



ABAC Adjudication Panel Determination No 153/24

Product: Wine
Company: Naked Wine
Media: Printed flyer/voucher
Date of decision: 15 November 2024
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 8 October 2024 about a printed flyer and voucher for wine (“the product”) by The Wine Group (“the Company”).
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 October 2024.
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 Advice

9. A component of the ABAC Scheme is an advice service by which an alcohol marketer can obtain an independent opinion of a proposed alcohol marketing communication against the ABAC standards prior to public release. Pre-vetting advice is separate from the complaint process and does not bind the Panel but represents best practice on behalf of alcohol marketers. Pre-vetting approval was not obtained for the marketing.

The Placement

10. The complaint relates to a Naked Wines printed flyer that included a voucher of \$100 toward a wine subscription placed inside the following birthday card.



Complaint

11. The complainant objects to the marketing as follows:
 - *I ordered a card for my 15-year old niece. It was sent directly to her from Snapfish and they included a \$100 gift card for a wine subscription service. This is advertising alcohol to a minor and is wholly unacceptable.*

The ABAC Code

12. Part 4 of the Code provides:
 - (a) An Alcohol Marketing Communication must comply with code provisions regulating the placement of Alcohol marketing and an Alcohol Alternative Marketing Communication must comply with code provisions regulating the placement of Alcohol Alternative marketing that have been published by Australian media industry bodies (for example, Commercial Television

Industry Code of Practice and Outdoor Media Association Placement Policy)

- (b) Available Age Restriction Controls must be applied to exclude Minors from viewing an Alcohol Marketing Communication and an Alcohol Alternative Marketing Communication.
- (c) If a digital, television, radio, cinema or broadcast print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, an Alcohol Marketing Communication and an Alcohol Alternative Marketing Communication may only be placed where the audience is reasonably expected to comprise at least 80% Adults (based on reliable, up-to-date Australian audience composition or social media follower data, if such data is available).
- (d) An Alcohol Marketing Communication and an Alcohol Alternative Marketing Communication must not be placed with programs or content primarily aimed at Minors.
- (e) An Alcohol Marketing Communication and an Alcohol Alternative Marketing Communication must not be delivered directly to:
 - a Minor by hand (except where the communication primarily relates to a matter unrelated to alcohol, for example, a shop receipt or a dining voucher);
 - a Minor by electronic direct mail (except where the mail is sent to a Minor due to a Minor providing an incorrect date of birth or age); or
 - any person that has sought removal from the marketer's mailing list.

The Company Response

13. The Company responded to the complaint on 26 October 2024. Its primary comments were:
- We believe strongly that the inclusion of our voucher in a Snapfish order did not violate the ABAC Responsible Alcohol Marketing Code (the "Code").
 - One of the ways we advertise our business is through \$100 wine vouchers distributed through various partners, like Snapfish. The vouchers state clearly, **"To use this voucher, you must be 18 years or older."**
 - When a recipient of our voucher attempts to use the voucher on our site, the first question they're asked is:

Your details

What's your date of birth? *

DD * MM * YYYY *

Why do we need this?

Your details

What's your date of birth? *

We ask for your date of birth as part of our commitment to responsible drinking

Why do we need this?

- Any person who enters an age less than 18 is prevented from completing a purchase.
- We distribute our vouchers through partners, like Snapfish, whose customers are primarily 18+. When Snapfish ships a product to a customer, it may include a Naked Wines voucher with that shipment. The customer then receives not only their purchase, but also an offer to try Naked Wines at a discounted price.
- Our goal is to send these vouchers only to persons 18 and older. We have never, and will never, target a person under 18 for receipt of a voucher. We think it's appropriate to analogize our vouchers to billboards or newspaper advertisements promoting the sale of alcohol. These advertisements are not intended for minors and should not be displayed in places inhabited primarily by minors, but a minor may nonetheless see them every once in a while.
- All of our marketing materials are vetted by our marketing team, management and legal.
- Naked Wines partners with Snapfish, as described above, to distribute vouchers to Snapfish customers. Historically, we have not provided our partners with a copy of the Code, but we will consider doing so going forward.
- This inclusion of the voucher in a Snapfish card does not violate the Code, in particular 4(e). It was not directed to a minor – instead, the minor received it inadvertently as part of a broad advertising campaign directly to persons over 18.

