



ABAC Adjudication Panel Final Determination No 250/21

Product: Various Vodkas
Company: High Spirits Wholesale
Media: Packaging, Social Media
Date of decision: 14 December 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 packaging of various vodkas (“the Products”) by High Spirits Wholesale, as well as social media posts by two retailers of the Products. It arises from a complaint received on 25 October 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:
 - 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 the retail and wholesale sale of alcohol, and contain some provisions dealing with alcohol marketing;
 - 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 meet 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 25 October 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.

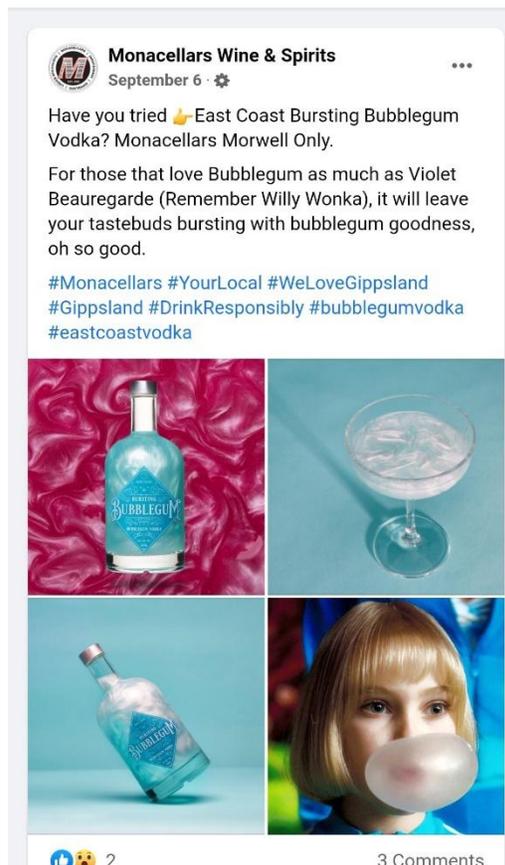
Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverage marketing features an 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.

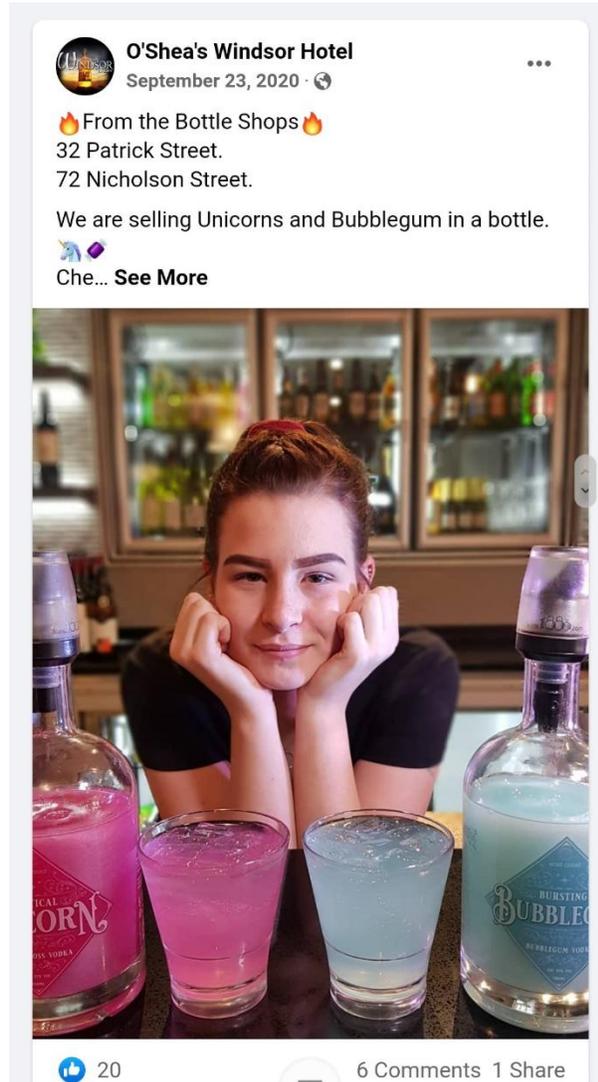
The Marketing

10. The complaint concerns the packaging of the Products, as well as social media posts by two of the Products' retailers.

