



ABAC Adjudication Panel Determination No 118/22

Products: Various
Company: Billson's Beechworth
Media: Packaging
Date of decision: 8 February 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Debra Richards

Introduction

1. This final determination by the ABAC Adjudication Panel ('the Panel') arises from a complaint received on 8 December 2022. It follows a provisional determination made on 4 January 2023. The determination concerns the packaging by Billson's Beechworth ('the Company') of the following vodka products ('the products'):
 - Cherry
 - Creamy Soda
 - Fairy Floss
 - Fruit Tangle
 - Lemon Lime & Bitters
 - Lime
 - Passionfruit
 - Pine Lime
 - Portello
 - Raspberry
 - Sarsaparilla
 - Strawberries & Cream
 - Toffee Apple
 - Turkish Delight
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 8 December 2022.
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 Communication

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





Start 202 Neck Area

Main Colour Limit 122mm x 150mm

Midpoint A/Powder Limit 168.3mm x 133.2mm



Start 202 Neck Area

Main Colour Limit 122mm x 150mm

Midpoint A/Powder Limit 168.3mm x 133.2mm



Start 202 Neck Area

Main Colour Limit 122mm x 150mm

Midpoint A/Powder Limit 168.3mm x 133.2mm





Start 202 Neck Area

Base Colour Limit
182mm x 150mm

Midpoint of Neck Limit
168.3mm x 135.2mm



Start 202 Neck Area

Base Colour Limit
182mm x 150mm

Midpoint of Neck Limit
168.3mm x 135.2mm



Start 202 Neck Area

Base Colour Limit
182mm x 150mm

Midpoint of Neck Limit
168.3mm x 135.2mm









The Complaint

11. The complainant objects to the marketing as follows:

- *Bright packaging as well as product name similar to that of products consumed by minors i.e. flavours of soft drinks, confectionary or Ice Creams e.g. Fairy Floss, Fruit Tingle.*

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 initially to the complaint on 14 December 2022. The principal points made by the Company were:

- Established by George Billson in 1865, Billson's Brewery in Beechworth is Australia's oldest Tower Brewery. The business has been continuously manufacturing a wide variety of beverages locally for over 150 years. When my family and I purchased Billson's in September of 2017, sadly the building had fallen into disrepair & the business was failing. Our ambition was to restore Billson's back to its former glory and work closely with the local community.
- After a challenging five years that included bushfires, Covid and all the resulting supply chain challenges, we are proud of our progress during this time. Our brewery was recently awarded a gold medal in the Victorian Tourism Industry Awards for wineries, breweries and distilleries. We've also received several gold medals in the Australian Gin awards, won the grand prix trophy at the global design effectiveness awards and won the Endeavor Group small supplier of the year and local product of the year. Our team has grown from 3 passionate locals to over 160, with the vast majority starting within the past 12 months.

- From inception in 1865, Billson's has made a wide variety of beverages including cordial, soda, tonic water, non alcoholic ales, beer & spirits. The majority of our products are still made in Beechworth using spring water from an original well onsite, many from original recipes.
- Today our most popular range is our premixed vodka, which appears to be the subject of the complaint. We'd like the panel to consider the following:
 - They sit within the ultra premium category & sell for \$25.00+ per 4-pack.
 - We avoid any wholesale discounting to maintain our premium positioning.
 - They are all mid strength at 3.5% alc/vol.
 - Our social media insights & scan data show that the vast majority of our followers & consumers sit within our target market of 25-44.
 - We have age restriction software on our website & social media to prevent access from minors.
 - The majority of our advertising is spent on social media allowing us to set targeted age demographics inline with our target market.
 - Our social media has over 400 million views / impressions over the past 12 months.
 - Having launched in 2019, we are the fastest growing premixed spirit in the category with over 20 million units sold within the past 12 months.
 - We believe the focal point of our packaging is the white 'roundel' in the centre of the can, whilst the surrounding colour is designed to help consumers navigate the range.
 - We have made sure to call out both 'VODKA' & '3.5%' as clearly as possible.
 - We believe our packaging reinforces our premium positioning with the sleek can format, quality design elements and heritage line illustrations.
- To specifically address your questions:

