

ABAC Adjudication Panel Final Determination No 24/23

Products: Various
Company: Billson's Beechworth
Media: Packaging
Date of decision: 30 March 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Jeanne Strachan

Introduction

1. This final determination by the ABAC Adjudication Panel ('the Panel') arises from a complaint received on 6 February 2023. It follows a provisional determination made on 16 March 2023 and concerns the packaging by Billson's Beechworth ('the Company') of the following vodka products ('the products'):
 - Berry Jelly
 - Banoffee
 - Grape Bubblegum
 - Green Apple
 - Peaches & Cream
 - Rainbow Sherbet
 - Tropical Punch
 - Watermelon
 - Zesty Lemon
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:
 - (b) 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;

(c) 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 6 February 2023.
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.

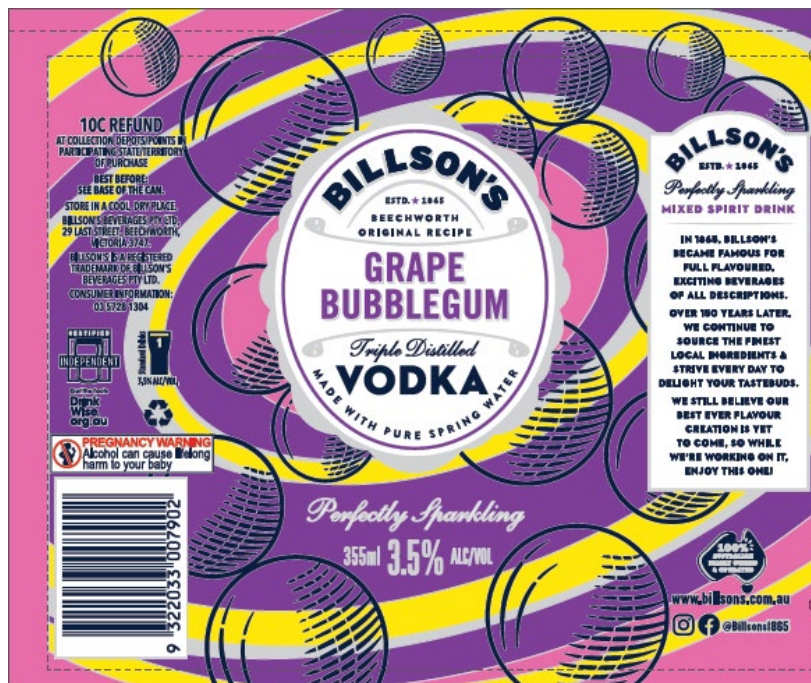
Pre-vetting Clearance

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 Communications

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:

- *As a parent of children in this age demographic the flavours/colours and descriptions of cordials are the same as the vodka drinks as well as soft drinks for consumption. Flavours such as Fairy Floss, Grape Bubblegum, Rainbow Sherbet, Tropical Punch are drinks that are known to children.*

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 phone call on 13 February 2023 and by email on 24 February 2023, confirming the following:

- We're currently undertaking a full review of our packaging and are committed to working closely with ABAC to ensure everything is compliant. We'll accept the determination of the panel and work swiftly to rectify any breaches.

15. The Company responded to the provisional determination by email on 23 March 2023. The additional comments made by the Company were:

- We accept the Panel decision and will work to resolve as quickly as possible.

16. As the the Company has accepted the provisional determination, under the rules and procedures applying to the Panel the determination now becomes final.

The Panel's View

Background

17. This is the second determination regarding the Company's pre-mixed flavoured vodkas packaged in 355ml cans. The first decision, Determination 118/22, dealt with 14 separate products in the Company's range. This determination considered a further nine can designs. The determination has been triggered by some Facebook posts from the Company but it is the packaging of the products rather than the posts themselves which is the basis of the complainant's concern.
18. On 16 March 2023 the Panel issued a provisional determination on the consistency of the packaging of nine vodka products from Billson's Brewing with the ABAC standard in Part 3 (b)(i) of the Code. The provisional determination found the packaging of six of the products consistent with the standard and three of the vodka products in breach of the ABAC standard. The three products found to have strong or evident appeal to minors were:
- Tropical Punch
 - Grape Bubblegum
 - Rainbow Sherbet.
19. The complainant argues that the packaging is not appropriate for an alcohol product due to the colours and product names used being similar to soft drink and confectionery products consumed by minors. Determination 118/22 provided detailed background to the products and the interplay between the ABAC Scheme and obligations under State government liquor promotion guidelines. This information will not be repeated here. Rather the determination deals with:
- the Code standard and general considerations
 - determination of the 'fruit flavoured' product packaging:
 - Green Apple Vodka
 - Watermelon Vodka
 - determination of the 'soft drink' flavoured product packaging:

