



## ABAC Adjudication Panel Final Determination No 35/22

**Product:** Henrietta Ale  
**Company:** Wildflower Brewing and Blending  
**Media:** Packaging  
**Date of decision:** 9 June 2022  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Professor Richard Mattick  
Ms Debra Richards

### Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) concerns the packaging of Henrietta Ale (“the Product”) by Wildflower Brewing and Blending (“the Company”). It arises from a complaint received on 9 May 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.

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 9 May 2022.
8. Generally, the Panel endeavours to make a decision within 30 business days of the receipt of a complaint but this timeline is not applicable due to the two-part process involved in determinations concerning product names and packaging.

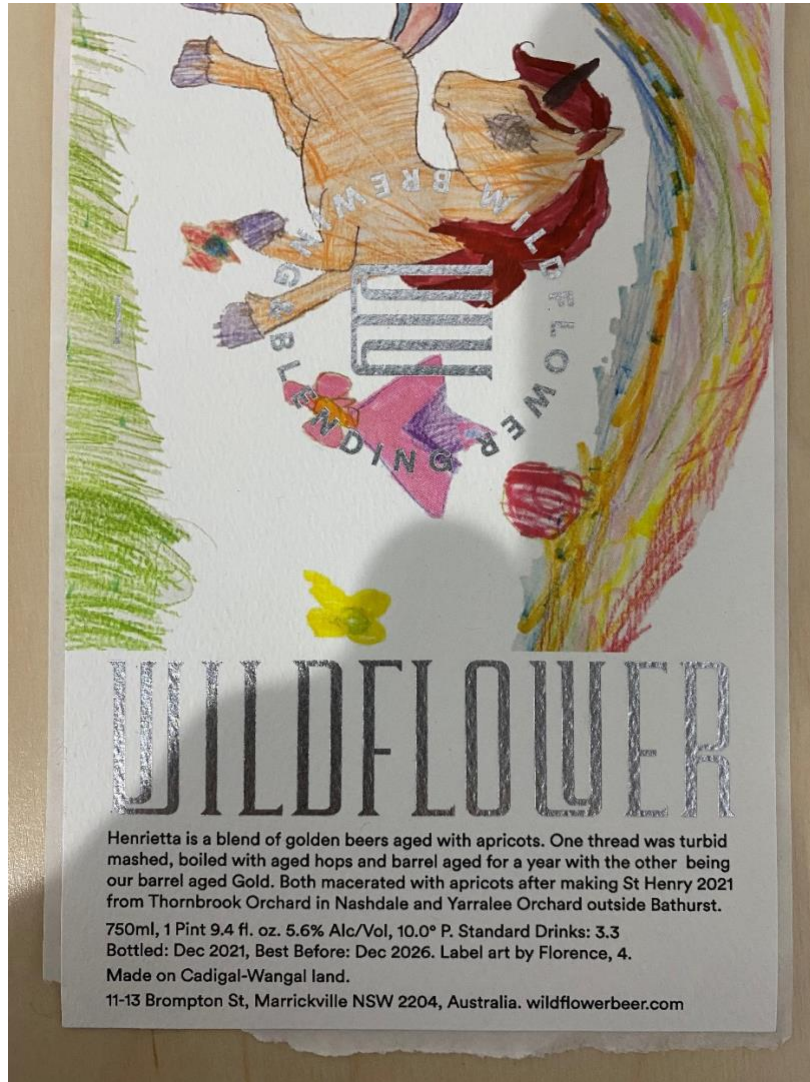
### **Pre-vetting Clearance**

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

10. The complaint relates to the packaging of the Product by the Company as shown below:





## The Complaint

11. The complainant objects to the marketing as follows:

- *Wildflower uses crayon drawings made by children making the label appealing to other minors.*
- *I don't think it is appropriate to use children's drawings to sell beer and I think it attracts minors to the product.*

## 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 letter emailed on 19 May 2022. The principal comments made by the Company were:

- Thank you for raising this complaint to our attention. To date, we have not received any complaints or reasons for confusion directly from our customers.
- As we are not a member of any of the Australian alcohol beverages manufacturing and marketing industry associations that are involved in the operation of ABAC, we are interested in the Panel's discussion regarding our product as a curio.
- Notwithstanding the Panel's decision or what is outlined below, we will cease at once the production of this beer and the printing of this label. If we are ever again to recreate a beer which is comprised of an 18-month-old golden barrel aged Australian Wild Ale using a turbid mash and boiled with aged hops which is left to macerate on second use apricots

for an additional three months and then blended again with an 8 month old barrel aged golden Australian Wild Ale also macerated on second use apricots for an additional three months. If this blend and recipe is ever made again, we vow to never use this label artwork again to depict the beer.