- We have not used the ABAC pre-vetting service for any of our packaging. We did however do extensive market audits on competitor products and packaging design. We can see the benefit of the pre-vetting service and would be happy to commit to using this for all future packaging design.
- The range was first launched in 2019 and was ranged in Dan Murphy's / BWS by 2020.
- The use of colour is to aid navigation within a large range. We don't believe the heritage line drawing style of illustrations is attractive to minors.
- We see the cordial and premixed vodkas as two clearly separate propositions. Both are clearly labelled as either 'VODKA' or 'CORDIAL'. Cordial is in a 700ml clear glass bottle where the liquid is visible, it's also not able to be consumed straight from the bottle & needs to be diluted. As we are primarily an alcohol brand, we advertise all of our products to adults only.
- With regards to the classic soda, we can see how the designs could be considered too similar. As such we have completely redesigned the soda range as per the attached. We've significantly reduced soda production and stopped advertising any soda until this transition occurs.
- We believe the shape on the soda cans is too similar to the premixed vodka and have therefore removed it in the redesign.
- We believe all these flavours are commonplace within the alcohol market and our labelling is that we are clearly an alcoholic premium adult beverage.
- Since receiving our liquor license in 2018, we have not received any demerit points in any of our venues or events.
- We did receive one complaint addressed to the Liquor & Gaming NSW surrounding our Fruit Tangle and Fairy Floss flavours. We used the opportunity to also engage with Liquor Control Victoria. After a collaborative process, we made several changes to our packaging including increasing the size of the alcohol %, increasing the size of the word 'VODKA', adapting the background colour palette + multi-coloured type of Fruit Tangle & changing the full colour illustration style of Fairy Floss. As a result they were fully satisfied. I've shared these changes in the attached document.

- We're a family business doing our best and we're committed to working collaboratively with ABAC into the future.
15. The Company sought a re-hearing of the Panel's provisional determination through their legal advisors by letter emailed on 13 January 2023. The further submissions made are detailed at paragraph 68.

The Panel's View

Introduction

16. On 4 January 2023 the Panel issued a provisional determination on the consistency of the packaging of 14 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 10 of the products consistent with the standard and four of the vodka products in breach of the ABAC standard. The four products found to have strong or evident appeal to minors were:
- Fruit Tangle
 - Fairy Floss
 - Creamy Soda
 - Toffee Apple.
17. As provided for by the ABAC Rules and Procedures, the Company sought a re-hearing of the provisional determination in relation to the packaging of the four products found to be in breach of the ABAC standard. A re-hearing is a fresh consideration of the complaint. The Company is able to make further submissions, and the Panel considers the additional submissions as well as the material considered in making the provisional determination.

Background

18. Billson's Beechworth has a long history as a beverage producer. Since 2019 the Company's most popular range has been pre-mixed flavoured vodkas packaged in 355ml cans. It is the can design for these vodka products which has drawn the complaint.
19. The complainant came across the product range via a Facebook post. The post shows 14 different cans of the product stacked upon each other in three rows. While it was the post that triggered the complaint, the concern is about the packaging (product names and can design) of each individual product shown rather than the post itself. It is argued that the packaging is not appropriate for an alcohol product due to using bright colours as well as product names similar to soft drink and confectionery products consumed by minors.

20. Due to the number of product cans involved and the somewhat involved nature of the issues arising, the Panel has structured the determination as follows:
- the Code standard and general considerations
 - ABAC and State Regulators
 - provisional determination of the 'fruit flavoured' product packaging:
 - Cherry Vodka
 - Lime Vodka
 - Passionfruit Vodka
 - Raspberry Vodka
 - provisional determination of the 'soft drink' flavoured product packaging:
 - Creamy Soda Vodka
 - Lemon Lime & Bitters Vodka
 - Portello Vodka
 - Sarsaparilla Vodka
 - provisional determination of the 'dessert/ice block' flavoured product packaging:
 - Pine Lime Vodka
 - Strawberries And Cream Vodka
 - provisional determination of the 'confectionery' flavoured product packaging:
 - Fruit Tangle Vodka
 - Fairy Floss Vodka
 - Toffee Apple Vodka
 - Turkish Delight Vodka
 - re- hearing of the provisional determination of the four breached products
 - the Company's submissions
 - Fruit Tangle Vodka

- Fairy Floss Vodka
 - Toffee Apple Vodka
 - Creamy Soda Vodka
- conclusion and final determination.

Code Standard and General Considerations

21. 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.
22. 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.
23. 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.
24. 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.
25. 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.
26. 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.
27. While the complainant referenced product names adopting flavours of soft drinks, confectionery and ice creams, 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.

