

ABAC Adjudication Panel Final Determination No. 52/19

Product: Skinny Freezers

Company: Slim Chillers - Australia

Media: Packaging & Digital (Facebook & Website)

Date of decision: 7 September 2019

Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)

Ms Debra Richards

Professor Richard Mattick

Introduction

- 1. This final determination by the ABAC Adjudication Panel ("the Panel") concerns marketing for Skinny Freezers by Slim Chillers Australia ("the Company") and arises from a complaint received 12 July 2019.
- 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 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") 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 which places 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 the other codes as well as meeting the standards contained in the ABAC.
- 4. For ease of public access, Ad Standards (AS) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by AS, 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 AS 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 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 12 July 2019. 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.
- 8. The quasi-regulatory system for alcohol beverage marketing features 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 marketing communication.

The Marketing Communication

9. The marketing communications referred to in the complaint are included at Attachment A and images of the product are included following.



The Complaint

- 10. The complaint is included at Attachment A. The complainant is concerned that:
 - the product's packaging and some of the marketing materials are likely to appeal strongly to minors, and/or create confusion with confectionary or soft drinks, specifically the popular children's treat Zooper Doopers; and
 - marketing communications on the company's Facebook page depict consumption of the product before or during swimming.

The ABAC Code

- 11. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (b)(i) have Strong or Evident Appeal to Minors
 - (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 co-ordination, such as the control of a motor vehicle, boat or machinery or swimming

12. Definition in Part 6 of the ABAC provides:

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 Minor 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 confectionary or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

A **Minor** means a person who is under 18 years of age and therefore not legally permitted to purchase an alcohol beverage in Australia.

The Company's Response

- 13. The Company responded to the complaint by email dated 28 July 2019. The principal points made by the Company were:
 - Our Skinny Freezers are a genuine Vodka Martini and can be consumed as a drink in liquid form or frozen.
 - Our product does have a small similarity to Zooper Doopers but no more than a bourbon & coke has a similarity to Coke or a UDL Vodka Rasberry has a similarity to Rasberry lemonade or the way straight Vodka looks exactly like water.
 - Lots of things have "bright colours" and have the names "lemonade, lime & orange" with only the word "lemonade" having anything to do with our Skinny Freezers. The names we use are genuine Martini cocktail names as they are genuine Vodka. Cocktails such as "Cosmopolitan", "Lemon Drop", "Appletini" which are recognised world-wide by Martini drinkers and our other flavour is "Watermelon Lemonade".
 - What personal comments people write on a social media public forum is beyond our or any companies control. There are millions of comments made on public sites everyday.

- The word "Poolside" indicates the side of the pool. People holding opened and un-opened product while standing "next" to a swimming pool in the "background" in the privacy of their own home.
- The image of the beach is super imposed & not actually on the beach. Nothing like the Corona bottles being consumed on a beach by young people on National TV.
- People who are above the legal drinking age of 18 in Australia are well within their rights to purchase alcohol legally and consume their alcohol in the privacy of their own home and wherever they like in their home anytime they like.
- We did not sort ABAC pre-vetting approval for our packaging, website & Facebook page. Our packaging has strongly adhered to all the Australian & New Zealand Food Standards Codes regarding Labelling laws in Australia & to be clear on that we hired a lawyer who specialises in labelling laws in Australia & worked with them closely. Our Skinny Freezers are nearly twice as wide & slightly longer than a Zooper Dooper & the largest words on our product is the words "VODKA MARTINI" so there is no chance of confusion between the products.
- Each Skinny Freezer is only 0.6 standard drinks & once again how people consume alcohol legally in the privacy of their own home is their right. At no stage do we show a person swimming whilst consuming our product or any alcohol.
- I find it offensive that you state that because our product is similar to another product that you accuse us of "deliberately" using a children's product to market our product. That is not the case at all. As stated before, a straight vodka in a glass looks EXACTLY like a glass of water so many many things are "similar". I can go on and write a long list of similar alcohol products to non-alcohol products that appeal to children.
- We do want to promote our product as being fun but nowhere do we say "consume whilst swimming". As stated before, what legally aged people do in their own home is their business, we have no control of what people do in their own homes. If people choose to consume our product, beer wine or any alcohol in their pool in their own home it is not illegal. I would disagree strongly that the people in the photo are in the pool. None of them are wet & the product is being held approximately about 5-6 feet above the pool & off to the side so I don't agree at all.
- We have taken every precaution and our marketing strategy is aimed at consumers above the legal drinking age of 18. It has from day 1. In designing our packaging we included the "pregnant lady" symbol when it wasn't a requirement to do so. We wanted to go with it, we registered

