

ABAC Adjudication Panel Final Determination No 71/23

Products: Various
Company: Billson's Beechworth
Media: Packaging
Date of decision: 8 June 2023
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 21 April 2023 and concerns the packaging by Billson's Beechworth ('the Company') of the following vodka products ('the products'):
 - Sour Scream
 - Sour Blueberry
 - Musk
 - Candy Cane
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 21 April 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 obtained for the Sour Blueberry Vodka and Musk Vodka product packaging (Approval Numbers 5162 and 5467 respectively). Pre-vetting approval was not obtained for Sour Scream Vodka and Candy Cane Vodka.

The Marketing Communications

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



10C REFUND
AT COLLECTION DEPOTS/POINTS IN PARTICIPATING STATE/TERRITORY OF PURCHASE

BEST BEFORE:
SEE BASE OF THE CAN.

STORE IN A COOL, DRY PLACE.
BILLSON'S BEVERAGES PTY LTD,
29 LAST STREET, BEECHWORTH,
VICTORIA 3747.

BILLSON'S IS A REGISTERED TRADEMARK OF BILLSON'S BEVERAGES PTY LTD.
CONSUMER INFORMATION:
03 5728 1304

INDEPENDENT
Get the Best Drink Wherever you go.

1.5% ALC/VOL

PREGNANCY WARNING
Alcohol can cause lifelong harm to your baby

BILLSON'S
ESTD. ★ 1865
BEECHWORTH
SEASONAL EDITION

CANDY CANE

Triple Distilled
VODKA
MADE WITH PURE SPRING WATER

Perfectly Sparkling
355ml **3.5%** ALC/VOL

100% AUSTRALIAN FAMILY OWNED & OPERATED

www.billsons.com.au
@Billson1865

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The Complaint

11. The complainant objects to the marketing as follows:

- [Billson's Musk] is alcohol that is candy flavoured. I would not want kids to see this. I think this is targeted at teenagers. It basically looks like soft drinks with all the colours. I notice that on their Instagram and their website there are many other products like this (link and screenshots provided).

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 28 April 2023. The principal comments made by the Company were:
 - *Sour Scream was a one-off seasonal release for Halloween last year, as Candy Cane was for Christmas. Neither was pre-vetted at the time. Having implemented ABAC training and pre-vetting into our standard procedures earlier in the year, we believe that in hindsight, the combination of flavour name, colour and illustration style could be eye catching to minors and have since pre-emptively discontinued these flavours.*
 - *Musk and Sour Blueberry both received pre-vetting. We don't believe either has primary appeal to minors given the colours chosen, illustration style, and clear labelling of Vodka.*
15. The Company responded to the provisional determination by email on 2 June 2023, advising that it would not be seeking a rehearing.
16. As 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 third determination regarding the Company's pre-mixed flavoured vodkas packaged in 355ml cans. The first determination (118/22) dealt with 14 separate products and the second determination (24/23) with a further nine in the Company's range. This determination considers a further four can designs. It has been triggered by Instagram posts from the Company, and depictions of the products on the Company's website, but it is the packaging of the products, rather than the posts and internet content, which is the basis of the complainant's concern.

18. On 17 May 2023 the Panel issued a provisional determination on the consistency of the packaging of four 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 two of the products consistent with the standard and two of the vodka products in breach of the ABAC standard. The two products found to have strong or evident appeal to minors were:
- Sour Scream; and
 - Candy Cane.
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:
 - Sour Blueberry
 - determination of 'occasion' or 'event' themed product packaging:
 - Sour Scream
 - determination of the 'confectionery' flavoured product packaging:
 - Candy Cane
 - Musk.

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 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 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:
- each can has its own colour scheme and packaging design features;
 - in the centre of the front of the can is an oval shaped white space (other than Sour Scream which is light blue) that contains in large black font the Company's name and the word 'vodka' in large font. In smaller font under the Company's name on the Sour Blueberry and Musk labels is 'Estd 1865 Beechworth original recipe'. On the Candy Cane and Sour Scream labels the words 'original recipe' is replaced by 'special edition'. The word 'vodka' is accompanied by 'triple distilled' and 'made with pure spring water';

- the product name is at the centre of the oval and in a colour used in the overall background;
- the bottom of the front of the can in white font (other than Sour Scream which is light blue) has the words 'Perfectly Sparkling' and the alc/vol percentage; and
- the side/rear of the can contains product information.