28. In making this point, the Panel is not saying that the taste of a product is not an important consideration in the appeal of a product to a consumer. But it will be no defence to a concern about the appeal of product packaging to minors to contend that minors won't like the taste of the product. Equally if a product's packaging can be fairly concluded as not strongly appealing to minors, the product packaging won't be in breach of the Code because the product is contended to have a taste that minors would be drawn to.
29. Accordingly, the question of the flavour profile of a product is relevant in how that flavour is portrayed in the marketing of the product. If the marketing portrayal would be understood by a reasonable person as increasing the product's appeal to minors, then this will be an important factor (but not the only factor) in assessing if the Code standard has been breached.
30. Further if a product adopts a name commonly associated with a non-alcoholic product such as confectionery, or a well-known soft drink, then this is clearly a factor in how a reasonable person will understand the product. This does not mean it is impermissible to adopt names or descriptions well recognised with drinks or foodstuffs familiar to minors, but it will increase the risk that the marketing item will have strong appeal to minors.

ABAC and State Regulators

31. In its initial submissions, the Company advised that it had discussions with the Liquor Licencing Authorities of NSW and Victoria following a complaint made to the NSW regulator about the packaging of its Fruit Tangle and Fairy Floss vodka products. This complaint also raised the appeal of these two packaging designs to minors. The Company explained that a 'collaborative process' with the regulators saw proposed changes to the packaging namely:
 - increased font size of the 'vodka' descriptor on the cans;
 - increased size font size of the alc/vol %; and
 - colour palette and illustration changes.
32. The agreed changes resulted in both regulators advising that regulatory action under the respective Liquor Acts of both States would not be required and that the regulators were satisfied that the revised designs did not 'likely appeal to minors'. The Company supplied the email exchange with the regulators that confirmed the advised outcome on these two product designs.

33. The Company also advised that it was redesigning its non-alcoholic soda can designs due to the soda cans being too similar to its pre-mixed vodka range can designs. While the design process for the new soda cans is occurring, the Company has 'significantly reduced soda production and stopped advertising until this transition occurs'.
34. The engagement the Company has had with the NSW and Victorian liquor licencing regulators necessitates a brief explanation of the inter-play between the ABAC Scheme and the regulators within the overall alcohol marketing regulatory system.
35. Alcohol as a product and alcohol marketing is subject to a shared regulatory regime. Overarching public policy objectives for alcohol are contained in a national policy statement endorsed by all Australian governments - the National Alcohol Strategy.
36. The responsibility to operationalise the Alcohol Strategy is shared between levels of government and between different government departments and agencies. eg health agencies, law enforcement and liquor licensing bodies. A range of laws, regulations and codes of practice apply to the alcohol industry and some of these are direct government regulation and others like the ABAC Scheme are industry lead initiatives.
37. The State liquor licensing authorities have a direct power to regulate the marketing and promotional activities of liquor licensees. While the focus of the authorities tends to be on licensed premises and the responsible service of alcohol, they have a plenary power on marketing more generally and have issued promotional guidelines that apply equally to alcohol producers such as the Company as they do to hotels, clubs and other alcohol retailers.
38. The ABAC Scheme and the regulators enjoy a cooperative relationship and at times ABAC might refer a matter to the relevant regulator. That said, the ABAC standards are a freestanding obligation and the wording of the Code standard on strong appeal to minors is slightly different to the advice contained in the regulator promotional guidelines.
39. Specifically, in relation to the advice given to the Company by the regulators on the revised Fruit Tangle and Fairy Floss vodka cans:
 - the complaint before the Panel relates to the product packaging as displayed in the Company's Facebook post, and this packaging shows the Fruit Tangle and Fairy Floss vodka cans prior to any revisions that might be implemented following engagement with the State regulators;
 - the Panel is to make its decision on the packaging as at the date of the complaint; and

- the Panel is of course mindful of the position reached by a State regulator but is to make its own independent assessment of the packaging applying the provisions in the ABAC.

The Panel’s Provisional Determination

40. As mentioned, on 4 January 2023 the Panel made a provisional determination regarding each of the 14 vodka products’ packaging against the Part 3 (b) standard. The provisional determination noted the common format adopted by each can in the range and then reviewed the products individually grouped into four categories based on the flavour of the products. In relation to the cans’ standard format, it was noted:

- the can has a background colour often reflecting the product flavour eg deep red for cherry, green for lime;
- 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 (with the exception of ‘Fruit Tangle Vodka’) is the same colour as the overall background but a different shade eg ‘creamy soda’ is a lighter shade of blue than the blue used for the background colour for the creamy soda product can;
- 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

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

Product descriptor	Unique packaging features
Cherry Vodka	The ‘Cherry Vodka’ product packaging is predominantly deep red in colour. Apart from silver, black and white, no other colours are visible in the design. Heritage line drawings of cherries are shown on the deep red background.
Lime Vodka	The predominant colour for the ‘Lime Vodka’ packaging is a deep green, tending towards a forest green. Apart from silver, black and white, no other colours are visible in the design.

