



ABAC Adjudication Panel Determination No 66/22

Product: Violet Crumble Espresso Martini
Company: Feminaè Beverage Co
Media: Packaging
Date of decision: 16 September 2022
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Louisa Jorm
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 22 August 2022 and concerns the packaging by Feminaè Beverage Co (“the Company”) of its Violet Crumble Espresso Martini (“the Product”).
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 22 August 2022.
8. Generally, the Panel endeavours to make a decision within 30 business days of the receipt of a complaint but this timeline depends on the timely receipt of materials 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 sought for the Products.

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:

- *They use a confectionery logo (Violet Crumble) on an alcoholic product, completely against ABAC guidelines. [This] creates massive confusion with confectionery.*
- *[The] imagery...creates confusion with confectionery or soft drinks, such as the presence of visual design features that would be commonly used on non-alcoholic beverages.*

1.

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 31 August 2022. The principal comments made by the Company were:
- The marketing communication was not submitted to the Pre-vetting service.
 - The product was supplied from 25/08/2022 – 19/08/2022 via online sale to 18+ consumers only (no longer on sale).
 - We believe the product does not have 'Strong or Evident Appeal to Minors' as:
 - The product clearly identifies as an alcohol beverage as it contains:
 - 'ESPRESSO MARTINI', 'Cocktail', '15% ABV' on the front of the packaging.
 - 'ESPRESSO MARTINI' font on the front of the packaging is larger than the 'Violet Crumble' logo.
 - The rear of the packaging clearly states 'ESPRESSO MARTINI', 'Standard Drinks 24' along with other references to vodka, spirits and cocktails.
 - 'DRINK RESPONSIBLY' logo is clearly displayed on the rear of the box in line with regulations.
 - The packaging is a 2-litre wine cask box. The 2-litre packaging type is not used in any products aimed at consumption by children and has only ever been associated with wine or alcoholic products.
 - The leopard print foiling on the packaging along with the diamond on the packaging does not appear on any confectionary items further highlighting this is not a confectionary product.
 - The product is only for sale online through our website of which you have to be 18+ to purchase.
 - We note that there is only a single (1) complaint to this effect from the 100,498,941+ impressions that would have seen the product or marketing from our report.

The Panel's View

15. Feminaè Beverage Co was established in 2020. Based in Melbourne, it offers via its website a range of gins and pre-mixed cocktails, including espresso martinis. It is the packaging of its Violet Crumble Espresso Martini served in a two litre cask which has drawn this complaint.
16. The product packaging uses the Violet Crumble trademark under licence from confectionary company, Robern Menz Australia Pty Limited. The packaging is a predominantly purple two litre cask, with small, gold coloured, randomly placed shapes on the sides. The front of the cask features the Violet Crumble name, along with the name of the retailer, Feminaè Beverage Co, and the words 'Espresso Martini' and 'Cocktail'. The ABV of 15% is also shown. The back of the cask again shows the Violet Crumble name and provides additional information about the product, including that it is an alcoholic beverage.
17. The complainant is concerned that the packaging's use of the Violet Crumble name and colour scheme will create confusion with the confectionery and as a result have a strong appeal to minors.
18. This concern raises Part 3 (b) of the ABAC. This standard provides that an alcohol marketing communication (including product packaging) must not have strong or evident appeal 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.
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. 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 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.
23. Violet Crumble is a well-known Australian chocolate confectionery item with a honeycomb centre. First made in Melbourne in 1913, it is currently manufactured by Robern Menz Australia Pty Limited in Adelaide. Its various product variants (bars, cubes, nuggets) are commonly sold in purple packaging with the well known Violet Crumble name shown. The brand name and colouring has also been employed on an ice cream.
24. The Company argues that the packaging does not appeal to minors and contains multiple descriptors making it clear that the product is alcoholic. To support its position the Company explains that:
- two litre casks have long been associated with wine or alcoholic products and are not used for products commonly consumed by children; and
 - the leopard print foiling on the packaging along with the diamond on the packaging does not appear on any confectionery items, further highlighting it is not a confectionery product.
25. The use of a well known confectionery brand name such as Violet Crumble in alcohol beverage marketing will always raise a heighten potential of the marketing material being recognised by minors. Accordingly, the design of such marketing material must be undertaken with considerable care and mindful of the overall impact of the marketing may have for minors. For product packaging, employing confectionery branding on a package type used for soft drinks e.g. a can, will enhance the risk the overall impact will have strong appeal to minors.
26. In the current case, on balance, the Panel does not believe the Part 3 (b) standard has been breached. In reaching this conclusion the Panel has regard to:
- two litre casks are commonly associated with alcohol beverages particularly wine and are not used for products commonly consumed by minors;
 - the packaging does establish through the descriptor 'espresso martini', 'cocktail' and the cask style packaging that the product is alcoholic and it is unlikely a reasonable person would confuse the product with a soft drink or confectionery notwithstanding the Violet Crumble name;
 - the Violet Crumble name is likely relatable to minors however the overall packaging design employs a pattern not used on the confectionery;

- the packaging uses deep colours rather than eye catching bright and contrasting colours;
- taken as a whole, the appeal to minors is incidental rather than strong and evident.

27. The complaint is dismissed.