The Panel's View

Background

14. Naked Wines is an online wine subscription based retailer with a business model that directly matches winemakers with consumers. One marketing method employed by the Company is partnering with non-alcohol businesses

to have promotional vouchers for wines distributed with the deliveries of non-alcohol products by the partner business.

15. Snapfish is an international photo sharing and gift business that enables consumers to order a range of customised products. Items that can be ordered at Snapfish include mugs, blankets, calendars and cards.
16. In October 2024, the complainant arranged for Snapfish to produce a customised birthday card for her 15 year old niece. The card had a printed message which identified the card was from the niece's aunty and family, but did not reference the age of the niece e.g. it did not say 'Happy 15th Birthday' or words to that effect.
17. As arranged, the card was sent directly from Snapfish to the niece. Without the complainant's knowledge a voucher from the Company was inserted into the card as if it was a birthday gift. The voucher offered a \$100 discount on an order of 12 bottles of wine if certain conditions were satisfied. Not surprisingly the complainant was concerned that the voucher for alcohol was delivered to a minor.
18. There is no question that alcohol should not be marketed towards 15 year olds and the fact that the voucher was received by the complainant's niece is self-evidently undesirable. The issue for determination is whether the ABAC obligations have been breached by the Company's actions.

The ABAC Standards

19. The obligations in the ABAC in relation to minors are essentially twofold. Firstly, alcohol marketing in its messaging and content is not to be strongly appealing to minors (Content Standards). Secondly, alcohol marketing material, to the extent reasonably possible, is to be directed towards adults and away from minors (Placement Standards).
20. It should be noted that the ABAC obligations are placed on alcohol producers, distributors and retailers and not on non-alcohol industry entities such as Snapfish. This means the responsibility to market consistently with the ABAC Standards rests with Naked Wines and not its partners in the distribution of marketing materials such as the vouchers.
21. The concern expressed by the complainant is not about the content of the voucher as such, but that any alcohol marketing irrespective of its content was included in the birthday card. This means the issue is not about the ABAC content standards but the ABAC Placement Standards and their application with this method of marketing.
22. The ABAC Placement Standards seek to have alcohol marketing directed toward adults and to the extent reasonably possible away from minors. The

Standards consist of five separate, but interrelated obligations imposed on alcohol marketers:

- Part 4(a) - the placement of marketing must comply with codes published by the Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy);
- Part 4(b) - available age restriction controls are used by the marketer to exclude minors from viewing the marketing;
- Part 4(c) - if a digital, television, radio, cinema or broadcast print media platform does not have age restriction controls available that are capable of excluding minors, then marketing may only be placed where the audience is reasonably expected to comprise 80% adults;
- Part 4(d) - irrespective of the expected audience, alcohol marketing must not be placed with programs or content primarily aimed at minors; and
- Part 4(e) – a marketing communication must not be delivered directly to a Minor either via hand, via electronic direct mail or to someone who has asked to be removed from a mailing list.

23. The Company does not believe that there has been a breach of the Code standards arguing:

- The vouchers state clearly, “To use this voucher, you must be 18 years or older.” And to use the voucher the recipient's date of birth must be entered and the person must be over 18.
- The vouchers are distributed through partners, like Snapfish, whose customers are primarily 18+. When Snapfish ships a product to a customer, it may include a Naked Wines voucher with that shipment.
- Our goal is to send these vouchers only to persons 18 and older. We have never, and will never, target a person under 18 for receipt of a voucher.
- The vouchers can be analogised to billboards or newspaper advertisements promoting the sale of alcohol. These advertisements are not intended for minors and should not be displayed in places inhabited primarily by minors, but a minor may nonetheless see them every once in a while.
- The inclusion of the voucher in a Snapfish card does not violate the Code as it was not directed to a minor, but received inadvertently as part of a broad advertising campaign directed to persons aged over 18.

24. It is accepted that to actually use the voucher, a customer must navigate an age gateway and further there are regulations applicable to the home delivery

of alcohol. This however is not an answer to the obligations created under the Placement Standards that seek to limit the exposure of minors to alcohol marketing rather than being part of the Responsible Service of Alcohol regime of State and Territory Liquor licensing bodies.