Product descriptor	Unique packaging features
	Heritage line drawings of limes and leaves are shown on the green background.
Passionfruit Vodka	The predominant colour for the 'Passionfruit Vodka' packaging is a deep yellow, tending towards gold. Purple heritage line drawings of passionfruit and leaves are shown on the yellow background. In addition to yellow and purple, silver, black and white are visible in the design.
Raspberry Vodka	The packaging of 'Raspberry Vodka' is predominately red in colour, with black heritage line drawings of raspberries. Silver, black and white are also used in the design

42. Each of the product names are used on soft drinks - either carbonated sodas or cordials - and hence would be familiar to many minors. Further the cans use outlines of the shapes of fruits and this makes the packaging more relatable to minors.
43. 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.
44. Cherries, limes, passionfruit and raspberries are fruits consumed by people of all ages and would be recognisable to minors.
45. The Panel made a provisional determination 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 deep and rich, as opposed to 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 and are also used in the names of confectionery items, non-alcoholic drinks, ice creams and desserts, the packaging design does not make any other specific references to these similarly flavoured items;
 - 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

46. 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
Creamy Soda	The 'Creamy Soda Vodka' product is predominantly blue in colour. Apart from silver, black and white, no other colours are visible in the design. Heritage line drawings of flowers and leaves are shown on the blue background.
Lemon, Lime & Bitters	The packaging of 'Lemon, Lime & Bitters Vodka' is predominately dark orange in colour (tending towards brown) and shows heritage line illustrations of fruits.
Portello	The packaging of 'Portello Vodka' is predominately red grape or port coloured, with black heritage line drawings of grapes.
Sarsaparilla	The packaging of 'Sarsaparilla Vodka' is predominately grey in colour, with black heritage line drawings of berries and leaves. Silver and white are also used in the design.

47. Each of the product names are used on soft drinks - either carbonated sodas or cordials - and hence would be familiar to many minors. Further, the cans use outlines of the shapes of fruits, and this makes the packaging more relatable to minors.

48. 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.

49. When assessing the packaging in its provisional determination, the Panel considered the following uses of the above descriptors:

- creamy soda (or the very similar creaming soda) would be familiar to minors due to being the name of a soft drink commonly consumed by minors;
- Lemon, Lime & Bitters is also a name used for non-alcoholic beverages available in supermarkets, however, these products are probably less commonly consumed by minors compared to core ranges of cola, lemonade and orange;

- Portello is a name given to a carbonated grape and berry flavoured soft drink, the taste of which is said to be comparable to port. Whilst available in supermarkets, Portello flavoured soft drinks would probably not have strong recognition amongst minors; and
- Sarsaparilla would be recognised by minors to some extent as it is a soft drink flavour, but it would probably not be as popular with minors as core range soft drinks eg cola, lemonade, orange.

50. The Panel’s provisional determination was that the creamy soda packaging breached the Code standard given:

- the familiarity of the product name with minors;
- a ‘soda’ is a soft drink term (particularly combined with ‘creamy’) and would be relatable to minors;
- the close similarity with the colour and packaging design of Bilsons non-alcoholic product of the same name heightens the risk that the product might be confused with a soft drink;
- the impact of name familiarity and similarity of the product brand and can design with the Company’s creamy soda soft drink creates an illusion of a smooth transition from a non-alcoholic to alcohol beverage; and
- taken as a whole, the packaging would be understood as having a strong appeal to minors.

51. The Panel did not believe that the packaging of the Lemon, Lime & Bitters, Portello and Sarsaparilla Vodkas breached the Part 3 (b)(i) standard. The distinction between the product packaging of these three products and Creamy Soda being that the product names would not be as familiar to minors and hence the strong association leading to an illusion of smooth transition to alcohol will be incidental rather than strong and evident.