Facebook Post 1



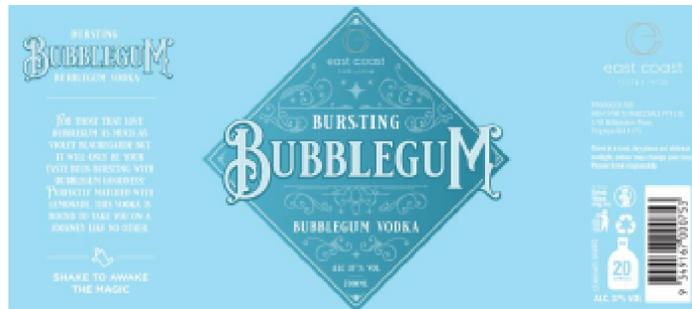
Facebook Post 2



Packaging

The complaint concerns the packaging of the following Products:

- Bursting Bubblegum, Bubblegum Vodka
- Magical Fairy Floss Unicorn Vodka
- Mystical Mango Magic Vodka



The Complaint

11. The complainant objects to the marketing as follows:
 - *The promotion of magical vodka products featuring pictures of minors and using terminology in the marketing of it that is aimed at youth/minors as well as the design of the bottle labelling being very attractive to minors. The labelling of this product and use of Magical, Bursting, Bubblegum, Unicorn and Fairy Floss in the labelling is prohibited as it is too 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;
 - (b)(ii) depict a person who is or appears to be a Minor unless they are shown in an incidental role in a natural situation (for example, a family socialising responsibly) and where there is no implication they will consume or serve alcohol;
 - (b)(iii) depict an Adult who is under 25 years of age and appears to be an Adult unless:
 - they are not visually prominent;
 - they are not a paid model or actor and are shown in a Marketing Communication that has been placed within an Age Restricted Environment
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 confectionery or soft drinks; or
 - (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

The Companies' Responses

14. Monacellars responded to the complaint by letter emailed on 27 October 2021. Its principal comments were:

- Firstly, thank you for bringing this to our attention, Monacellars is a family owned and operated business and has been for over 30 years, based in Gippsland, regional Victoria. Our business prides itself on supporting the community and ensuring our moral obligation in the responsible service of alcohol to our communities.
- Having operated in the Liquor industry for 30 years in both Wholesale to the hospitality industry and in our own retail stores, the way we market to our consumers has changed from traditional media to digital/online media, which we find ourselves navigating today. At present, we develop content that is applicable to new products, however, this complaint has highlighted additional steps we need to take immediately to ensure we comply with the ABAC Responsible Alcohol Marketing Code, for all content produced and marketed by us.
- Firstly, before commenting on the questions asked by the panel, I confirm that the post in question was removed immediately upon receiving the complaint.

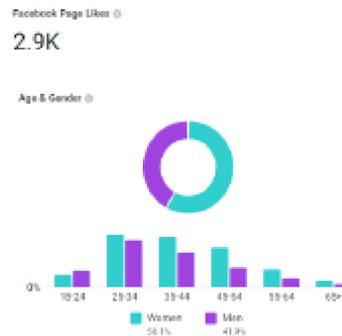
Alcohol Advertising Pre-vetting Service Approval

- Unfortunately, until now, we were unaware of the Pre-Vetting service offered by ABAC. We are now taking steps to ensure that we're fully informed of all the guidelines, including ensuring staff access the new online training course offered by ABAC and intend to make use of the service in the future when relevant to do so.

Responsibility to towards Minors

- Monacellars maintains a Responsible Service of Alcohol policy in line with the VCGLR requirements and subscribe to the following: ID for anyone under 25, don't buy it for them (Purchasing of alcohol by Adults for Minors), right to refuse service to anyone intoxicated or under the influence of any drugs.
- Monacellars is a family-owned business and as such advocates for the safe and responsible sale and marketing of products to the community.
- The Facebook post was placed on the understanding that it is posted in an age-restricted environment, which our Facebook audience data from our

page shows is over 18 Years of age. Most of our audience is aged 25 to 44. This would suggest that Minors could not access this content.



Age Restrictions Page is only shown to people over 18 years of age.

- We believe that the post was more about the bubblegum flavour of the product itself that the complainant has an issue with which could pose questions for the producer of the product more so, than how it was depicted in this post. The post is to remind consumers of the Nostalgic 1971 Film, and the target audience that we market to, and that age of the film, would show our intention was to target people who are currently aged in their 40's, 50's and 60's, and not minors.