- To the specific issues raised, the advertising did not receive Alcohol Advertising Pre-vetting Service Approval, as we are not a member of any of the associations involved in ABAC.
- The product was made available for sale on 5 May 2022.
- The label art of this product was indeed coloured by a child, my four-year-old daughter Florence. The artist would like to rebut the complainant's claim that the artwork was coloured by crayon, which it was not, and instead insert into the record that this was a mixed media on paper drawing using graphite, watercolour, coloured markers and colouring pencils.
- The product is available into the market only via 750ml champagne style bottles for a recommended retail price of \$28 per bottle. In our humble view, the potential for this product to be confused with a soft drink is inconceivable not only because of its packaging type, but also the fact it is described as an Ale directly on its packaging. Furthermore, I do not believe that a reasonable person would believe that this product has a strong or evident appeal to minors when considering its packaging as a whole.
- We look forward to the Panel's discussion on our product and we will take the following actions:
  - remove the offending Instagram post included in your 11 May letter sent to us from ABAC;
  - not print any more of the offending labels; and
  - better review and apply the Code's standards when creating product labels.

## The Panel's View

15. Wildflower Brewing and Blending is based in Marrickville, an inner west suburb of Sydney. The Company produces craft beers that are brewed with yeast playing the dominant role as opposed to grains and hops. This means each range is individual in its characteristics and as such product runs are small. Reflecting this, the Company appears to adopt distinctive packaging (product labelling) for each beer released with the only common branding point being the use of a stylised 'W' with the company name. This determination concerns the labelling of a current release - 'Henrietta Ale'
16. The Henrietta Ale is described as a golden beer aged with apricots. It is packaged in a 750 ml beer bottle and uses a label featuring a child-like drawing of a unicorn, rainbow and green grass. The Company explains the label artwork was coloured by a four-year-old daughter of one of the Company founders. The side/rear of the label contains product information.
17. The complainant was concerned by the label and submitted that it will attract minors to the product. This concern raises Part 3 (b) of the ABAC that 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.
18. On 24 May 2022 the Panel made a provisional determination that the product packaging is in breach of Part 3 (b) 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. As the Company has not sought a rehearing, the Panel has proceeded to make a final determination on this complaint.
19. 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.

20. 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.
21. 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.
22. The Company points out that it is not signatory to the ABAC Scheme but it supports the responsible service and marketing of alcohol. It contends that while the label was coloured by a child, a reasonable person would not believe it has strong appeal to minors as:



- it would not be confused with a soft drink due to its packaging type and use of the term “ale”; and
  - taken as a whole, it would be recognised as a style of beer.
23. Although it was argued the labelling would not breach the ABAC standard, the Company advised it will not print further labels and will better review and apply the ABAC standards going forward.
24. The Panel believes that the packaging does breach the Part 3 (b) standard. In reaching this conclusion the Panel noted:
- given the use of unicorn imagery on many products and services which are directed towards minors, the use of a unicorn image on alcohol branding does create an inherent possibility of the branding having a strong appeal to minors;
  - the unicorn image and the children’s drawing/colouring in style more generally gives the label a strong appeal to minors due to:
    - the use of imagery familiar to minors; and
    - the depiction of an activity (colouring in) that is relatable to minors;
  - the front of the labelling fails to unambiguously establish the product as an alcohol beverage, although the overall packaging, particularly the bottle type, means it is unlikely to be confused with a soft drink; and
  - taken as a whole, a reasonable person would probably understand the label has a strong and evident appeal to minors.
25. Accordingly, the Panel makes a final determination that the product packaging is in breach of Part 3 (b)(i) of the Code.