Dessert/ice block flavoured products

52. In addition to the standard format the table below summarises the particular features of the dessert/ice block flavoured vodka cans:

Product descriptor	Unique packaging features
Pine Lime	The packaging of ‘Pine Lime Vodka’ is predominantly lime green in colour, with darker green heritage line drawings of limes, flowers and leaves.
Strawberries & Cream	The ‘Strawberries and Cream Vodka’ product is a brighter red colour than ‘Cherry Vodka’ and ‘Raspberry Vodka’. Apart from silver, black and white, no other colours are visible in the design.

Product descriptor	Unique packaging features
	Heritage line drawings of strawberries are shown on the red background.

53. When making its provisional determination the Panel considered the following uses of the above descriptors:

- pine lime flavouring is commonly associated with frozen icy-poles and cordial, both of which would be familiar to minors; and
- strawberries are a commonly consumed fruit, across all age groups, and are often teamed with cream. Strawberry flavoured conserves, desserts, ice-creams, cordials and confectionery items are familiar to minors. There are also similarly named strawberries and cream confectionery items produced by Allens and The Natural Confectionery Co (amongst others).

54. The Panel's provisional determination was that the dessert/ice block packaging did 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; and
- taken as a whole the packaging has incidental appeal rather than strong or evident appeal to minors.

Confectionery flavoured products

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

Product descriptor	Unique packaging features
Fruit Tangle	The photo of 'Fruit Tangle Vodka' packaging provided by the complainant shows the use of bright red, orange, yellow and green wavy blocks of colour in the packaging design, against which heritage line drawings of different fruits are positioned. Similar to the other Billson's products, 'Fruit Tangle' also uses a white 'roundel' on the front of the can to provide product information. However, in this instance the letters of 'Fruit Tangle' are shown in the alternating colours of red, orange,

Product descriptor	Unique packaging features
	yellow and green (the other products use a single colour for the product name).
Fairy Floss	The packaging of the 'Fairy Floss Vodka' product is blue, with bright pink and yellow stylised illustrations of fairy floss.
Toffee Apple	The packaging of 'Toffee Apple Vodka' is predominately dark orange in colour, tending towards brown. Silver, black and white are also used in the packaging design. Black heritage line drawings of apples and leaves are shown against the orange background
Turkish Delight	The 'Turkish Delight Vodka' packaging is predominantly pink in colour, with lesser amounts of silver, black and white also being used. Black heritage line drawings of fruit and roses are positioned against the pink background.

Fruit Tangle Vodka

56. 'Fruit Tangle' is clearly an adaptation of the name fruit tingle, which is the name of a Life Saver confectionary item which also employs pinkish red, orange, yellow and green wavy blocks of colour on its packaging. The individual pieces of confectionery contained within the packaging are also in alternating pinkish red, orange, yellow and green colours.
57. Fruit Tingle is also the name of an alcoholic cocktail. While the precise origins of the cocktail were not readily revealed by a brief search, it is reasonably apparent:
- a cocktail called a 'fruit tingle' based on a combination of vodka, blue curacao, grenadine and lemonade has been commonly available at bars and nightclubs in Australia since at least the 1990's;
 - in turn the cocktail draws its name from the fruit tingle lollies made and sold in Australia since the 1930's; and
 - there are a number of alcohol products bearing the fruit tingle name on the Australian market with some products being a cocktail kit for making at home cocktails and others a pre-mixed version of the cocktail.
58. It can be accepted that an alcoholic beverage called a 'fruit tingle' has antecedence in Australia and from that, would be recognised by some adult consumers as an alcohol beverage. That said, the more common association of the fruit tingle name is with the longstanding and widely available lolly from which the cocktail drew its name. This means that care is needed in marketing alcohol products employing a name associated with confectionery as there will be an inherent potential for the marketing material to be relatable to minors.

59. The Panel's provisional determination was that the packaging breached 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 name 'Fruit Tangle' which strongly resembles and is easily confused with 'Fruit Tingle', the name of a confectionary item commonly consumed by children;
 - the wavy blocks of bright colours used on the can being themselves eye-catching and appealing to children, and also being similar to those used on the confectionery packaging;
 - the alternating use of bright colours used for different letters making up the words 'Fruit Tangle', which would be eye-catching and appealing to children; and
 - taken as a whole, a reasonable person would conclude that the packaging has strong or evident appeal to minors.
60. As previously noted, the Company has engaged with the NSW and Victorian liquor licensing regulators on the design of the fruit tangle can. This resulted in the packaging being redesigned and the liquor licensing authority providing advice that it would not take action based on the revised can design. As previously stated, the Panel has assessed the packaging as at the time of the complaint and as best as can be ascertained, the re-designed packaging was not at the time of the provisional determination in the market.