25. Working through the Placement Standards, and applying them to the specific circumstances of this complaint, it is clear that:
 - The Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy do not apply and therefore Part 4(a) has not been breached.
 - Part 4(c) does not apply to a printed voucher, but rather to broadcast media.
 - Part 4(e)(ii) and (iii) do not apply as the card was delivered physically and this delivery is not associated with a mailing list.
26. Part 4(b) is about the channels over which alcohol marketing is conveyed and mostly commonly comes into play when digital marketing is being used on social media platforms or broadcast via digital TV and streaming platforms. It requires the use of Available Age Restriction Controls, the Code definition of which refers to “*age restriction, targeting or affirmation technologies available...*”
27. The complainant has advised that when placing the order for the card she was not asked about the age of the recipient. Nor did the customised card refer to the age of the complainant’s niece. Accordingly Snapfish was not expressly put on notice that its product would be sent to a minor, although it would be common for birthday cards to be created for minors.
28. The process of including a voucher with an order is not dissimilar to the process of placing a flyer in a letterbox where the age of the person who will collect the flyer is unknown. However, it is also different in that an order is being delivered directly to an individual.
29. The policy intent of the Part 4 (b) standard is that alcohol marketers should use the means reasonably available to them to exclude minors being served with alcohol marketing material. The Company has advised that they select partners with customers that are primarily 18+ and that they would never deliberately target a minor. This commitment is the baseline for an alcohol marketer.
30. There was no ‘age restriction control’ in place at Snapfish but good practice would suggest an alcohol marketer should be conscious of the real possibility that its marketing might be delivered to a minor and instigate measures such as:

- setting clear expectations that marketing material should not be delivered to minors;
 - including these expectations in contractual obligations with partners involved in the distribution of alcohol marketing material;
 - instigating a proper and robust system to implement the obligations created; and
 - monitoring the obligations and ensuring any failures are identified and rectified.
31. The Part 4(d) standard provides that an alcohol marketing communication must not be placed with programs or content primarily aimed at minors. This standard has in mind broadcast media like TV and radio as well as content delivered by social media platforms such as Facebook or YouTube. That said, the standard is capable of applying to a marketing method that has alcohol material distributed with non alcohol products.
32. Birthday cards are not of themselves aimed solely at minors. However if the card is the type that nominates the age of the person receiving the card or if the customisation makes clear the card is for a minor, then the card could fairly be regarded as being content primarily aimed at minors. While in the current case an argument could be made either way, the card design did not nominate the age of the recipient and the image of a slice of birthday cake does not automatically suggest the card is for a minor. Nor did the customised message reference the niece's age.
33. Part 4(e)(i) is a new requirement of alcohol marketers that was included in the revisions to the Code that came into operation on 1 August 2023. It relates to the physical delivery of an alcohol marketing communication directly to a minor but specifies the scenario of hand delivery, and as such is not applicable to this scenario.

Conclusion

34. This has been a novel case the facts of which have not previously been encountered by the Panel. The concern expressed by the complainant is entirely legitimate and a birthday card sent to a 15 year old should not arrive with alcohol marketing.
35. It would be fair to say that the ABAC Placement Standards were not drafted with this kind of factual circumstance in mind. While the Code is to be applied guided by the 'spirit and intent' of the Code's provisions, the Panel does not believe a breach of the Standards can be said to have occurred noting of the two Standard potentially in play:

- there was no 'age restriction control' in place for marketing through Snapfish that the Company failed to apply; and
- the birthday card did not identify in its design or message that it was being sent to a minor nor was Snapfish advised on the age of the card's recipient when the card was ordered.

36. The Panel believes that the Company should strengthen its practices in partnering with non alcohol entities for the physical distribution of its marketing materials. The practices should embody:

- setting clear expectations that marketing material should not be delivered to minors;
- including these expectations in contractual obligations with partners involved in the distribution of alcohol marketing material;
- instigating a proper and robust system to implement the obligations created; and
- monitoring the obligations and ensuring any failures are identified and rectified.

37. Further the Panel draws this case to the attention of the ABAC Scheme's Management Committee as to whether adjustments of the Code provisions are required at the time the Code is next reviewed.

38. The complaint is dismissed.