Concluding Comments

- We appreciate the service offered by ABAC and for bringing this to our attention.
- 2021 has seen many challenges as a result of the pandemic. A significant proportion of our business is the supply of alcohol to the hospitality industry and as a result, many of our employees have at some point been stood down, and others reduced hours and taking up roles and tasks that they are not entirely educated or trained in doing.
- As a result of this complaint, we will now implement an internal vetting process and ensure anyone creating or reviewing content is trained using the New ABAC Online training resources on the appropriate ABAC guidelines, and if any content fails this then we will consider submitting it to the ABAC pre-vetting approval service or not proceeding with the content.
- We look forward to hearing the decision from the panel, and any further comments on how we can alleviate complaints in the future.

15. O'Shea's Windsor Hotel responded to the complaint on 13 December 2021:

Alcohol Advertising Pre-vetting Service Approval

- We did not know about your business or the approval process.

Responsibility to towards Minors

- After reading your letter we are much more informed about the code but thinking that you must be 18 to see our posts I thought that was suffice . Now knowing more about the code we understand that wasn't right.
- We didn't know of the Code and its responsibilities but will use this letter as a guide for anyone creating and posting ads.
- The person pictured in the ad was aged 19, was not a paid model or actor and the Facebook page was age restricted to those over 18 years of age.
- We have learnt a lot and will make sure in future to work to the Code.

16. High Spirits Wholesale's legal advisors responded on behalf of their client by letter emailed on 11 November 2021. Its principal comments were:

Alcohol Advertising Pre-vetting Service Approval

- Pre-vetting approval was not obtained for the marketing communications referred to in the complaint.

Scope of ABAC Scheme's Authority

- The Code does not regulate physical alcohol beverages, i.e., the physical characteristics of a beverage such as its alcohol to volume content, its taste, its colour, if the liquid has effervescent qualities or the viscosity of the beverage. To the extent that physical characteristics of alcohol beverages on sale to the public are regulated, either for public safety or other policy reasons, then this rests directly with government agencies.

Response to Complaint

Background

- Our client is not a signatory to the ABAC Scheme. However, we are instructed that they fully support the regulatory framework around alcohol marketing in Australia.
- Our client is a small family-owned business operated by a team of five employees. Our client purchased the High Spirits Wholesale in August 2021 and therefore has had a limited opportunity to review, change or amend its labelling and packaging to comply with the Code.

- Our client also had no opportunity to seek pre-vetting approval of the Product Labels (defined below) prior to the first retail sale of the products subject of the Complaint. The reason being our client did not take over control of the sale of the relevant products until they had already been on the market for approximately two years.
- Currently, 100% of our client's sales are direct to retailers. Our client does not sell to consumers and is not responsible for the marketing of its product beyond its packaging and labelling.

Pre-Vetting Service

- The following product's labels were not submitted by our client for pre-vetting:
 - 'Magical Fairy Floss Unicorn Vodka' ("the East Coast Fairy Floss Vodka");
 - 'Bursting Bubblegum Vodka' ("the East Coast Bubblegum Vodka"); and
 - 'Mystical Mango Magic Vodka' ("the East Coast Mango Vodka");(collectively, "the Product Labels")

Date of First Retail Sale

- We are instructed that the Product Labels first began to be supplied for bona fide retail sale in the ordinary course of business in Australia in or around 2019.

Responsibility Towards Minors:

- Although our client is not a signatory to the ABAC Scheme, it takes compliance with the Code seriously, and the Product Labels were designed to comply with the Code, including specifically section 3(b)(i).

Label Design

Colour Palette

- Our client refutes the claim that the colours used on the Product Labels would "be very attractive to minors". The Product Labels have been professionally designed with the primary intention to appeal to adults. Our client's internal review of the product marking supports the product has the highest appeal with adult females. The main colour palette used on the

Product Labels are analogous colours as opposed to vivid, rich, and contrasting colours, which are more likely to appeal to minors¹.

