



## ABAC Adjudication Panel Determination No. 103/20

**Product:** Juicy Juicy Grapefruit Boozy Seltzer  
**Company:** Brookvale Union  
**Media:** Packaging  
**Date of decision:** 10 August 2020  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Debra Richards  
Professor Richard Mattick

### Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns the packaging for Juicy Juicy Grapefruit Boozy Seltzer by Brookvale Union (“the Company”) and arises from a complaint received 20 July 2020.
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 20 July 2020.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint was completed in this timeframe.

### **Pre-vetting Clearance**

9. The quasi-regulatory system for alcohol beverage marketing features 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.

## Marketing Communication

10. The following product packaging is referred to in the complaint.



## The Complaint

11. The complainant is concerned that the word “Boozy” promotes drinking significant volumes of alcohol as it:

- refers to the state people get to after drinking copious amounts of alcohol; and
- signals a very high percentage alcohol product.

## The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:

- (a)(i) show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines
- (a)(iv) encourage the choice of a particular Alcohol Beverage by emphasising its alcohol strength (unless emphasis is placed on the Alcohol Beverage’s low alcohol strength relative to the typical strength for similar beverages) or the intoxicating effect of alcohol

## The Company's Response

13. Carlton & United Breweries responded to the complaint on behalf of the Company by letter dated 30 July 2020. The principal points made were:

- Brookvale Union (BU), who are part of the 4 Pines Brewing family, recently released a new offering of alcoholic seltzer products, which are available in two flavour variants: Juicy Juicy Grapefruit and Lime & Orange Bitters. These two seltzers will join BU's existing product offering of Ginger Beer, Spiced Ginger Beer and Vodka & Peach Iced Tea.
- The complainant asserts that in respect of the Grapefruit variant:

*Its the Packaging and the use of the word 'BOOZY'  
In my opinion the the [sic] word "BOOZY" refers to the state people get to after drinking copious amounts of alcohol. It also signals to me a Very High % Alcohol Product. This is obviously to promote 'Drinking in significant' Volumes*

- We reject the assertions made by the complainant and reject the interpretation that the product and its packaging suggest either irresponsible consumption or that the product is seeking to promote drinking in large volumes. Furthermore, the phrase 'boozy' has not been adopted by BU to signify a high ABV percentage, as this is simply not the case. The product has an ABV of 4.0%. When assessing the product holistically, including the information on the product, the product's ABV and number of standard drinks, this clearly establishes that the seltzer is not a product that contains a 'very high' alcohol percentage.
- The marketing communication, namely the packaging for the grapefruit variant of BU's seltzer, does not breach Parts 3(a)(i) or (ii). The product does not show or encourage excessive consumption or the misuse or abuse of alcohol. The product packaging does not depict or imply any irresponsible or offensive behaviour, and the use of the word 'boozy' plays a critical role by informing and educating consumers that this product is alcoholic.
- Part 3(a)(i) of the ABAC states:

*'A Marketing Communication must NOT:*

- (i) show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines;...'*

The current NHMRC guidelines suggest that for healthy adult men and women "no more than two standard drinks on any day reduces the lifetime risk of harm from alcohol-related disease or injury" and that "drinking no more than four standard drinks on a single occasion reduces the risk of alcohol-related injury arising from that occasion."

<https://www.nhmrc.gov.au/file/1646/download?token=pbOC6GL8>

- The packaging of BU's Grapefruit seltzer is not inconsistent with the NHMRC guidelines. The product itself contains one standard drink, and consumption of one can of the product is consistent with the NHMRC's recommendations. Nothing on the packaging depicts or implies excess consumption, and the use of the term 'boozy' in and of itself does not create this impression. Furthermore, the lack of emphasis or colour around the term 'boozy' further demonstrates that this term has been used purely to inform consumers, as opposed to encourage any behaviour that is in breach of the ABAC Code.
- In assessing the packaging, we wish to draw the Panel's attention to BU's branding style, which is perfectly encapsulated in its tag line 'quality nonsense'. BU have an established branding style and as the term 'quality nonsense' implies, their style is quirky and at times absurd. The packaging for this product is true to this principle. There are some eye-catching, nonsensical elements on the can, however none of those aspects seek to emphasise the word 'boozy', nor do they imply or depict excess consumption or the misuse of alcohol. We believe that a reasonable consumer reviewing this packaging would form an overall impression that this beverage is the product of an eccentric brand, who have made an alcoholic seltzer, and when assessing the packaging as a whole would not interpret that excess consumption nor misuse of alcohol has been implied or depicted.
- Part 3(a)(ii) of the ABAC states:

*'A Marketing Communication must NOT:*

- (ii) show (visibly, audibly or by direct implication) or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage; ...'*

The marketing communication does not show or imply any kind of irresponsible or offensive behaviour.