Fairy Floss Vodka

61. Fairy floss is a well-known form of confectionery. A brief internet search did not disclose any specific data as to the age demographics of the consumers of fairy floss, but the marketing of fairy floss does appear to be far more centred toward minors than adults. It is not unreasonable to think that while fairy floss would be consumed across age groups, it is a confectionery aimed far more directly toward minors than it is toward adults.
62. The Panel's provisional determination was that the packaging of fairy floss vodka did breach the Part 3 (b)(i) standard. While the packaging does use a clear alcohol descriptor of 'vodka' the Panel noted:
- bright, contrasting colours are used on the packaging with the yellow and pink illustrations of fairy floss on a blue background likely to be eye-catching to children;
 - fairy floss is a confectionery which is likely marketed toward and consumed more extensively by minors than adults;

- the use of the name fairy floss on an alcohol product would likely contribute to an illusion of a smooth transition to an alcohol product for a minor; and
- taken as a whole, the reasonable person would conclude that the packaging has strong or evident appeal to minors.

Toffee Apple Vodka

63. Toffee apples are made by skewering an apple onto a stick to be used as a handle when dipping it in toffee and then eating it after the toffee has set. In Australia, toffee apples are often associated with sideshow alleys, such as those at the Royal Adelaide Show or the Sydney Royal Easter Show. There are also a number of confectionery items that use toffee apple in their name.
64. The Panel's provisional determination was that the packaging did breach the Part 3 (b)(i) standard. While the packaging does use a clear alcohol descriptor of 'vodka' the Panel noted:
- the toffee apple product name will have familiarity to minors and be relatable to minors;
 - the name and background images of the toffee apples would contribute to an illusion of a smooth transition to an alcohol product for a minor; and
 - taken as a whole, the reasonable person would conclude that the packaging has strong or evident appeal to minors.

Turkish Delight Vodka

65. The Turkish Delight name might have some familiarity to minors, primarily due to Fry's Turkish Delight confectionery being included in the Cadbury Favourites boxes. In contrast, the traditional Turkish Delight, (being cubes of a rosewater or rose syrup flavoured gel covered in icing sugar), is more likely to be consumed by adults than children. Neither confectionery would be a staple treat for minors.
66. Taking the contents of the 'Turkish Delight Vodka' packaging as a whole, the Panel provisional determination was that the Part 3 (b)(i) standard had not been breached. The Panel noted:
- the overall design of the can is mature in nature;
 - the illustrations are subtle, and the heritage line drawing style is of roses and a fruit image;
 - the packaging does not reference any other non-alcoholic items that use these flavourings;

- the use of the word 'Vodka' provides a strong alcohol cue such that the products would not be confused with a soft drink; and
- any appeal to minors would be incidental rather than strong or evident.

Final Determination - The Company's submissions

67. The Company made submissions firstly to the complaint, and then secondly additional submissions in support of its request for a re-hearing of the provisional determination. In overall terms, the Company contends that its packaging design does not appeal to minors but to its target demographic of 25- to 44-year-olds. Important points made by the Company in its initial submission include:

- we have made sure to call out both 'VODKA' & '3.5%' as clearly as possible;
- the use of colour is to aid navigation within a large range. We don't believe the heritage line drawing style of illustrations is attractive to minors;
- we see the cordial and premixed vodkas as two clearly separate propositions. Both are clearly labelled as either 'VODKA' or 'CORDIAL'. Cordial is in a 700ml clear glass bottle where the liquid is visible, it's also not able to be consumed straight from the bottle & needs to be diluted. As we are primarily an alcohol brand, we advertise all of our products to adults only; and
- we believe all these flavours are commonplace within the alcohol market and our labelling establishes that we are clearly an alcoholic premium adult beverage.

68. The Company accepted the Panel's provisional determination in relation to 10 products, however contended that the Panel's decision to find the packaging of four of the products had strong or evident appeal to minors was mistaken. Through its legal advisors, the Company made additional submissions about these four products arguing as follows:

Fruit Tangle Vodka

- it is noted that the term 'Fruit Tangle' differentiates this product from the confectionery which is called 'Fruit Tingle';
- a Google search of the term 'Fruit Tingle' shows a first page of results relating to the cocktail of the same name, not the confectionery. The cocktail of the same name would therefore appear to be the more dominant association with this name, rather than the confectionery;

- it is noted that the colours and pattern on the Fruit Tangle product packaging – red, orange, green and yellow - are not the same as the confectionery which prominently includes the colour pink; and
- the imagery on the product is mature, heritage designed fruit pictures which are not appealing to minors. There is no fruit imagery on the confectionery packaging.