- The colour palette for the Product Labels are as follows:
 - East Coast Fairy Floss Vodka – Light pink, dark pink and white;
 - East Coast Bubblegum Vodka – Light blue, dark blue and white; and
 - East Coast Mango Vodka – Light orange, dark orange and white.
- These colour combinations are lower contrast combinations that are perceived as more mature.²
- The content of the bottles is coloured, however, they are complementary to each individual label colour scheme, reducing any contrast with the colour of the label. The lack of contrast makes the product appear as a mature product for consumers over the age of 25 (our clients target audience).³

Design Features

- The Product Labels have been designed using clean, simple abstract shapes with cursive detailing in the logo on the front of the products. The Product Labels do 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 the bottles, does not create confusion with confectionary. The use of bright colours does not detract from the Product Labels simple design. There is a low likelihood that a minor could confuse this product with a product for them.
- Our client accepts the focus of the Product labels is on the flavour profile of each product being, 'Fairy Floss', 'Bubblegum', and 'Mango'. The flavour profiles are enlarged across the centre of the Product Labels. The Product Labels clearly, in capital text, identify the products as vodka at the bottom of the logo. Our client, however, disputes the suggestion that the Product Labels have been designed to appeal to minors as although there is an emphasis on the flavour profile, each product is clearly identifiable as vodka.

¹ ABAC Adjudication Panel Determination No 230/21.

² As above n 1 at page 5.

³ Ibid.

- Additionally, there is nothing contained in the description on the label that is intended to cause any confusion for a minor.
- In the premises of the paragraphs above, it is submitted that the Product Labels are compliant with the Code. The design contains abstract shapes with analogous colours (as opposed to contrasting colours). Vodka is clearly displayed on the Product Labels, and nothing on the Product Labels causes any ambiguity as to what the product is. Our client does not accept the suggestion that the use of colour in a label may make minors believe the product is a confectionery product for them rather than an alcoholic product for an adult.

Bright Colours and Shimmery Qualities of Product

- As outlined above, the ABAC Scheme does not regulate the physical characteristics of a beverage, and therefore the products' colour and qualities could not be a breach of the Code.

Use of the word 'BubbleGum' and 'Fairy Floss':

- Our client refutes the suggestion that using the words 'Bubblegum' and 'Fairy Floss' would have significant appeal to children.
- The font, colours and design of the Product Labels are not comparable to, and do not have any equivalent names to, any products sold to minors such as common confectionary brands, 'Hubba Bubba', 'Zappo', or 'Sweetworld'. It cannot be said that any person could confuse a children's confectionery product with a 700ml bottle of East Coast Bubblegum Vodka or East Coast Fairy Floss Vodka. Especially given the bottle type used is typical of that found in alcoholic spirit beverages and does not resemble packaging commonly used for fruit juices, soft drinks or another confectionary.
- It is also submitted that there is no risk that anyone would confuse a chewy confectionery (bubblegum) or soft confectionary (fair floss) item for a bottle of spirit simply because they are described as containing similar flavour profiles. Our client, therefore, does not accept that including the word 'Bubblegum' and 'Fairy Floss' is likely to have a significant appeal to minors.
- It is further submitted that East Coast Fairy Floss Vodka can be distinguished from the product referred to in the Fairy Floss & Aurora Vodka decision⁴ in that:

⁴ ABAC Adjudication Decision Panel Final Determination No 114/20.
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- Our client's product does not use a name that could reasonably invoke reference to a specific fictional character;
- Our client's product does not utilise rainbow colours; and
- Our client is not responsible for the marketing of the product beyond the Product Labels.

Use of the word 'Unicorn'

- Our client refutes the suggestion that using the word 'Unicorn' would have a significant appeal to children and refutes that it would suggest to children that the product is for their consumption.
- The font, colours and design of the Product Labels are not comparable to, and do not have any images equivalent to, any products sold to minors such as toys, books or clothes which refer to unicorns. It cannot be said that any person could confuse reference to a mythical creature as an indication that a 700ml bottle of East Coast Fairy Floss Vodka is appropriate for consumption by minors. Especially given the bottle type used is typical of that found in alcoholic spirit beverages and does not resemble packaging commonly used for children's toys, clothes, books or movies.
- It is further submitted that East Coast Fairy Floss Vodka can be distinguished from the product referred to in the Unicorn Vodka Liqueur decision⁵ in that:
 - Our client's product does not make use of any imagery directed towards minors;
 - Our client is not responsible for the marketing of the product beyond the Product Labels;
 - Does not use a font that is akin to children's products, tv shows or consumables; and
 - Our client's product is clearly identified as vodka.

Use of the words 'Mystical', 'Magical' and 'Bursting':

- Our client refutes the suggestion that using the words 'Mystical', 'Magical' and 'Bursting' would have significant appeal to children. The font, colours and design of the Product Labels are not comparable to, and do not have

⁵ ABAC Adjudication Decision Panel Final Determination No 33/21.
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equivalent names as, any children's books, television programmes, movies or other entertainment primarily aimed at children.

