



ABAC Adjudication Panel Determination No 100/22

Product: Rosé Coloured Glasses
Company: Wine Not The Brand
Media: Packaging
Date of decision: 19 December 2022
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Jeanne Strachan

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 14 November 2022 and concerns the packaging by Wine Not The Brand (“the Company”) of Rosé Coloured Glasses in 250ml pouches (“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 14 November 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 obtained for the product packaging.

The Marketing Communication

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



The Complaint

11. The complainant objects to the marketing as follows:

- *The packaging is not age appropriate and*
- *is not appropriate for alcohol, a squeezezy yoghurt pouch only seen in supermarkets.*

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 22 November 2022. The principal comments made by the Company were:

- This product was first released in 2004, and into liquor stores by McWilliams (who has been in operation since 1877) approximately 12 years ago, with no complaints or issues recorded.
- The product line was picked up by major liquor stores which indicates due diligence was done to ensure the product was appropriate for the industry. While McWilliams no longer produce or sell this product, to our knowledge they were one of the first to bring wine in a pouch to the

Australian market. To the best of our knowledge, and our manufacturing partners, there have been no issues with children confusing the pouch for yoghurt over the last 12+ years.

- Our wine pouches were released in April this year and are not available in supermarkets. To access wine pouches you must be either shopping online through our website which is age protected, or in a venue which is 18+. Wine pouches are not available or accessible to minors.
- Any promotion online is only visible to those 18+ and our social media account clearly states it is intended for those 18+.
- This product is clearly made for adults:
 - This concept has been done before and we are not the only providers of wine in a pouch globally
 - The product is not available to purchase or view anywhere children would be. We ship direct to consumers from an age-protected website, through Australia Post who require an adult to sign for a delivery of alcohol. We deliberately chose a direct to home model to ensure the product was not available to children. Sale is restricted to adults.
 - The brand name is “wine not” which is a clear indication the products are related to wine products
 - The image on the front is a wine glass, not an image that appeals to children. There is no recognisable cartoon, branding or catch phrases that children would be familiar with that would lead them to believe this is a product designed for them
 - The back labelling clearly indicates standard drinks and again, uses a wine glass, not something relatable to children
 - The packaging itself is not easy for a child to open as the lids are not child-friendly lids. They are sealed with force requiring an adult hand to open. Child-friendly products are required to use a choke proof anti swallow cap for children - we intentionally avoided use of child friendly cap, as this product is not intended for child use and is for adults only.
- In addition to the lack of accessibility to children and the clear labelling of the product itself it should be noted that in a supermarket a variety of

products are in pouches including: washing liquid, pet food, shampoo, hot sauce, body scrub, sunscreen, olive oil etc.

- By the logic suggested, all of these products and more are inappropriately packaged and might lead children to ingest them, especially as they are visible and available in most supermarkets. Wine pouches are not available in supermarkets or anywhere children would be present.
- It should also be noted that most beer, seltzer, RDL and other carbonated alcoholic drinks are also sold in the same cans that soft-drink is and this packaging similarity is globally recognised and not seen as inappropriate. Added to this, supermarkets are now stocking and displaying non alcoholic wines, sparkling, cocktails, beers etc in the aisles children have access to, and regularly at children's eye level. If this is appropriate, socially accepted & approved by regulatory bodies there seems to be little reason to fear a child coming across wine pouches on a restricted website or social media channel. Once a wine pouch is in a home it is a parent's responsibility to restrict access and store it appropriately, like any other alcohol, laundry detergent, or allergy inducing product. However, as mentioned, even if one found its way into a child's hands it is extremely unlikely that a child could remove the lid, as we opted not to use the child-friendly cap, which is far too small and secure for a child to remove by themselves.
- The pouch industry is rapidly expanding as the world moves to be more eco-conscious. The wine industry has a fundamental requirement to reduce its carbon emissions - demonstrated by all wine industry bodies. Lowering the industry's carbon footprint is critical. To do this, flexible packaging is required.
- Pouches are 94% lighter than bottles, saving extraordinary amounts of resources in both production and transportation. You will be seeing many more alcohol brands shifting to pouches of varying sizes as this packaging material allows for easier portion control, and more responsible disposal. Over the coming years the pouch industry is working hard to be 100% biodegradable which saves the recycling industry a tremendous amount of resources.
- While our brand may be leading the Australian market in this particular product, this industry is growing quickly as consumers want smaller portion sizes, and manufacturers look to create more eco friendly products. You will be seeing more and more wine, cocktail, and other brands and products in general shift to packaging in "squeezy pouches".

Yoghurt is certainly not the only thing in a pouch. Europe is currently leading the way in flexible packaging and you can expect to see Australian producers follow suit.

The Panel's View

Introduction

15. Wine Not The Brand was founded in 2018 with millennials as the Company's target market. In 2021 the Company introduced 250ml 'wine pouches' to its product range. The pouches are made of plastic with a base that enables the pouch to remain upright. At the top is a screw top to access the liquid contained in the pouch. The Company contends that pouches offer a range of benefits as a packaging type including:
 - pouches are much lighter than traditional containers such as bottles and hence are less resource intensive to produce and transport;
 - they allow for better portion control; and
 - the pouches are more easily disposed, and a fully biodegradable material will be shortly available.

