain similar flavour profiles.
- Additionally, there is no other word to effectively describe the unique combination of fruity esters that are contained in the GinFinity BubbleGum gins in a way that the general adult population would understand, or be able to use as a point of reference. While the esters listed above have distinctive fruity flavours, esters can present less desirable flavours of glue, parsnip, cheese, nail polish remover and butter. Thus, the term ‘BubbleGum esters’ is used to accurately identify different combinations of fruity esters. By way of comparison, if you were to describe a gin or alcohol product as ‘Christmas Pudding’ flavoured or ‘Chocolate’ flavoured, there is no other way to accurately describe the botanicals and flavours contained in product which would get the flavour profile across to the consumer without using a comparison point generally understood by the general consumer. Thus, the use of the word BubbleGum on both products is not intended to appeal to minors at all, but to accurately describe the flavour profile of the gins to adults.
- Contrary to the complaint, BubbleGum Gin is not sweet nor designed to mimic a confectionary product, it simply contains organic aromas and a fruity flavour profile (which are also commonly used in some confectionary). We do not accept that adults are not able to enjoy alcoholic beverages that contain fruity characteristics.
- In response to your question whether the fact that GinFinity BubbleGum Gins share a name ‘Bubble gum’ with a confectionary product ‘provides the illusion of a smooth transition from non-alcohol to alcohol beverages’. The font, colours and design are not comparable to, and does not have any equivalent names to, any products sold to minors such as common confectionary brands, ‘Hubba Bubba’ or ‘Zazzo’. It cannot be said that any person could confuse a confectionary product with a 500ml bottle of GinFinity BubbleGum Gin. We also submit that there is no risk that anyone would confuse a chewy confectionary item for a bottle of spirit because they

are described as containing similar flavour profiles. We therefore do not accept that GinFinity BubbleGum gin provides the illusion of a smooth transition from non-alcoholic beverages to alcoholic beverages.

Advertising

- The BubbleGum Gins are specifically designed to appeal to a female consumer over the age of 25. GinFinity BubbleGum products are rum/gin hybrids and thus create a gateway for females from gin to rum. The use of colours is designed to specifically appeal to the female consumer with feminine colours of pink and purple and a combination of different shades of orange.
- Our product is a premium craft product costing \$65 for a 500ml bottle. We only advertise on social media (specifically Facebook and Instagram) to individuals over the age of 20 with most people seeing the ads being between 25-44 years old. Therefore, there is almost no chance of the product being advertised to minors. From our Facebook analytics, none of our ads have ever reached individuals under the age of 20 (please see screenshots below of two example ads and their analytics).

Ad/Post	Analytics/Audience	Description/Content
 <p>Above is an ad of our BubbleGum Gin advertised on Facebook in June 2021. As you can see, the bottle is contrasted with lighter colours of wood and white tissue paper to appear as a premium product. The only colour is that of the label and the focus is on the name of our distillery, GinFinity (which is in large white text across the centre of the label). Thus, there is nothing that would lead a minor to believe the product is for them. Nor is the bottle overly attractive to minors, especially as the main text on the bottle says 'GinFinity'.</p>	 <p>The product is described as 'the worlds first high ester gin'. Our product is never described in a way that would appeal to minors or appear as something that a minor would enjoy. In fact, it is highly unlikely a minor would even understand what 'high ester' means.</p> <p>This is consistent throughout all our posts and ads.</p>	

 <p>The image used in the above ad contrasts the label with darker and muted pastel pink (common across all). As you can see, this mutes all the colours and thus, is not bright and attractive to minors. This is intended to appeal to a more mature audience and unlikely to be attractive to minors. Additionally, the colours used are analogous colours, not bright contrasting colours.</p>	 <p>As you can see from the above analytics, this ad was advertised to <u>men and women over the age of 25</u>. In addition, most of our audience is aged between 25-44. Again, this provides evidence for our submissions above that we intend to market towards more mature adults and our product is not designed to appeal to minors, nor is it overly attractive to minors.</p>	<p>The product is described as '...borrowing heavily from the rum world by introducing dunder to the fermentation to create heaps of bubblegum characteristics.' This supports our position that our product was not designed to mimic a child's confectionary product, but is a word used to describe a particular flavour profile created by 'dunder'.</p> <p>This is consistent across all our ads and posts.</p> <p>We have never described our product as anything that would appeal to minors as it is not a product that, honestly, people under the age of 25 would enjoy. It is not sweet; it is not candy-like and certainly not designed off of a confectionary product. It is an advanced unique spirit mimicking a Jamaican Style of Rum designed to appeal to females.</p>
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- In all our ads on social media, the imagery is professionally rendered using muted colours with clean sophisticated backgrounds (in contrast to bright colours which would appeal to minors). Additionally, we never use language or imagery (such as the use of characters, confectionary items, or cartoons) in our advertisements that might cause confusion in the event it was ever seen by a minor. We consistently indicate that it is the world's first high ester gin with fruity characters. It is never described in a way that a minor would think it is a product they would enjoy. Thus, we reject the suggestion in the complaint that "the advertising of it is overtly attractive to minors."
- The complaint attached two screenshots from our website alleging that it is "overly attracting to minors". The products are displayed on a white background, and as discussed above, we reject the suggestion that colour is not appealing to adults. The title of the product clearly contains the word 'Gin'. Additionally, the complainant has failed to show the description of the products. The descriptions do not create any confusion that the product is for adults, identifying the product as a Gin and 45% ABV.