- The use of the words 'Mystical', 'Magical' and 'Bursting' needs to be considered in the overall context of the products, including that:
 - The Product Labels use the term 'vodka' and employ other cues that it is an alcoholic beverage, such as including the alcohol content on the front of the product bottles;
 - The cues ensure that the product is not to be confused with one which is for children's consumption;
 - The bottle type used is typical of that found in alcoholic spirit beverages and does not resemble packaging used for products often consumed by children; and
 - The Product Labels do not employ design features considered to be targeting minors, or as having an appeal to minors beyond a general appeal to adults e.g., there is no animation or child-like writing used.
- Consequently, taken as a whole, the products' packaging, including the use of the words 'Mystical', 'Magical' and 'Bursting' is not considered as being highly relatable to minors and therefore not of significant appeal to them.

East Coast Mango Vodka refers to fruit

- Our client refutes the suggestion that using the product name and 'Mystical Mango Magic Vodka' would appeal to children simply because it refers to fruit commonly consumed by children or used as a flavouring in food or soft drinks consumed by children. Again, the product name needs to be considered in the overall context of the products, including that:
 - The bottle type used for this product is typical of that found in alcoholic spirit beverages and does not resemble packaging commonly used for fruit juices or other soft drinks;
 - There is no display of fruit images and does not employ design features considered to be targeting minors, or as having an appeal to minors beyond a general appeal to adults e.g., there is no animation or child-like writing used; and
 - The labelling uses the term 'vodka' and employs other cues that it is an alcoholic beverage, such as including the alcohol content on the front of the product bottles.

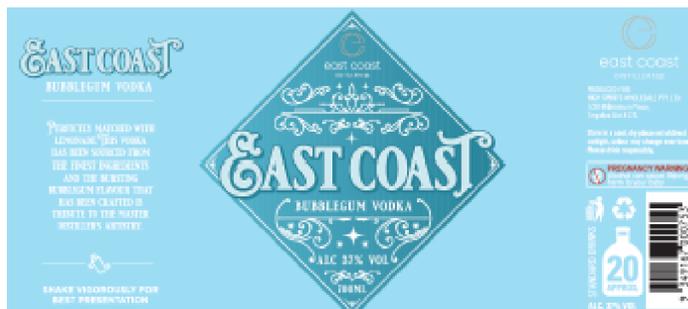
- Consequently, taken as a whole, East Coast Mango Vodka is not considered as being highly relatable to minors and therefore not of significant appeal to them.
- It is further submitted that the Newy Distillery decision⁶ may be relied upon by our client as an example of where the product elements outlined in the bullet points above are sufficient to satisfy the Panel of the product's compliance with the Code.

Limited Cues that Content is Alcoholic

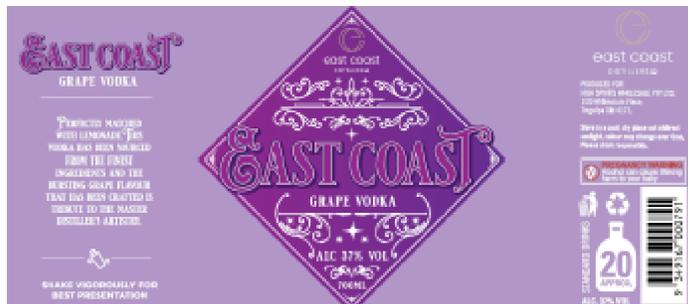
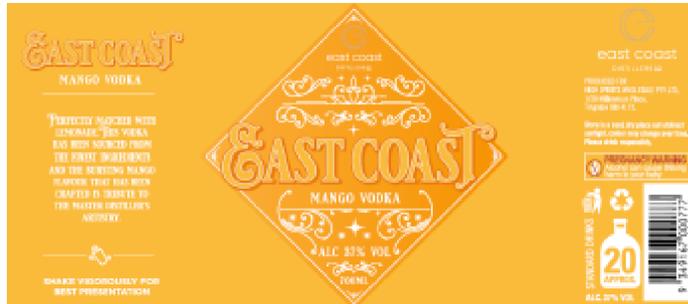
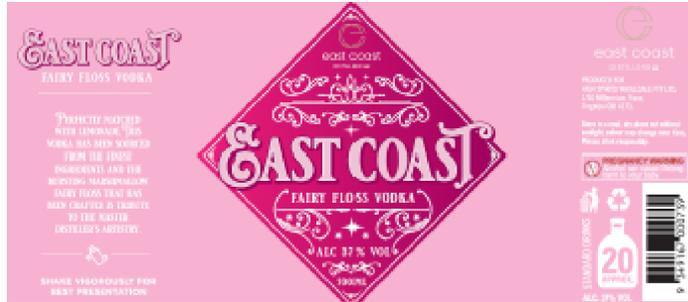
- Our client refutes the suggestion that the products have limited cues on the packaging that the contents are alcoholic and not confectionery or soft drink items aimed at children, on the basis that:
 - The Product Labels clearly, in capital text, on the front and back of the bottles identify the products as 'vodka';
 - The Product Labels on the front of the bottles include the alcohol content of the product; and
 - The Product Labels coupled with the bottle type used for this product being typically used for alcoholic spirit beverages clearly provide a cue that the content is not for consumption by children.