with <u>drinkwise.org.au</u> from the beginning and as stated above when we designed the label we made the words "VODKA MARTINI" as the biggest words on the label. We have made our Skinny Freezers extremely hard for adults to open which is a negative but we went with that as well. When sold in store they are sold in a cannister which also has a sealed lid with the lid being too wide for children's hands to open.

- The only place we market is on Facebook and a little on Instagram. Our settings are set at over 18's and we retail to the public through online orders. When we send our online orders we send in an Australia Post pre paid Parcel Post pack which does not allow anyone to see the contents. We also charge an additional \$3 so the package has to be signed for by a person at the address over 18 or else it is taken back to the local Post Office where ID needs to be shown to have the item picked up.
- Our website has an age gate on it so only over 18 year old's should enter and
 we have our required warning on the website as well for anyone buying for
 under 18's. We do our best to be compliant with all rules & regulations but are
 always happy to get advice and work with people like yourselves to make our
 industry better.

The Panel's View

Introduction

- 14. Slim Chillers is an American producer of a range of alcoholic products including a product branded as Skinny Freezers. Skinny Freezers are a vodka pre mixed product made to be principally consumed in a frozen state. The products come in a number of different flavours based upon vodka style sweet martinis such as a Cosmopolitan and Appletini. It seems from a brief internet review, that Skinny Freezers have been on the USA market since at least 2013.
- 15. The Skinny Freezers have now been introduced to the Australian market. According to the Australian website for Slim Chillers a Mr Zukanovic came across the product while holidaying in the US, and he subsequently secured the entitlement to be the offical Australian and New Zealand distributor for Slim Chillers. It is Mr Zukanovic who has responded to the current complaint on behalf of the Company.
- 16. While Skinny Freezers do not as yet appear to be widely available via alcohol retailers such as bottle shops, the Company has in place online distribution based upon orders through its website and its marketing takes place principally on Facebook and in a more limited way through Instagram. It is the Company's Facebook Page which has drawn the concerns of the complainant who contends that the product packaging and some Facebook posts breach ABAC standards in Part 3 (b) and (d) respectively.

- 17. The Company is not a signatory to the ABAC scheme and has not made a contractual undertaking to meet ABAC standards or abide by Panel determinations. The Company has, however, expressed its commitment to responsible alcohol marketing and did initially respond to the complaint and provided arguments as to why it believed the packaging of the product and the marketing via various Facebook posts was consistent with the ABAC standards. The arguments made by the Company have been considered in making this determination.
- 18. On 18 August the Panel made a provisional determination that the product packaging was in breach of Part 3 (b) of the Code and consistent with the rules and procedures applying to decisions concerning product packaging, the Company was afforded an opportunity to seek a rehearing of the provisional determination by making further submissions. The Company as at the date of this determination has not responded to the provisional determination, and as the timeframes permitted under the rules and procedures for seeking a rehearing have expired, the Panel has proceeded to make a final determination of the complaint.