16. The complainant argues the packaging is not appropriate for an alcohol product due to its similarity to packaging used for children's products such as yoghurt. The concern is directed at the packaging style i.e. the pouch itself rather than any particular aspect of the design or messaging printed on the pouches. The nature of the complaint requires the Panel to consider two issues namely:
 - does the ABAC Scheme permit the restriction of a class of packaging because of potential inconsistency with an ABAC standard; and
 - is this particular example of packaging inconsistent with the ABAC standard regarding strong appeal to minors.

Classes of packaging and the ABAC Scheme

17. The ABAC Scheme and the standards contained in the Code have the policy aim of alcohol marketing occurring in a responsible manner. This recognises that while alcohol is a lawful product and it can be freely marketed, the marketing needs to complement public policy objectives that aim to limit the harm that can arise from irresponsible or unhealthy levels of alcohol consumption.

18. The ABAC Scheme has operated since 1998, but it did not extend to product brand names and product packaging until 1 November 2009. The Code is built on specific standards of good marketing practice and these standards in turn sit within a wider regulatory framework of government requirements and other industry codes of practice. Product packaging is subject to:
- the National Food Standards which proscribe legally mandated information that must be contained on alcohol beverage packaging eg alcohol to volume content;
 - State and Territory liquor licensing requirements; and
 - industry codes such as the ABAC.
19. The power to, in effect, ban alcohol products or types of packaging rests with the government and not with the ABAC Scheme. All alcohol producers and retailers are required to obtain a liquor licence from the relevant State or Territory Authority. The governing legislation empowers the placing of conditions on the grant of a licence and the relevant authority can exclude certain products and/or packaging designs from the market.
20. For its part, the ABAC cannot 'ban' an entire class of packaging type. The jurisdiction given to the Panel is to determine the consistency of an individual marketing communication (which includes a brand name and product packaging) with the Code standard or standards raised by a complaint. This means the Panel might find that the individual execution of a packaging type is in breach of a Code standard, but this does not go to every possible use of the packaging type.
21. In essence, the packaging type is a relevant factor in assessing the consistency of the marketing with the ABAC standards. The other factors are the design features of the marketing messaging placed on the packaging i.e. the wording and the colours used etc.

Does the product packaging have strong appeal to minors

22. The complainant's concern about the packaging 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.
23. 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.
24. 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.
25. 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.

26. 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.
27. The Company contends that the packaging is consistent with the ABAC standard. It points out that:
- 250 ml pouches are used for many products (including cleaning products and by other alcohol brands), and aren't exclusively associated with products designed for consumption by children;
 - the packaging clearly identifies the contents as being alcoholic, both through the use of the word "wine" and the picture of a wine glass;
 - the label does not include illustrations or text that would specifically appeal to children; and
 - it is common and acceptable for alcoholic drinks to be sold in cans, which are also used for soft-drinks consumed by children.
28. It is recognised that soft drinks and alcoholic beverages will invariably come in similar packaging styles. For instance, both beer and soft drinks are sold in cans. A fruit juice and alcohol spirit may both be sold in glass bottles. The pouch style packaging does have some history with alcohol products as pointed out by the Company, but it would be fair to say that most consumers would not associate pouches with alcohol products.
29. A brief survey of items available at major supermarkets indicates the pouch style packaging certainly is employed with products for children such as pureed

fruit and baby foods, fruit juices, and yoghurts. Equally however, pouches are used in a range of other products including:

- shampoo and body wash;
- laundry liquid;
- air purifier; and
- dog food.

30. A reasonable conclusion is that the packaging type is not typically associated with alcohol beverages, and while the pouches are used with a variety of products, there are well established children's foodstuffs that come in this type of container. As explained earlier, this does not mean the pouches cannot be used for alcohol, but alcohol companies will need to be mindful of the potential for the familiarity of the product type with minors to enhance the prospect of the packaging having strong appeal to minors.

31. The Company put weight on an argument that the sales channels for the product meant that it was unlikely that minors will be exposed to the product. This is a fair point to make, but it is not a defence to the obligation to ensure that the product packaging is not designed so as to have strong appeal to minors. All alcohol companies should seek to limit the potential of its marketing to reach minors. The ABAC has Placement Rules which detail these obligations. Compliance with the Placement Rules does not mean it is ok for the content of alcohol marketing to have strong appeal to minors.

32. As noted, the packaging type is an important factor to be assessed in the potential appeal of the marketing to minors, but it is one of a range of factors. The other factors include the design of the messaging on the packaging, the colours used and the clarity of identifying that the beverage contained is in fact alcohol and not a soft drink or fruit juice.

33. Drawing this together, the Panel believes that the packaging does not breach the Part 3 (b) standard. In reaching this conclusion the Panel noted:

- whilst pouches are used for food and beverages consumed by children, they are also used for other products;
- the colours used are muted rather than bright and contrasting;
- the packaging does not depict objects, characters or concepts with strong or evident appeal or familiarity to children;

- the product clearly establishes that the contents are alcoholic through use of the word 'wine' and the predominate illustration being of a glass of wine and an adult woman; and
 - taken as a whole a reasonable person would probably understand the packaging does not have a strong or evident appeal to minors.
34. It should be noted that in accordance with the rules and procedures applying to public complaints, the Panel is assessing the concern raised by the complaint, namely the appeal of the packaging to minors. It would be prudent for the Company to seek advice from the ABAC pre-vetting service as to its marketing messaging more widely in relation to all ABAC standards.
35. Accordingly, the Panel makes a final determination that the product packaging is not in breach of Part 3 (b)(i) of the Code.