Intention to Amend Product Labels

- Notwithstanding our client's position, we are instructed they intend to amend the Product Labels to appear as follows so as to better comply with the Code ("the Amended Product Labels"):



⁶ ABAC Adjudication Panel Determination No 36/21.
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- In determining whether the Amended Product Labels comply with the Code, our client may undertake the pre-vetting service provided by the ABAC.

The Panel's View

17. High Spirits Wholesale is a liquor wholesaler that was established in 2007 and distributes a range of products sourced from around the world, including the East Coast Vodkas, which are the Products referenced in this complaint. There has been a recent change in ownership of the business in August 2021.
18. High Spirits Wholesale, O'Shea's Windsor Hotel and Monacellars are not signatories to the ABAC scheme and as such are not contractually bound to abide by a Panel determination. However, all Companies have fully engaged in the complaint process and expressed their commitment to good marketing practices.
19. On 29 November 2021 the Panel made a provisional determination that the 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.

20. The complaint raises concerns that the packaging of the Products appeals to minors, and that social media posts by liquor retailers that promote the Products appeal to children due to the terminology used and also depict youths or minors. These concerns bring Parts 3 (b)(i), (ii) and (iii) of the ABAC into play.
21. Part 3 (b)(i) 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.
22. 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.
23. 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 that shapes how a reasonable person will understand the item.
24. Product packaging can give rise to strong appeal to minors if it creates confusion with confectionary or a soft drink. Confusion with a soft drink might occur if:
- the packaging fails to clearly identify the product as an alcohol beverage through the use of an alcohol term like beer, ale, vodka, style of wine etc or reliance is made of more subtle alcohol references or terms understood by regular adult drinkers but less likely to be understood by minors eg IPA, NEIPA;
 - the packaging has a visual design that resembles a soft drink such as the display of fruit images, bright block colours and the use of a font style or iconography found typically on soft drinks or fruit juices;
 - the use of terms commonly associated with a soft drink or fruit juice e.g. orange, lemon, blueberry, pop, smash etc; and
 - the type of physical package used and whether this is similar to that used by soft drinks or fruit juices e.g. prima style juice box.
25. Part 3 (b)(ii) provides that an alcohol marketing communication must not depict a person who is or appears to be a Minor unless they are shown in an incidental role in a natural situation (for example, a family socialising responsibly) and where there is no implication they will consume or serve alcohol.
26. Part 3 (b)(iii) provides that an alcohol marketing communication must not depict a visually prominent adult under 25 years of age unless the person shown is not a paid model or actor and the marketing communication in which they are shown has been placed within an age-restricted environment.
27. Assessment of the consistency of a marketing communication with an ABAC standard is from the probable understanding of a reasonable person. This means that the life experiences, values, and opinions held by a majority of the community is to be the benchmark. A person who interprets a marketing message in a different way is not 'unreasonable' but possibly their understanding would not be shared by most people.

28. The Panel will consider each of the marketing communications, being the packaging and the two Facebook posts, in turn below.

Facebook Post 1

29. Facebook Post 1, which was made to the Monacellars Wine & Spirits Facebook page, includes a grid of four pictures, two of which show bottles of Bursting Bubblegum Vodka, one shows a glass of what appears to be Bursting Bubblegum Vodka, and the final shows a picture of the character Violet Beauregarde from the 2005 movie, "Charlie and the Chocolate Factory", who is blowing a bubble-gum bubble. The post is accompanied by the following text:

Have you tried 🍷 East Coast Bursting Bubblegum Vodka? Monacellars Morwell Only.