- The packaging itself depicts a rather absurd scene containing various artistic motifs in the BU brand style, including various prints and depictions of grapefruit, leaves and hybrid, nonsensical animals. The overall impression from this marketing communication is that the packaging is eccentric in nature, however there is no reference or implication to irresponsible or offensive behaviour related to the consumption of a beverage and the use of the word 'boozy' in and of itself performs the function of informing consumers that the product contains alcohol. Nothing in the packaging encourages or implies that irresponsible or offensive behaviour is endorsed or encouraged by BU. All of the artistic elements of the packaging are very much separate to the word 'boozy', and this word clearly performs a purely informative function and in no way implies or encourages any behaviour that is in breach of Part 3(a)(ii).
- The use of the term 'boozy' has been adopted to convey to consumers that this product contains alcohol. The term 'seltzer' has been defined as 'mineral water with bubbles' (<https://dictionary.cambridge.org/dictionary/english/seltzer>). Consequently, the term seltzer alone does not clearly connote to consumers

that the product contains alcohol, and therefore the term 'boozy' is necessary to ensure the front of the packaging communicates the alcoholic nature of the beverage. This packaging does not encourage the choice of product by emphasising its strength or the intoxicating effect of alcohol and this is evident in the design itself. The design features 'boozy' directly above 'seltzer' which makes it clear that BU are providing information to consumers about the alcoholic nature of the product and not advertising the product on the basis of its alcohol content.

- Whilst the packaging makes it clear that the product contains alcohol, this reference does not breach Part 3(a)(iv) of the Code, as BU have not encouraged the choice of this particular product based on the ABV and the reference to 'boozy' plays an informative role in distinguishing the alcoholic nature of the product.

- Part 3(a)(iv) of the ABAC states:

*'A Marketing Communication must NOT: ... encourage the choice of a particular Alcohol Beverage by emphasising its alcohol strength (unless emphasis is placed on the Alcohol Beverage's low alcohol strength relative to the typical strength for similar beverages) ...'*

- As outlined in the ABAC Guidance Notes for this section:

*'There are two elements to this part of the standard:*

- *emphasis of alcohol strength*
- *in a way that encourages a consumer to choose the product.'*

- 'Emphasis of alcohol strength' - The packaging itself has many prominent elements that do not refer to the alcoholic nature of the product, including:

- the BU logo & 'Quality Nonsense' tag line;
- reference to 'Juicy Juicy Grapefruit' flavour;
- the reference to 'seltzer'; and
- many artistic motifs in the BU 'quality nonsense' brand style as described above.

- The reference to 'boozy' on the front of the can, is the single reference to alcohol on the front of the packaging. This reference has been utilised to inform consumers that this product is an alcoholic beverage. Furthermore, the word 'boozy' is simply printed in black font and is one of the least dominating elements, contrasted with other aspects of the can, including the 'grapefruit' flavour name (which is in pink), and the artistic motifs, which are more eye-catching than the word 'boozy'. Whilst the word 'boozy' has been legibly, and clearly communicated, a reasonable consumer reviewing this packaging would have their eye caught by the other design elements that the

brand have sought to emphasise, namely the fruit flavour, and the art featured on the packaging, which is presented in true BU quality nonsense style.

- The Guidance Notes for this ABAC section specifically note that alcohol strength 'must' be communicated on packaging, but that the strength must not be a 'dominant' part of the communication. In this instance the alcohol content is articulated via the word 'boozy', which is smaller in size and significantly less prominent than the flavour description, branding and the reference to 'seltzer'. Assessing at the packaging holistically, the alcoholic nature of the product, whilst being responsibly communicated to consumers, is not the dominant part of the communication.
- 'Encourages a consumer to choose the product' - By stating that the product is 'boozy' on its can, the grapefruit variant packaging articulates that this seltzer is indeed alcoholic in nature, however there is nothing on this packaging that encourages the choice of this beverage over any others because of its alcohol content, and consequently it does not satisfy the second element of Part 3(a)(iv). As noted above, nothing about the word 'boozy' has been presented in an eye catching or particularly appealing manner.
- Furthermore, noting that the seltzer category is an emerging style in the Australian beverages market, at the time of writing there are 14 seltzer flavours promoted on the Dan Murphy's website. Seven of these products contain a higher ABV than BU's product, and four are the same ABV. This further demonstrates that BU are certainly not trying to create the impression that this seltzer should be selected above others based on its high alcoholic strength within the category, as this is simply not the case.
- It is important for BU to distinguish this new product from any non-alcoholic carbonated waters on the market and to inform consumers of its alcohol content so they can make an informed choice. This product contains alcohol and the references to 'boozy' in this marketing communication are therefore an informational tool to distinguish the product as one that contains alcohol, without in any way heralding it as the preferred choice
- We also wish to draw the Panel's attention to ABAC Determination 18/20, a recent Determination in which the Panel found that the reference to 'double the booze' in respect of the Pirate Life Double Acai & Passionfruit, in the context of the marketing communication, did not give 'undue emphasis to the strength'. We acknowledge that the Panel are not bound by prior Determinations, however we wish to highlight to the Panel, the similarities between the use and context of 'boozy' by BU, and the reasoning of the Panel in finding that PL's 'booze' reference was acceptable in the context, namely:
  - a reasonable consumer would understand that the dominant message from this packaging is that this is a grapefruit alcoholic seltzer, with a rather whacky brand personality;