Creamy Soda Vodka

- 'Creamy Soda' is an old- fashioned flavour which was first developed in the 1800s, similar to Sarsaparilla or Portello. It is therefore a heritage/nostalgic flavour which is likely to be more commonly consumed by adults in current times;
- in any event, our client's product packaging has been clearly differentiated from the soda which is typically a brown, red or orange colour and packaging whereas our client's packaging is blue;
- the vanilla pod imagery on the packaging is in heritage style and is not an image which is commonly associated with children or the soda; and
- the term soda is regularly used in alcoholic beverages and cannot in and of itself be suggestive of a product which appeals to minors.

Fairy Floss Vodka

- it is not clear what evidence is relied upon for Fairy Floss being a product which has an inherent appeal to minors and this assertion is therefore not accepted by our client;
- the Fairy Floss packaging does not use 'bright, contrasting colours'. In fact the packaging depicts fairy floss in dull colours and the depictions are therefore mature in nature. The dull, pastel colouring is inherently less attractive to minors; and
- the fairy floss depictions are also noted to be more abstract sketches/illustrations which makes them more appealing to mature audiences rather than cartoonish or obvious depictions of fairy floss.

Toffee Apple Vodka

- it is not clear that the mere existence of a confectionery named toffee apple makes the Toffee Apple Vodka product inherently strongly appealing to minors;

- toffee is an old-fashioned flavour similar to Sarsaparilla or Portello. It is therefore a heritage/nostalgic flavour which is likely to be more commonly consumed by adults in current times;
- the Toffee Apple Vodka product packaging utilises imagery which is mature, heritage designed fruit pictures which are dark in colour and overall not appealing to minors. The depiction of a toffee apple does not show the confectionary in its traditional form on a stick and instead differentiates it from the confectionary utilising leaves and the general heritage, mature design.

Conclusion

- Our client is committed to working with ABAC and has committed to implementing the Code and participating in the pre-vetting service and training course going forward.
- Our client is a family business which has grown very quickly in recent years and they are committed to improving their products and responsibly advertising them.
- On balance it is our client's view that a reasonable person would most probably not understand the packaging as having strong appeal to minors but any appeal being incidental and not greater than it would be for an adult consumer.
- It is our client's view that the products are clearly differentiated from products which may appeal to minors with the prominent wording of 'VODKA', 'MIXED SPIRIT DRINK' and '3.5% ALC/VOL. Further, the heritage design conveys that the product is for mature audiences. These choices have all been made to avoid any possible uncertainty that the product contains alcohol and is for adults.

Final Determination - Panel's Ruling

69. This has been an involved determination due to sheer number of products, the role of the State alcohol regulators and the Company's intention to re-design some of its packaging designs. Further, all of the products adopt names which 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 strong and evident appeal that offends the core ABAC standard in Part 3 (b)(i).
70. The Panel has reflected carefully on the concern of the complainant and the detailed and thoughtful submissions advanced by the Company and its legal advisors. The decision on the packaging of the four products upon which the Company sought a re-hearing is as follows.

Fruit Tangle Vodka

71. The Panel believes the packaging of the Fruit Tangle Vodka breaches the Part 3 (b) standard. The Company in its additional submission observed that a Google search of 'fruit tingle' revealed that the most prominent results related to the fruit tingle cocktail and not the confectionery item, and this should be taken as indicating that the name is now more associated with alcohol than a children's sweet.
72. With respect, this argument ignores how the analytics of search engines and social media platforms are customised to the preferences and patterns of use of each individual logged in user. This means that there is no universal result to a search term, but rather each individual receives a curated outcome that reflects the profile, location, search history and other data about the user. In short, a person gets more of the things that they like on a platform - be it cat videos or alcohol products if for instance a user was conducting research about alcohol products named 'fruit tingle'.
73. Secondly, it is noted that the State regulators expressed concern about the packaging of the fruit tangle product as it was displayed in the Facebook post seen by the complainant. While the Panel makes its own assessment based on the ABAC provision, the view of the regulator about the potential appeal to minors reinforces the Panel's view that the packaging likely would be regarded by a reasonable person as having strong appeal to minors.
74. Thirdly, the Panel believes the points noted in the provisional determination remain relevant namely:
- the name 'Fruit Tangle' which strongly resembles and is easily confused with 'Fruit Tingle', the name of a confectionary item commonly consumed by children;
 - the wavy blocks of bright colours used on the can being themselves eye-catching and appealing to children, and also being similar (not identical) to those used on the confectionery packaging;
 - the alternating use of bright colours used for different letters making up the words 'Fruit Tangle', which would be eye-catching and appealing to children; and
 - taken as a whole, a reasonable person would conclude that the packaging has strong or evident appeal to minors.