For those that love Bubblegum as much as Violet Beauregarde (Remember Willy Wonka), it will leave your tastebuds bursting with bubblegum goodness, oh so good.

30. The complaint raises a concern that the marketing appeals to minors by showing a picture of a minor, and also using terminology that appeals to minors.
31. Monacellars has responded to the complaint, explaining that:
- data shows that the audience of its Facebook page is over 18 years of age, with most of its audience being aged 25 to 44. This would suggest that Minors could not access this content;
 - the complaint was more about the bubble-gum flavour of the product itself, which could pose questions for the producer of the product more so than how it was depicted in this post;
 - the post was intended to remind consumers of the Nostalgic 1971 Film, and the target audience that we market to, and that age of the film would show our intention was to target people who are currently aged in their 40's, 50's and 60's, and not minors.
 - The post was removed immediately upon receiving the complaint.
32. The Panel believes that the post breaches Part 3 (b)(i) and (ii) of the Code due to:
- showing a picture of AnnaSophia Robb, who was born in December 1993, and was therefore under 18 years old at the time of her portrayal of Violet Beauregarde in the 2005 movie, "Charlie and the Chocolate Factory";

- referencing Violet Beauregarde and Willy Wonka, who are two of the main characters in the well-known children’s book by Roald Dahl, “Charlie and the Chocolate Factory”, on which two popular movies have been based; and
- emphasising the flavour, which will “leave your tastebuds bursting with bubblegum goodness”, with bubble-gum being a confectionery item popular with children.

Facebook Post 2

33. Facebook Post 2, which was made to the O’Shea’s Windsor Hotel’s Facebook page, shows a bartender leaning on a bar, with bottles and poured glasses of Fairy Floss and Bubblegum Vodka in front of her. The post is accompanied by the following text and emojis:

We are selling Unicorns and Bubblegum in a bottle.



34. The complaint raises concerns about the age of the person shown in the Facebook post, as well as the terminology used, which they believe would appeal to minors.
35. O’Shea’s Windsor Hotel is not a signatory to the ABAC scheme and did not respond to the complaint.
36. The Panel believes that the post would have strong or evident appeal to minors in breach of Part 3 (b)(i) of the Code due to Unicorns and Bubblegum being prominently referenced, alongside unicorn and lolly emojis, both of which emphasise a connection with an imaginary creature and a confectionery item currently popular with children, and therefore likely to appeal strongly to them.
37. The Panel notes that the person in the post is a 19 year old bartender who is not a paid model or actor. As the O’Shea’s Windsor Hotel Facebook page is age-restricted, this means that it is permissible to show a visually prominent 18 to 24-year-old and there has not been a breach of Part 3 (b)(iii) of the Code.

Packaging

38. High Spirits Wholesale argues that the Product packaging does not breach the ABAC standard. It is submitted:
- the labels have been professionally designed with the primary intention of appealing to adults;

- the label design contains abstract shapes with analogous colours (as opposed to contrasting colours which are more likely to appeal to minors);
- there is no animation or child-like writing used;
- the labelling uses the term 'vodka' and employs other cues that it is an alcoholic beverage, such as including the alcohol content on the front of the product bottles;
- the font, colours and design of the labels are not comparable to, and do not have any equivalent names to, any products sold to minors such as common confectionary brands, 'Hubba Bubba', 'Zappo', or 'Sweetworld'.
- no-one would confuse a chewy confectionery (bubblegum) or soft confectionary (fair floss) item for a bottle of spirit simply because they are described as containing similar flavour profiles.
- no-one would confuse reference to a unicorn, a mythical creature, as an indication that an alcohol beverage is appropriate for consumption by minors.
- the bottle type used is typical of that found in alcoholic spirit beverages and does not resemble packaging commonly used for children's toys, clothes, books or movies.
- the labels coupled with the bottle type used for this product being typically used for alcoholic spirit beverages clearly provide a cue that the content is not for consumption by children.
- the ABAC Scheme does not regulate the physical characteristics of a beverage, and therefore the products' colour and qualities could not be a breach of the Code.
- the business does not sell to consumers and is not responsible for the marketing of its product beyond its packaging and labelling.

39. In addition, High Spirits Wholesale has advised of its intention to modify the product packaging. The Panel must, however, assess the packaging as it was at the time of the complaint, and advice on any subsequent modifications can be sought from the ABAC Pre-vetting Service.