- the reference to 'boozy' is subordinate to other aspects of the packaging (including the visual and written references to grapefruit and seltzer);
  - the use of 'boozy' here has not placed undue emphasis on the strength, as in comparison with other beverages in the alcoholic seltzer category, this is not on the stronger end of the scale; and
  - considering the overall messaging conveyed by the packaging, there is not undue emphasis on the alcoholic nature of the beverage.
- CUB is committed to ensuring our promotional and marketing material, and that of our associated entities such as 4 Pines and Brookvale Union, does not promote or encourage any irresponsible consumption of alcohol. Our goal is for consumers to enjoy our products responsibly and in moderation. We believe the Juicy Juicy Grapefruit Boozy Seltzer is entirely within both the spirit and letter of ABAC.

### **The Panel's View**

14. Brookvale Union is a company within the CUB group of alcohol brands. The Company produces a small range of alcohol products as well as a non-alcoholic ginger beer. One alcohol product produced by the Company is a Ready To Drink vodka based alcoholic seltzer branded as 'Juicy Juicy Grapefruit Boozy Seltzer'. It is the packaging (product name and labelling) of this product which has attracted the complaint and lead to this determination.
15. The complainant takes issue with the term 'boozy' as used in the packaging. It is argued that boozy refers to the state people get to after drinking to excess. Further, it is contended the term signals the product would have a very high alcohol to volume content. The issues raised by the complaint bring into consideration the consistency of the packaging with two ABAC standards namely:
  - the prohibition of alcohol marketing encouraging excessive consumption of an alcohol beverage (Part 3(a)(i)); and
  - the prohibition of alcohol marketing encouraging the choice of a particular alcohol beverage by emphasising its alcohol strength or the intoxicating effect of alcohol (Part 3(a)(iv)).
16. The Company responds to the complaint by providing lengthy arguments as to why the packaging is consistent with the two standards. In short it is contended:
  - the product, in relative terms, does not have a high alcohol to volume percentage (4%);
  - the term boozy merely identifies the product as an alcoholic as opposed to a non-alcoholic seltzer;
  - the product has a branding style encapsulated by the tag line 'quality nonsense' and the term, boozy, would be understood in the context of this style rather than seen as encouraging excessive consumption; and
  - the packaging doesn't set up a comparison with other products which then seeks to promote the choice of the product over other products based on its alcohol strength.



17. In assessing the consistency of a marketing communication within a Code standard, the Panel is to adopt the probable understanding of the marketing item by a reasonable person taking the contents of the marketing as a whole. The 'reasonable person' test is borrowed from the common law system and requires the touchstone to be the life experiences, opinions and values found commonly in a majority of the community. This means, if a marketing message could be interpreted in several ways, it is the most likely interpretation which is to be preferred over a possible, but less likely, understanding of the marketing message.
18. A seltzer is a carbonated water i.e. water with carbon dioxide. It is similar to a soda water and a sparkling water with the differences being related to the presence of potassium bicarbonate in soda water, while sparkling water features naturally occurring materials. Each of these beverages are non-alcoholic. The addition of alcohol to seltzer creates an alcohol beverage which will often be differentiated in a branding sense from a non-alcoholic 'seltzer' by use of a descriptor such as 'alcoholic seltzer' or 'vodka seltzer'.
19. Essentially, the question then is, how a reasonable person would understand 'boozy seltzer' in the context of the use of the term on the product label. It can be accepted that 'boozy' does, like the descriptors, 'alcoholic seltzer' or 'vodka seltzer', identify the product as alcoholic as opposed to a flavoured but non-alcoholic carbonated water. But does 'boozy' do more than this and go on to encourage irresponsible behaviour (excessive consumption) or imply the product has a high alcohol content and this makes it a preferable consumer choice?
20. The Panel believes a reasonable person would not share the complainant's interpretation of the packaging. The more likely understanding is that the term boozy in the current context is simply identifying the product as alcoholic. Certainly, the word 'boozy' could in some contexts suggest excessive consumption but there are no elements used on the packaging which raise excessive alcohol use. Nor does the term, as used on the label, give undue emphasis to the alcohol strength of the product. If anything, it might be suggested the packaging does not sufficiently make clear the product is in fact alcoholic. Other than the word boozy on the front of the can, the cues that the product is an alcohol beverage are found less prominently on the side of the can in smaller font, whereas 'juicy' and 'grapefruit' are used on the front of the can and are terms more commonly associated with soft drinks. In any event, the overall impression is not that the product is high in alcoholic content as a main selling point.
21. The complaint is dismissed.