A Decision on Marketing not the Product itself

- 19. Alcohol use and marketing within Australia is a shared regulatory space. The ABAC Scheme is limited to alcohol product marketing and does not extend to the regulation of products themselves. In other words, the ambit of the ABAC does not extend to whether a particular alcohol product should be permitted to be sold but rather is focussed on how a given product and brand is advertised and marketed.
- 20. This can be contrasted with the broader powers within State and Territory liquor licensing regimes which can extend to a power to remove or not permit certain products to be sold or marketed at all. There is some overlap between the liquor licensing regimes and the ABAC provisions in relation to alcohol marketing with both systems in effect having provisions requiring that product marketing not have strong appeal to minors or cause confusion with soft drinks or confectionary.
- 21. Over time liquor licensing authorities have removed from the market a range of products including alcoholic ice blocks, alcoholic milk, and some alcoholic powders, vapours and aerosol products. From time to time an ABAC determination deals with a marketing item which is also subject to action taken by a State or Territory licensing authority. As a matter of practice, the ABAC scheme seeks to cooperate with government authorities when issues arise touching on the regulatory domain of both parties.
- 22. In relation to the current case, the interplay between the public regulatory requirements of government liquor licensing regimes and the quasi regulatory obligations contained in ABAC is that:
 - the Panel will not assess whether Skinny Freezers as a product should or should not be available for sale; and

 the product packaging might be subject to consideration under liquor licensing powers as well as by the Panel under the ABAC.

The Product Packaging

- 23. The ABAC standards were extended to product name and packaging through a revision of the Scheme which took effect from 1 November 2009. This extension was not retrospective so products which were as at 31 October 2009 already on bona fide retail sale in Australia are able to continue in the market without needing to meet the standards. It is clear that Skinny Freezers however were not on sale in Australia until reasonably recently and certainly well after November 2009.
- 24. The complainant argues that the product packaging has strong or evident appeal to minors and contends the product's presentation 'bears a distinct resemblance to non-alcoholic icy poles' which are popular with children. The complainant makes reference to the Company's own media release describing the product and the comments on the Company's Facebook page from users of the page to support the argument. It is argued the product could readily be confused with a confectionary or soft drink.
- 25. The ABAC provides that an alcohol marketing communication (which includes product packaging) must not have strong or evident appeal to minors (under 18 year olds). The standard might be breached if the marketing item:
 - specifically targets minors
 - has a particular attractiveness to minors beyond its general attractiveness to adults
 - uses imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to minors or that create confusion with confectionary or soft drinks
- 26. The Company argues in reply that while the product does have a 'small similarity' to icy poles such as 'Zooper Doopers' this similarity is no more than is often found between alcohol beverage products and non-alcoholic products. For instance, a bourbon & coke premix product appears similar to a straight coke and vodka is the same colour as water. Further, the Company argues that the names used in the Skinny Freezer range are common vodka based cocktails like a cosmopolitan. It is strongly refuted that the Company has a 'deliberate' strategy to target minors as was speculated by the complainant and the Company points out its marketing approach via social media adopts age restriction controls that seek to exclude minors from seeing its advertising material.
- 27. In assessing if a Code standard has been breached the Panel is to have regard to the probable understanding of the packaging by a reasonable person taking the contents of the packaging as a whole. The reference to a 'reasonable person' is borrowed from the common law system and means that the opinions, values and life experiences common in a majority of the community is to be the benchmark.

- 28. Over time the Panel has made a number of decisions about alcohol marketing and product names and packaging, in particular in relation to consistency with the standard going to strong appeal to minors. From these previous cases the following general considerations can be derived:
 - each case has to be considered on its own merits and it is the overall impression created by the packaging that is to be assessed by a combination of features such as imagery, colour, use of language, product name and type of product container;
 - it is possible that a marketing item might have some residual or incidental appeal to minors while not strongly or evidently appealing to minors; and
 - the intention of the marketer as to its target audience is not the test, but rather the understanding of the marketing item by a reasonable member of the community.
- 29. In relation to product packaging creating confusion with a soft drink or confectionery, some considerations include:
 - does the packaging clearly identify the product as an alcohol product through use of an alcohol term like beer, ale, vodka, style of wine etc;
 - does the packaging have a visual design that resembles a soft drink such as the display of fruit images, bright colours and the use of a font style 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.
- 30. As mentioned earlier, the Panel is not making an assessment about the physical product itself and to this extent arguments about alcohol beverages and non-alcoholic beverages often looking similar if not identical are not really relevant. What the ABAC standard goes to is the packaging of the product not the beverage's appearance when poured into a glass or, with a Skinny Freezer, squeezed from its container.
- 31. While the packaging does establish the product is alcoholic it does in the Panel's view breach the Part 3 (b) standard. In reaching this conclusion the Panel noted:
 - the use of clear plastic gives prominence to the bright colours of the product and this combined with fruit depictions are highly likely to attract the attention of children;
 - the packaging is similar to that commonly used for icy poles and a reasonable person would likely draw a ready comparison of the packaging with that used on icy poles popular with children;
 - some of the range uses terms like lemonade and lemon which is commonly employed on non-alcoholic children's soft drinks; and
 - each of these elements in combination would lead a reasonable person to probably understand that the packaging has an evident appeal to minors.

