



ABAC Adjudication Panel Final Determination No 131/23

Product: Testalonga - El Bandito I wish I was a Ninja
Company: Andrew Guard Wine Imports
Media: Packaging
Date of decision: 25 September 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint in relation to the packaging of Testalonga’s El Bandito I wish I was a Ninja (“the product”), a South African wine imported to Australia by Andrew Guard Wine Imports (“the Company”). The complaint was received on 9 August 2023.
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:
 - 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;

- 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 complaints raise concerns under the ABAC Code and accordingly are within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaint was received on 9 August 2023.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and

advice 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 packaging.

The Marketing

10. The complaint relates to the packaging of the product:



Complaint

11. The complainant objects to the marketing as follows:
 - *The label clearly promotes the dangerous activity of consuming alcohol and swimming.*

The ABAC Code

12. A revised ABAC Code commenced on 1 August 2023. As the complaint relates to packaging that was in use prior to 31 July 2023, it will be considered against the previous Code provisions. References in this determination are therefore to the previous Code.
13. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (d) show (visibly, audibly or by direct implication) the consumption of an Alcohol Beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical coordination, such as the control of a motor vehicle, boat or machinery or swimming.

Marketer means a producer, distributor or retailer of Alcohol Beverages.

Marketing Communications means marketing communications in Australia generated by or within the reasonable control of a Marketer (apart from the exceptions listed in Section 2(b)), including but not limited to brand advertising (including trade advertising), competitions, digital communications (including in mobile and social media), product names and packaging, advertorials, alcohol brand extensions to non-alcohol beverage products, point of sale materials, retailer advertising and Marketing Collateral.

The Company Response

14. The Company responded to the complaint by email on 29 August 2023. The principal comments made by the Company were:
 - We import the wine directly from the producer Testalonga, we are the sole importer and distributor - we are wholesalers, we mostly sell to Restaurants (On premise) and also a little bit of independent retail.
 - We purchase a finished product from the winery and have no input into its creation at all.
 - We only have reasonable control over the back labels, as is mandatory, the front labels are entirely the domain of the producer.
 - I don't feel that the label of "El Bandito I wish I was a Ninja" creates a scene that reasonably implies a person is consuming alcohol while swimming. It shows someone in a pool with an almost empty glass of wine - I don't feel that it advocates that people should swim whilst drinking wine. I do think the various swim up pool bars that are a part of most beach hotel resorts advocate swimming and drinking at the same time but not this wine label in particular.

The Panel's View

Introduction and application of the ABAC Standards

15. This determination has arisen from a complaint about the packaging (labelling) of a South African wine produced by Testolonga called 'El Bandito I wish I was a Ninja'. Andrew Guard Wine Imports is the sole importer of the wine into Australia, which it wholesales primarily to restaurants, and also in smaller quantities to independent retailers.
16. On 7 September 2023 the Panel issued a provisional determination on the consistency of the packaging with the ABAC standard in Part 3 (d) of the Code. The Company has not sought a rehearing and accordingly, the provisional determination is now made final.
17. The front label of the product bottle shows an illustration of a smiling man wearing a cap and sunglasses in a swimming pool. The man is up to his chest in water and in one hand he is holding a champagne glass, with what appears to be a small amount of red wine in it. The complainant argues the label is irresponsible as it promotes the dangerous combination of alcohol consumption and swimming.
18. Before turning to the substance of the complaint, it is necessary to consider the application of the ABAC standards to the product packaging. This issue arises because the product and its branding comes from a South African wine producer. The ABAC Scheme applies to marketing communications in Australia generated by or within the reasonable control of a producer, distributor or retailer of alcohol.
19. The Company explains that it imports the finished product and it does have control over the rear label of the product. It would be the rear label which contains information mandated by government for alcohol products on sale in Australia such as the alc/vol details and the pregnancy warning. The Company contends however it has no control over the product branding - i.e. the product name and the front label illustration of the man in the pool.
20. It should be noted that the Company is not a signatory to the ABAC Scheme and hence has not given a contractual commitment to market its products consistently with the ABAC standards. It has however fully cooperated with the complaints process and is no doubt supportive of responsible alcohol marketing practices.
21. Given that alcohol is a global product, it is not uncommon for alcohol products created overseas to be sold and marketed in Australia. These products are required to meet Australian regulatory standards and as part of the regulatory system applying to alcohol, this includes the ABAC Scheme. As an alcohol distributor the Company falls within the scope of a 'marketer' for the ABAC and hence the Code provisions apply to the products the Company markets in Australia.

22. The fact the Company did not itself devise the branding and front label of the product does not derogate from its obligations as an Australian alcohol distributor to comply with the ABAC standards. Accordingly, the Panel finds that the Code standards are applicable

Alcohol marketing and Safety

23. The complainant is concerned that the label clearly promotes the dangerous activity of consuming alcohol and swimming. This concern raises Part 3 (d) of the Code which requires that an alcohol marketing communication (including branding and product labelling) must not show the consumption of an alcohol beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical coordination, such as swimming.
24. 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.
25. The Company contends that the label is consistent with the ABAC standard. It is argued the scene on the label would not be understood as showing alcohol consumption and swimming. Further it is submitted that the label does not advocate that people should swim whilst drinking wine.
26. The label does not show the man physically drinking from the glass he is holding, but it is a reasonably direct implication that a person shown holding a glass is drinking from the glass. The Part 3 (d) standard is clear, and the probable understanding from the scene is both that consumption in the pool is occurring and that this is an acceptable practice.
27. Accordingly, the Panel makes a final determination that the 'El Bandito I wish I was a Ninja' packaging breaches Part 3 (d) of the Code by showing the consumption of an Alcohol Beverage while swimming, which is an activity that, for safety reasons, requires a high degree of alertness or physical coordination.