



## ABAC Adjudication Panel Final Determination No 13/22

**Product:** Juice Bar Triple Fruited Gose  
**Company:** Banks Brewing  
**Media:** Packaging  
**Date of decision:** 4 February 2022  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Debra Richards  
Professor Richard Mattick

### Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) concerns the packaging of Juice Bar Gose (“the Product”) by Mr Banks Brewing Co (“the Company”). It arises from a complaint received on 1 February 2022.
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 the 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 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.

- The complaint raises concerns under the ABAC Code and accordingly is within the Panel's jurisdiction.

### The Complaint Timeline

- The complaint was received on 1 February 2022.
- 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 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 product packaging.

### The Marketing Communication

- The complaint relates to the packaging of Juice Bar Triple Fruited Gose by Banks Brewing as shown below:





## The Complaint

11. The complainant objects to the marketing as follows:

- *We believe this labelling/packaging is in breach of Part 3 of the ABAC Responsible Marketing Code whereby a marketing communication and product must NOT:*
  - *(b)(i) have Strong or Evident Appeals to Minors*
- *The colourful, cartoon-style design is likely to appeal to minors and is overall not synonymous with an alcohol product.*
- *The product's prominent reference to being "juice" and lack of identification as alcohol aside from the niche beer term "gose" may cause confusion for minors and adults alike. The term "gose" is also not prominent on the label.*

## The ABAC Code

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

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

13. Part 6 of the ABAC Code provides that:

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

- (i) likely to appeal strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a 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 Company's Response**

14. The Company responded to the complaint by email on 2 February 2022. The principal comments made by the Company were:

- The alcohol marketing communication referred to in the complaint did not receive Alcohol Advertising Pre-vetting Service Approval.
- The Product was first supplied for bona fide retail sale in the ordinary course of business in Australia on 24 November 2021.
- We don't believe the label breaches the code.
- We employ a designer to make our products look eye-catching and fun for adults. The fact we use colours and in this case illustrations of fruits that are inside the beer is part of our design style and is not aimed at nor do we believe it markets to minors.
- The label is synonymous with a fruited beer/alcohol product. These images are directly linked to the beer/alcohol product in question.
- We are using these images to show consumers what fruits are within the beer. We personally don't want it to get to a state where due to the few people having some concern over this all alcoholic products are

packaged the same in black and white cans that say Beer across the front. That would put a lot of people out of work and take a lot of the fun/creativity out of the beer industry.

- This beer is no longer in production and has sold out and won't be made again so all production/marketing is finished on this product.
- We believe this complaint reads like it's from another producer of beer (competitor) with the way the complaint is written/language used. I believe there is a bit of this going on in the industry at the moment which is a shame.
- Please note we have contacted our designer and made note for all new labels going forward to keep these things in mind when designing and will do our best to make sure these don't fall into this category again. We will in particular add the word beer to the can design as much as possible (recognisable alcohol cues).

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

15. Banks Brewing is based in Seaford, an outlying beachside suburb of Melbourne. The Company offers a combination of standard range craft beers supplemented by limited release products. This determination concerns the packaging (can design) of a limited release 'Triple Fruited Gose' branded as 'Juice Bar'.
16. On 3 February 2022 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 advised that the beer is completely sold out, there will be no further sales or promotion of the beer, and it will not be made again. As no rehearing is sought, the Panel has proceeded to make a final determination on this complaint.
17. The Gose style of beer has its origins in the German district of Goslar in the Middle Ages and was brewed with malted wheat and saltwater. In more recent times the style has had somewhat of a renaissance with fruit being used. The Company's product uses blueberry, raspberry and blackcurrant and is described as 'huge berry fruits on the palette, rounded mouthfeel all finished off with a salty kick'.

18. The Company explains that the packaging design aimed to be eye-catching and fun for adults while showing the fruit images directly linked to the product. The complainant believed the can design appeals to children, due to:
- the colourful cartoon-style design which is not synonymous with an alcohol product;
  - the product's prominent reference to being 'juice'; and
  - the main reference to the product being alcoholic in nature is the word "Gose", which is not prominent on the can and is a niche term not readily recognised by minors and adults.
19. This is a case where both the complainant and the Company's opinions can be correct i.e. the packaging might well be intended to appeal to adults and show the nature of the beer in a fun and eye-catching way and at the same time be a design that has a strong and evident appeal to minors. In part, the tension arises because the Company is seeking to speak to a relatively narrow market segment, namely craft beer drinkers who know what a 'Gose' actually means. In contrast, the complainant comes from a whole community perspective, where 'Gose' is hardly a household term and cues about the product are taken from the overall packaging design.
20. The relevant ABAC standard is contained in Part 3 (b) of the ABAC and provides that alcohol marketing communication must not appeal strongly to minors. The standard might be breached if the marketing:
- 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.
21. 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.

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 confectionery 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 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.

25. In arguing that the packaging was consistent with the Code standard, the Company contended that the label is synonymous with a fruited beer/alcohol product. This contention requires that the term 'Gose' would be widely recognised as an alcohol beverage descriptor. In 2021, the ABAC Scheme commissioned research into public attitudes regarding alcohol marketing. As part of this research, the level of community understanding of various alcohol descriptors actually referring to an alcohol beverage was tested. The term 'Fruit Gose' was associated with an alcohol product by 15% of the population, whereas 20% associated it with a non-alcohol product and the majority of 64% were unfamiliar with the term. The research findings support the belief that while 'Gose' is a descriptor that a craft beer drinker may well recognise, a large majority of the community do not associate the term with designating a style of beer.

26. The fact that a large majority of the population could not be reasonably expected to recognise the 'Gose' term as establishing the product as an alcohol beverage does not mean the term cannot be used on packaging and there is no ABAC standard that requires that alcohol beverages be unambiguously identified as alcoholic as such (the requirement for alcohol beverages to contain mandatory alc/vol information is found in direct government labelling regulation). However, the use of a specialised alcohol descriptor such as 'Gose' will heighten the potential of a product being confused with a soft drink if there are no other clear alcohol cues used on the packaging.

27. The Panel believes that the packaging does breach the Part 3 (b) standard. In reaching this conclusion the Panel noted:

- there is the potential for the product to be confused with a non-alcohol beverage as the front of the labelling fails to unambiguously establish the product as an alcohol beverage;
- the name Juice Bar is far more associated with a non-alcohol product than an alcohol beverage;
- the prominent and repeated imagery of a fruit juice container with a straw is highly suggestive of a non-alcohol beverage available to minors;
- the overall impact of the packaging creates relatable imagery for minors inclusive of the product name and fruit and fruit juice container decoration pattern; and
- taken as a whole a reasonable person would probably understand the packaging as having a strong and evident appeal to minors.

28. Accordingly, the Panel makes a final determination that the product packaging is in breach of Part 3 (b)(i) of the Code.

29. The Company's comment about regulatory standards not driving all packaging to be 'in black and white cans that say Beer' is noted. There is however available a very large creative space between plain packaging and packaging that a reasonable person would consider as having strong appeal to minors. The Company would be well advised to take advantage of the ABAC pre-vetting service in making branding decisions such as product packaging.