The Facebook posts

- 32. In addition to raising a concern about the product packaging, the complainant has contended that a number of posts on the Company's Facebook page are in breach of the ABAC standards. The Panel has determined that the product's packaging has breached the ABAC standard and therefore depictions of those products on the Company's Facebook page will breach the ABAC Code. The second argument advanced is that photographs of the product shown in conjunction with a swimming pool depict or imply the use of the product while swimming. Further, it is contended that some of the user generated comments in response to the Facebook posts are inconsistent with the ABAC.
- 33. For its part, the Company argues that the posts with the product shown with a swimming pool establish that the products are not being consumed while swimming. It is pointed out that it is not uncommon in marketing to place alcohol products near water such as being used on a beach. In relation to the comments made in response to the posts, it is argued that such comments are outside the Company's control and that millions of comments are made on social media sites every day.
- 34. Part 3(d) of the Code provides that an alcohol advertisement must not show (including by direct implication) the consumption of alcohol before or during any activity that for safety reasons requires a high degree of alertness or physical coordination such as swimming. This means that the Code does not prohibit showing alcohol consumption near water per se, provided such consumption is not depicted as occurring before engaging in swimming or during swimming.
- 35. The Facebook images show the products being held apparently alongside a backyard swimming pool. The shots are staged to feature a picture of the product rather than depicting a social activity of people actually swimming in the pool. In one case (25 January) the products are unopened while in the other posts the products are opened and one of them seems to have been partially consumed. The accompanying text from the Company with the posts does not suggest the products are to be consumed while swimming but is more generically associating the product with summer e.g. 'beat the heat'.
- 36. On balance, the Panel does not believe the Company posts are in breach of the standard. The clear intent is to show the products and to associate them with summer and the swimming pool is used as a prop for this purpose. The pool is not being used, and there is no implication that swimming is occurring e.g. the tiles alongside the pool appear to be dry. The text with the photos does not advocate the use of the product while swimming and while the opening of the products implies consumption, taken as a whole the posts would not be considered as encouraging the inappropriate use of the products.
- 37. A range of user comments have been made to the Company's posts. The Company contends that it cannot be held responsible for the comments of others and this of

course is true. The Company is however responsible for its own website and social media platforms and this responsibility extends to the moderation of comments added to the sites by users. Accordingly, the comments become part of the Marketing Communication of the Company and these comments in terms of how a reasonable person would understand the communication as a whole might raise issues about the consistency with ABAC standards.

38. In this case, one comment in response to the Company's post of 25 January states 'we need to find these (the product) and float in the pool'. A reasonable person would take this mean that it is ok to consume the product while using a swimming pool. This message is inconsistent with Part 3 (d) of the Code.

Conclusion

- 39. This final determination has concluded that the packaging of the Skinny Freezers product, and its depiction in Facebook posts, is in breach of Part 3(b) of the Code. As noted, this decision goes to the packaging and not the product itself as rulings on the desirability of physical alcohol products being available for sale is beyond the remit of the ABAC scheme and rests with government authorities.
- 40. Further, the Facebook post of 25 January is in breach of Part 3(d) of the Code due to the inclusion of a user comment namely 'we need to find these and float in the pool.
- 41. The Company is encouraged to engage with the ABAC pre vetting process if it wishes independent advice on how best to market alcohol products consistently with the standards in the Code.