- Tropical Punch Vodka
- Zesty Lemon Vodka
- determination of the 'dessert' flavoured product packaging:
 - Berry Jelly
 - Banoffee
 - Peaches & Cream
- determination of the 'confectionery' flavoured product packaging:
 - Grape Bubblegum
 - Rainbow Sherbet

Code Standard and General Considerations

20. The complainant's concern raises the ABAC standard contained in Part 3 (b)(i) of the Code. This standard requires that an alcohol marketing communication (which includes brand names and product packaging) must not have strong or evident appeal to minors. This might occur if the product packaging:
 - 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. The benchmark applied when assessing if an ABAC standard has been satisfied is the 'reasonable person' test. This means the Panel puts itself in the shoes of a person who has the life experiences, opinions and values commonly held by most Australians, and assesses how this reasonable person would probably understand the marketing communication.
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 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. When assessing a design of a can or bottle, it cannot be expected that a reasonable person will turn the container around the full 360 degrees and study

it in fine detail. Rather it is the front of the can/bottle that will be most influential in how the person will probably understand the packaging and impressions will be most strongly shaped by larger font writing and the predominant colours and design features.

26. While the complainant referenced product names adopting flavours of soft drinks and confectionery, it is important to note that the ABAC Scheme and the Code is directed at the marketing of alcohol beverages. ABAC does not regulate physical beverages, namely the taste, colour, viscosity or alcohol to volume strength.

The Panel's Determination

27. A common label format is adopted by each can in the range whereby:
- the colours used reflect the product flavour eg yellow for lemon, green for green apple;
 - in the centre of the front of the can is an oval shaped white space which contains in large black font the Company's name and the word 'vodka' in large font. In smaller font under the Company's name is 'Estd 1865 Beechworth original recipe'. The word 'vodka' is accompanied by 'triple distilled' and 'made with pure spring water';
 - the product name is at the centre of the white oval and in a colour used in the overall background;
 - the bottom of the front of the can in white font has the words 'lightly sparkling mixed spirit drink' and the alc/vol percentage; and
 - the side/rear of the can contains product information.

Fruit flavoured products

28. In addition to the standard format the table below summarises the particular features of the fruit flavoured vodka cans:

Product descriptor	Unique packaging features
Green Apple Vodka	The 'Green Apple' product packaging is predominantly light green in colour. Darker green heritage line drawings of apples are shown on the light green background. Apart from silver, black and white, no other colours are visible in the design.
Watermelon Vodka	The predominant colour for the 'Watermelon Vodka' packaging is red. Green heritage line drawings of limes and leaves are shown on the red background. Apart from silver, black and white, no other colours are visible in the design.

29. Apples and watermelons would be familiar to minors, and both are used as flavourings for non-alcoholic drinks and confectionery consumed by minors (although apple is probably more so than watermelon). Further, the cans use outlines of the shapes of fruits and this gives the packaging some relatability to minors.
30. On the other hand, the labelling does use the clear alcohol descriptor of vodka and other alcohol cues and would most likely not be confused with a soft drink. The colour palette is a combination of the background colour and the white oval containing branding and product information.
31. The Panel finds that the fruit flavoured packaging does not breach the Code standard, noting that:
- the overall design of each product can is mature in nature and not individually eye-catching;
 - the background colours used are not bright and contrasting;
 - the illustrations are subtle, and the heritage line drawing style is not commonly used in children's products, books or programs;
 - while the fruit flavour descriptors would be familiar to minors the packaging does not contain features likely to appeal strongly to minors;
 - the use of the word 'Vodka' provides a strong alcohol cue such that the products would not be confused with a soft drink; and
 - taken as a whole the packaging has incidental appeal rather than strong or evident appeal to minors.

Soft drink flavoured products

32. In addition to the standard format the table below summarises the particular features of the soft drink flavoured vodka cans:

Product descriptor	Unique packaging features
Tropical Punch Vodka	The 'Tropical Punch Vodka' product is predominantly blue in colour. Red/orange, green and yellow heritage line drawings of lemons, apples, oranges, bananas and pineapples are shown on the blue background. Apart from silver, black and white, no other colours are visible in the design.
Zesty Lemon Vodka	The packaging of 'Zesty Lemon Vodka' is yellow in colour and shows orange heritage line illustrations of fruits.