40. The Panel has considered the packaging of broadly similar products in other determinations. In Determination 114/20, the Panel found a Fairy Floss Vodka product to breach Part 3 (b)(i) of the ABAC Code. The Panel considered the origins of fairy floss as a confectionery item, concluding that it is a confectionery

item aimed far more directly toward minors than it is toward adults. In that decision the Panel noted:

- fairy floss is a confectionery that is likely marketed toward and consumed more extensively by minors than adults;
- the use of the name fairy floss on an alcohol product would likely contribute to an illusion of a smooth transition to an alcohol product for a minor;
- the combination of the name fairy floss with the variety names, such as 'bubblegum' and 'marshmallow', would be highly relatable to minors;
- while the name is used, in part to invoke a sense of nostalgia in potential adult consumers, this nostalgia stems from memories of childhood use of fairy floss and supports the attraction of the name to minors; and
- the packaging label does use a clear alcohol descriptor of 'vodka' and employs other cues as to the alcoholic nature of the product. Further, a clear glass bottle is typically used with alcohol spirit products and these elements taken together means it is not considered the packaging creates confusion with a soft drink.

41. In Determination 230/21 the Panel considered the packaging of a product branded as Ginfinity Bubblegum Gin. In that case, the Panel found the label did not breach the ABAC standard, noting:

- 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 its association with the use of esters in the product's production 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.

42. An assessment as to the appeal of 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.
43. As noted by High Spirits Wholesale, the ABAC does not regulate physical alcohol beverages. This means the nature of the beverages, i.e. their alcohol to volume content, their colour or the fact the beverages can change colour when mixed or shaken is not within the remit of the ABAC Scheme. The colour of a product can be a factor in how a reasonable person will understand the appeal of the packaging as a whole, but it is unlikely that the colour alone would be the basis of a breach of a Code standard. It is conceivable, however, that the colour of a beverage, which is visible because of the style or type of packaging used, might in combination with other design aspects of the packaging, lead a reasonable person to conclude the packaging as a whole is in breach of a Code standard. In this case, the packaging container is clear glass which permits the colour and shimmering properties of the product to be seen.
44. The Panel believes the packaging of the Fairy Floss and Bubblegum Vodkas do breach the Part 3(b)(i) standard. In reaching this conclusion the Panel noted:
- the packaging establishes the product as being an alcohol beverage due to the clear reference to 'vodka' on the front of the label and would not be confused with a soft drink or confectionery;
 - fairy floss and bubblegum are confectionery items likely marketed toward and consumed more extensively by minors than adults and the references to these confectionery items are the most dominant messaging on the front of the label;
 - while the font and design elements of the label do not have any particular appeal for minors, the use of descriptors 'magical fairy floss' alongside 'unicorn vodka' and 'bursting bubblegum' on an alcohol product would enhance the appeal to minors as the terms 'unicorns', 'magic' and exaggerated descriptors like 'bursting' are highly relatable to minors;

- the use of references to these confectionery items on a vodka product is likely to contribute to an illusion of a smooth transition to an alcohol product for a minor;
- while the name is used, in part, to invoke a sense of nostalgia in potential adult consumers, this nostalgia stems from memories of childhood use of fairy floss and supports the attraction of the name to minors;
- the pastel blue or dark pink colour of the packaging is attractive; and
- while no one factor of itself is decisive, taken as a whole, a reasonable person would probably understand the packaging has a strong and evident appeal to minors.

45. However, the Panel does not believe the packaging of the Mango Vodka is in breach of the Part 3(b)(i) standard. In reaching this conclusion the Panel noted:

- the packaging establishes the product as being an alcohol beverage due to the clear reference to 'vodka' on the front of the label and would not be confused with a soft drink or confectionery;
- the product name, 'Mystical Mango Magic Vodka', while referencing a fruit flavour and 'magic' would have broad appeal;
- the packaging's font and design elements would not have any particular appeal for minors;
- the colour scheme is muted; and
- taken as a whole, a reasonable person would probably not consider the packaging to have a strong and evident appeal to minors.

46. Accordingly, the Panel makes a final determination that:

- the following product packaging is in breach of Part 3 (b) of the ABAC:
 - Magical Fairy Floss Unicorn Vodka packaging; and
 - Bursting Bubblegum Vodka packaging; and
- the following marketing communications are in breach of Part 3(b) of the ABAC:
 - Monacellars Facebook post dated 6 September 2021; and
 - O'Shea's Windsor Hotel Facebook post dated 23 September 2020.