Attachment A

Complaint about Skinny Freezers, a product made by Slim Chillers

Summary

There are two parts to the complaint:

- That the product's packaging and some of the marketing materials are likely to appeal strongly to minors, and/or create confusion with confectionary or soft drinks, specifically the popular children's treat Zooper Doopers. And that user comments on Facebook clearly show that the product could be easily confused with Zooper Doopers. This breaches section 3(b)(i) of the ABAC Responsible Alcohol Marketing Code.
- 2. That marketing communications on the company's Facebook page depict consumption of the product before or during swimming, and that user comments clearly show that this is how the marketing communications were interpreted. This breaches section 3(d) of the ABAC Responsible Alcohol Marketing Code.

In making this complaint, I note that Ad Standards considers that Facebook content generated by the page creator as well as material or comments posted by users or friends falls under the Advertiser Code of Ethics and falls within reasonable control of the advertiser. See cases 0271/12 (http://ms.adstandards.com.au/cases/0271-12.pdf) and 0272/12 (http://ms.adstandards.com.au/cases/0272-12.pdf).

Detail

1. Strong or evident appeal to minors and potential for confusion with non-alcoholic product This product is designed to be consumed as an icy pole in frozen form. It bears a distinct resemblance to non-alcoholic icy poles, such as "Zooper Doopers", a similarity that the company points out and deliberately appeals to in a press release. An image of this release is included in Appendix A.

Zooper Doopers (and other icy poles) are popular summertime treats consumed by, and marketed at, children. They feature bright colours and appealing flavours of both fruit and confectionary, with flavours such as 'lemonade', 'lime' and 'orange sherbet'. Skinny Freezers have very similar packaging, colours and styling, with flavours such as 'watermelon lemonade', 'appletini' and 'lemon drop'. In fact, it is likely, given the nature of the marketing material, that the similarities between the two products was a deliberate marketing tactic. A comparison image showing the similarities of these two products is included in Appendix B.

The similarity between this alcoholic product and an iconic children's treat is both irresponsible and dangerous. It has obvious appeal to children and could easily be confused with a non-alcoholic product. User comments on Facebook clearly show that the product could be easily confused with Zooper Doopers or other icy poles, and that children would not understand the difference. For example:

• Facebook user 1: "Kids will never no lol they will just think I got an icy pole too hahha"

- Facebook user 2: "wow that would be easy but the boys would think they are for them lol"
- Facebook user 3: "ramped up Zooper Doopers Iol"
- Facebook user 4: "imagine if I had these at work instead of Zooper Doopers"

Facebook user comments are included at Appendix D to support both parts of the complaint.

2. Depiction of the product being consumed before or during swimming

The association of Skinny Freezers with summer, swimming, pools and beaches is a deliberate marketing strategy. This is evident in the imagery used in the marketing communications (included in Appendix C), and the description of the product on the company website which says that the product "CAN however hit the POOLSIDE, BEACHSIDE [...]".

It is not always clear in the images whether the people holding the Skinny Freezers are in or beside the pool. There is certainly room for interpretation that they are in the pool. It is also clear in the pictures that the products have been opened and therefore there is a clear implication that they are being consumed. Furthermore, it is evident from some of the Facebook user comments that their interpretation, and subsequent intention, is to consume the product in the pool. For example:

- Facebook user 1: "for our next pool day"
- Facebook user 2: "when your pool gets fixed"
- Facebook user 3: "we need to find these and float in the pool"

Facebook user comments are included at Appendix D to support both parts of the complaint.

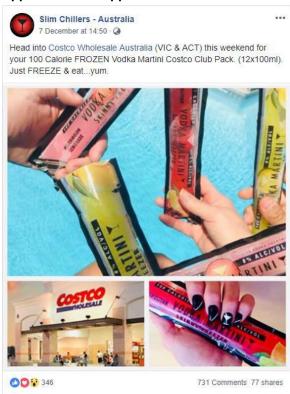
APPENDIX A Slim Chillers media release, 12 Jan 2018



APPENDIX B
Compilation image showing comparison between Skinny Freezers and Zooper Doopers



APPENDIX C Images showing the product being consumed before or during swimming. See also images at Appendix B and Appendix D.



APPENDIX D

Slim Chillers Facebook posts with selected comments (accessed 1 May 2019)

Facebook page: https://www.facebook.com/slimchillers.com.au/