33. To some extent the product names, or variations thereof are used on soft drinks - carbonated sodas, juice or cordials - and hence would be familiar to minors. Further, the cans use outlines of the shapes of fruits, and this enhances the reliability of the packaging to minors.
34. On the other hand, the labelling does use the clear alcohol descriptor of vodka and other alcohol cues and would most likely not be confused with a soft drink. The colour palette is a combination of the background colour and the white oval containing branding and product information.
35. The Panel does not believe the Zesty Lemon product packaging would have strong appeal to minors. The Tropical Punch however would have strong appeal given:
- the familiarity of the product name to minors combined with:
 - the bright and contrasting colours employed in the outline of the fruit images and
 - taken as a whole the packaging would go beyond incidental appeal and have strong or evident appeal to minors.

Dessert flavoured products

36. In addition to the standard format the table below summarises the particular features of the dessert flavoured vodka cans:

Product descriptor	Unique packaging features
Banoffee	The 'Banoffee Vodka' product is predominantly yellow in colour. Brown heritage line drawings of bananas and sugar cubes are shown on the red background. Apart from silver, black and white, no other colours are visible in the design.
Peaches & Cream	The packaging of 'Peaches & Cream Vodka' is predominantly orange in colour, with darker orange heritage line drawings of peaches.
Berry Jelly Vodka	The packaging of 'Berry Jelly Vodka' is predominantly purplish/pink/ in colour, with darker heritage line drawings of various berries

37. The Panel considered the following uses of the above descriptors:
- banoffee usually refers to a sweet pie filling, made using bananas, toffee and cream or condensed milk. A quick Google search shows that it was apparently first created in England in 1971. The dessert

would have some familiarity to minors but would not be a staple treat for minors;

- compared to other fruits, peaches are consumed relatively less often by minors and are not as prevalent as an ingredient in desserts or preserves, or as a flavouring for ice-creams, cordials and confectionery items;
- jelly is a dessert item consumed more commonly by children than adults.

38. The Panel believes that the packaging does not breach the Part 3 (b)(i) standard. The Panel noted:

- the overall design of each product can is mature in nature and not individually eye-catching;
- the colour palette does not use strong contrasts;
- the illustrations are subtle, and the heritage line drawing style is not commonly used in children's products, books or programs;
- the use of the word 'Vodka' provides a strong alcohol cue such that the products would not be confused with a soft drink;
- while 'jelly' would have stronger resonance with minors, the packaging of that product would not likely attract minors than it would adults; and
- taken as a whole the packaging has incidental appeal rather than strong or evident appeal to minors.

Confectionery flavoured products

39. In addition to the standard format the table below summarises the particular features of the confectionery flavoured vodka cans:

Product descriptor	Unique packaging features
Grape Bubblegum	The packaging of 'Grape Bubblegum Vodka' shows purple, yellow and pink circles of colour. Silver, black and white are also used in the packaging design. Black heritage line drawings of bubble gum balls are also shown.
Rainbow Sherbet	The packaging of 'Rainbow Sherbet Vodka' shows repeated green, blue and purple arches. Silver, black and white are also used in the packaging design.

40. The Panel believes that the packaging breaches the Part 3 (b)(i) standard. While the packaging does use a clear alcohol descriptor of 'vodka', the Panel noted that the combination of the following features would strongly attract the attention of minors:
- multiple bright colours in eye-catching designs;
 - the descriptors 'bubble gum' and 'sherbet', which are both confectionery items commonly consumed by children;
 - the term 'rainbow' elevates the appeal of the rainbow sherbet product to minors;
 - the use of the names 'bubble gum' and 'sherbet' would likely contribute to an illusion of a smooth transition to an alcohol product for a minor; and
 - taken as a whole, a reasonable person would conclude that the packaging has strong or evident appeal to minors.

Conclusion and final determination

41. This has been an involved determination due to sheer number of products, and the adoption of product names which all have some degree of association with well-known soft drinks or confectionery. In such instances, there is always a prospect that packaging might have appeal to minors and depending on the name and packaging design this can become a strong and evident appeal that offends the core ABAC standard in Part 3 (b)(i).
42. The Company is not a signatory to the ABAC Scheme and has not made a prior commitment to comply with Code standards. That said, the Company has made clear its intention to utilise pre-vetting and undertake ABAC training courses going forward. This commitment to good practice in alcohol marketing speaks highly of the Company's corporate responsibility.
43. The Panel therefore makes a final determination that the 'Tropical Punch', 'Grape Bubblegum' and 'Rainbow Sherbet' vodka products breach Part 3 (b)(i) of the Code by having strong or evident appeal to children. In relation to the packaging of the other six products, the complaint is dismissed.