Fairy Floss Vodka

75. The Panel believes the packaging of the fairy floss vodka product does breach the Part 3 (b) standard. The Panel has considered product packaging named

'fairy floss' on previous occasions see - Determination 114/20 and Determination 250/21. As noted in these decisions there is no readily available data as to the age of consumers of fairy floss, but the product's history and general marketing strongly suggested that it is a confectionery consumed more by minors and with a greater appeal to minors compared to adults.

76. This means there is a starting point potential for an alcohol product branded as fairy floss to be relatable and familiar to minors. This does not mean an alcohol product cannot use the name, but care needs to be taken in marketing, particularly in packaging, so that the potential appeal to minors does not become strong or evident. The Company's additional submission that there is no evidence of fairy floss having inherent appeal to minors is not accepted.
77. Again, the concern of State regulators about the packaging as it was depicted in the Facebook post is noted as reinforcing a view that a reasonable person would probably understand the packaging has strong appeal to minors.
78. In reaching its conclusion that the packaging breached the standard, the Panel had regard to:
- the depiction of yellow and pink fairy floss images on the can, contrasts with the blue background and hence is highly noticeable and eye catching to minors;
 - the combination of the product name with the can design and fairy floss imagery will likely create an illusion for a minor of a smooth transition from a familiar product to an alcohol product; and
 - taken as a whole, a reasonable person would probably understand the packaging as having more than incidental appeal to minors and having strong appeal to minors.

Toffee Apple Vodka and Creamy Soda Vodka

79. The Panel accepts that reasonable minds might differ as to the level of the appeal of the packaging of the toffee apple and creamy soda vodka products to minors. Some elements of the packaging support consistency with the standard namely:
- the packaging uses descriptors such as vodka and in font of sufficient size to make it unlikely that the products would be confused with a soft drink; and
 - the packaging design is mature and the colour scheme does not employ bright and contrasting colours.

80. It is not accepted, as put forward in the additional submissions, that both products adopt names of a confectionery or a soft drink respectively that would not be familiar to most minors. Equally, while the product names might invoke a sense of nostalgia amongst adult consumers, this nostalgia derives from the experience of a toffee apple or creamy soda as a child. There is no particular reason to think that toffee apples and creamy soda were consumed by children up to say the mid 1980's so as to be remembered by current adults but stopped being consumed by children after that date.
81. On balance the Panel does believe the packaging of both products are in breach of the ABAC standard. In reaching its conclusion the Panel had regard to:
- the 'reasonable person' benchmark is based on the balance of probabilities and does not require that the Panel's view is beyond reasonable doubt;
 - the names of both products draw on confectionery or a soft drink that are likely consumed more by minors than adults and will have a degree of familiarity for minors;
 - the nostalgia appeal of the product names to adults is founded on the likely consumption of the confectionery/soft drink of adults while minors and there is no particular basis to believe there is not a continuing use of the products by minors;
 - while the packaging uses alcohol descriptors and identifies the products as alcohol beverages, the combination of the product name and can imagery (particularly the toffee apple images) creates an illusion of a smooth transition from a non-alcohol product to an alcohol beverage;
 - the Company's Creamy Soda Vodka packaging and its non-alcohol product (at the time of the complaint) as conceded by the Company were very similar and could likely contribute to confusion as to the vodka product being a soft drink; and
 - while no one element alone is decisive, all of the factors combined would lead a reasonable person to probably understand that the packaging of both products has evident appeal to minors.

Conclusion and final determination

82. 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 engaged fully in the complaints process and made clear in its additional submissions 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.

83. Specifically, the Company in light of the advice of the State regulators and this determination might make revisions to its packaging across its range. It would be prudent for the Company to engage with the ABAC pre-vetting service in undertaking this work.
84. The Panel makes a final determination that the 'Fruit Tangle', 'Fairy Floss', 'Creamy Soda' and 'Toffee Apple' 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 10 products, the complaint is dismissed.