Conclusion

- Firstly, we note that the complainant has described the advertising subject as "Promoting fun Bubblegum Gin". We have never described our product in any ad or post as 'fun'. It is a specialty product, designed for those who appreciate craft spirits. In all our advertisements, we identify the product

name and typically describe the product as ‘the world’s first high ester gin’, ‘a high ester gin’ and ‘inspired by the rum world.’ Then we typically describe the fruity bubblegum characteristics. We also never insinuate that the Gin is sweet (because it’s not, it is very dry) or easy to drink (it is 45%ABV) which are the type of drinks would appeal to minors. Nothing insinuating that the product is ‘fun’.

- Sophisticated, clean designs with analogous colours appeal to adults more than they appeal to minors, particularly when paired with white, muted or pastel-coloured backgrounds. Additionally, a clear spirit or liquid is not attractive to minors.
- The term ‘BubbleGum’ is frequently used to describe flavour profiles and fruity characteristics in alcohol, and the confectionary category ‘Bubble gum’ contains similar flavour characteristics. GinFinity BubbleGum Gins contain bubblegum esters, a combination of fruity chemical compounds derived from the long fermentation process during production. There is no other way to accurately describe the flavour profile to the consumer without causing confusion.
- The label clearly identifies the product as a Gin and cannot be confused for a confectionary product.
- In conclusion, it cannot be said that taking into account the product itself, packaging, name, description and content as a whole, that the product is overly attractive to minors or could cause any confusion between our product and a confectionary product.

The Panel’s View

15. GinFinity is a recent addition to Australia’s gin producers commencing operations in 2020 at Belgrave in Victoria’s Dandenong Ranges. The Company produces a wide range of different gin flavours as well as gin-making kits for at-home distilling. This determination relates to the packaging of two products, both featuring the descriptor ‘BubbleGum’ in the product name and labelling.
16. The complainant believes the packaging is very attractive to minors through a combination of the bubblegum name and the bright colours on the packaging. This concern brings into play Part 3 (b)(i) of the ABAC which provides that an alcohol marketing communication (which includes product labels and packaging) 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.
17. 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 are 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.
18. 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;
 - the illusion of a smooth transition from non-alcoholic to alcoholic beverages;
 - creation of a relatable environment by use of images and surroundings commonly frequented by minors;
 - depiction of activities or products typically undertaken or used by minors;
 - language and methods of expression used more by minors than adults;
 - inclusion of popular personalities of evident appeal to minors at the time of the marketing (personalities popular to the youth of previous generations will generally not have strong current appeal to minors);
 - style of humour relating to the stage of life of a minor (as opposed to humour more probably appealing to adults); and
 - use of a music genre and artists featuring in youth culture.
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. The Company contends the packaging is consistent with the ABAC standard. It is argued:
- the bubble-gum descriptor relates to the distilling process and the product having a high ester count. It is explained that while esters are used in the production of chewing gum, they also have an established use in alcohol production;
 - the label design has been directed towards adults, specifically adult women;
 - colours employed are lower contrasts and are mature in appeal;
 - the product is clear in colour and hence does not create a contrast with the colour of the label; and
 - the label does not feature imagery, designs, cartoon characters likely to appeal to minors.
21. The Company goes to some length in explaining the background of the use of esters and why the bubble-gum descriptor is apt for the product. This is interesting and informative, but it is not entirely relevant in as much as the assessment as to the appeal of the packaging is based on how a reasonable person will understand the labelling. In this regard it is the key features which will be most influential such as:
- the front of the packaging rather than the rear and sides;
 - messaging in larger rather than smaller font;
 - the dominant design aspects;
 - the prevailing colour scheme; and
 - the overall impact of these features combined.
22. While acknowledging the points made by the complainant, the Panel does not believe the packaging breaches the Part 3 (b) standard. In reaching this conclusion the Panel noted:
- the packaging establishes the product as being an alcohol beverage and would not be confused with a soft drink or confectionery;
 - the bubble-gum descriptor does not dominate the labelling but is secondary to other features such as the Ginfinity brand name and the geometric design;

- the labelling provides information as to the use of the bubble-gum descriptor, and while this is of less impact given its placement on the rear of the packaging, it does provide context;
 - the overall colour scheme is restrained rather than bright and contrasting; and
 - while the bubble-gum term would be familiar to minors, this element does not overpower the total labelling design and the overall impact is considered more appealing to adults than to minors.
23. The complaint is dismissed