Fruit flavoured product

28. In addition to the standard format the table below summarises the particular features of the Sour Blueberry vodka can:

Product descriptor	Unique packaging features
Sour Blueberry Vodka	The 'Sour Blueberry' product packaging is predominantly dark blue in colour, with a number of randomly placed pink, purple, grey and lighter blue differently sized, pointed shapes.

29. The Panel makes a determination that the Sour Blueberry Vodka packaging does not breach the Code standard, noting that:

- the overall design of the product can is mature in nature;
- the background colours used are not overly bright and contrasting and the geometric shapes would not likely have a strong appeal to minors;
- blueberries are consumed across age groups, and are not a prevalent ingredient used in children's desserts, or as a flavouring for ice-creams, cordials and confectionery items likely to have high consumption levels with minors as compared to adults;
- the use of the word 'Vodka' provides a strong alcohol cue such that the product would not be confused with a soft drink; and
- taken as a whole the packaging would at most have incidental appeal rather than strong or evident appeal to minors.

Confectionery flavoured products

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

Product descriptor	Unique packaging features
Candy Cane Vodka	The packaging of 'Candy Cane Vodka' has a bottle green background, against which illustrations of red and white candy canes, white snowflakes and lighter green leaves are shown.
Musk Vodka	The packaging of 'Musk Vodka' has a background of dark blue, light blue, dark pink (almost red) and grey curvy stripes.

Candy Cane Vodka

31. The Company advised the product was a seasonal release for Christmas 2022. The Panel believes that the Candy Cane Vodka 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:

- the packaging imagery creates a strong association with well recognised Christmas tropes and would be relatable to minors;
- the descriptor and pictures of candy canes, which are a festive confectionery item consumed commonly by minors and 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.

Musk Vodka

32. A limited internet search indicates that 'musk' was a name originally given to a substance with a strong odour obtained from a gland of the musk deer. Natural musk was used extensively in perfumery until the late 19th century when economic and ethical motives led to the adoption of synthetic musk, which is now used almost exclusively.
33. 'Musk sticks', which are artificially flavoured with a substance that is reminiscent of musk perfume, are a well-known confectionery in Australia. However, the Panel does not believe that the Musk Vodka packaging breaches the Part 3 (b)(i) standard by having strong or evident appeal to minors as:
- the overall design of the product can is mature and not particularly bright or contrasting;

- the label contains no reference to or illustrations of musk sticks confectionery and the packaging in colour and design does not resemble the packs in which musk sticks are sold;
- the use of the word 'Vodka' provides a strong alcohol cue such that the product would not be confused with a soft drink; and
- taken as a whole the packaging would at most have incidental rather than strong or evident appeal to minors.

Occasion or event themed product

34. In addition to the standard format the table below summarises the particular features of the Sour Scream vodka can:

Product descriptor	Unique packaging features
Sour Scream	The 'Sour Scream' product packaging is predominantly dark orange in colour, against which are shown illustrations of white 'sheet covered' ghosts with various expressions, black bats, grey stars, a black two storey house with a Gothic style roofline and grey cobwebs.

35. The Company has advised that Sour Scream was a one-off seasonal release for Halloween last year. The Panel believes that the Sour Scream Vodka 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 likely strongly attract the attention of minors:

- the strong association with Halloween, an event that has grown in popularity amongst Australian children in recent years;
- the stereotypical pictures of ghosts (with pronounced whacky and goofy expressions), spooky bats and a haunted house, which as well as being associated with Halloween, are also similar to illustrations used in children's books and animations;
- these factors mean the labelling would likely be strongly relatable to minors; and
- taken as a whole, a reasonable person would probably understand that the packaging has strong or evident appeal to minors.

Conclusion and determination

36. 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.
37. The Panel therefore makes a determination that the 'Sour Scream' and 'Candy Cane' 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 two products, the complaint is dismissed.