



ABAC Adjudication Panel Determination No. 146/20

Product: Juicy Juicy Grapefruit Boozy Seltzer
Company: Brookvale Union
Media: Packaging & Digital
Date of decision: 3 November 2020
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns the packaging for and Instagram advertising of Juicy Juicy Grapefruit Boozy Seltzer by Brookvale Union (“the Company”) and arises from a complaint received 12 October 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 12 October 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 complaint refers to the product packaging and a post on the Company's Instagram account made on 9 October 2020. The product packaging is shown below. The Instagram post is in the form of a range of fast-moving images including an image of a cherub with the strapline – “Light But Loose” shown below.



The Complaint

11. The complainant is concerned that:
- The packaging uses the word “boozy” which is youthful language that could be attractive to minors;
 - The Instagram posts include the words “boozy” and “loose” which encourage the consumer to drink large quantities of alcohol so as to relax and lose their inhibitions.

The ABAC Code

12. Part 3 of the ABAC Code provides that 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
 - (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
- (i) have Strong or Evident Appeal to Minors
 - (i) suggest that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment

(c)(iv) suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation.

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.

The Company's Response

13. Carlton & United Breweries responded to the complaint on behalf of the Company by letter dated 21 October. The principal points made were:

The Product Packaging

- This product has been the subject of a prior dismissed complaint, with respect to Parts 3(a)(i), 3(a)(ii) and 3(a)(iv) of the Code, which also objected to the use of the word 'boozy' as an alcohol signifier. In response to that complaint, we outlined the rationale for use of the word 'boozy' as a well-understood colloquial signifier that this is in fact an alcoholic beverage, similar to the way in which 'hard' is often used as an alcohol signifier with respect to other seltzer and cider products.
- In designing this can, we have taken great care to ensure a balance between several aspects of the Code:
 - Demonstrating that the product is in fact alcoholic and should not be mistaken for a soft drink or fruit juice, while taking care that we are not emphasising its alcohol strength.
 - Ensuring that the flavour profile and alcoholic nature of the product is communicated, without appealing to minors.
 - Communicating the Brookvale Union brand proposition of 'Quality Nonsense' – well-crafted and delicious products that maintain a sense of fun and eccentricity – while providing factual information to consumers about the product.
- The same care that has been taken to ensure use of the word 'boozy' is compliant with Parts 3(a)(i), 3(a)(ii) and 3(a)(iv) of the Code has been taken

with respect to Part 3(b)(i). The word 'boozy' is presented as part of the overall informational context supplied by the can. There is no emphasis or colour around the term 'boozy', it is not designed to be eye-catching to minors, and the complainant's assertion that it is "trying to use a word that would be considered 'cool' by younger consumers to get them to drink the product" is pure, and false, conjecture on their part. 'Boozy', like 'hard' is a well-understood colloquial term signifying the presence of alcohol that in this case serves to inform and educate the consumer on the emergence of a relatively new, but growing, category: alcoholic seltzers.

- I am sure that the complainant would agree that both 'juicy juicy grapefruit' and 'seltzer' require further clarification for consumers to be assured that this is an alcoholic product and thus not suitable for minors, and that is the role that the word 'boozy' plays, while staying true to the brand's overall playfully colloquial identity.
- The packaging depicts an absurdist 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 of this packaging is eccentric yet mature and sedate, with no reference to or implication of themes that appeal to minors. Use of the word 'boozy' is in the same vein: a colloquial signifier that the product is intended for a mature audience.

The Instagram Post

- The use of the word 'boozy' in the context of Parts 3(a)(i) and 3(a)(ii) of the Code has already been dismissed by the Panel with respect to Complaint 103/20, and I will not relitigate that argument here; 'boozy' is used only in the context of informing the consumer that the product is alcoholic. It is only used in the Instagram post in the context of appearing on the product packaging, so I must question why it is being raised again as the subject of another complaint.
- I refer to the assessment of the Panel in that adjudication:

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.

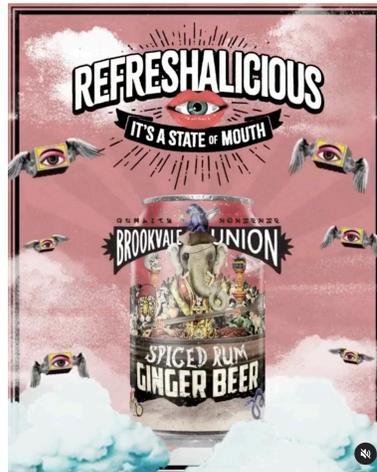
- With respect to use of the word 'loose', again the complainant is ascribing intentions to the marketing communication that are not supported by the text. The full caption on the Instagram post is:

It's dry but juicy. Sweet but citrusy. Light but loose. <90 cals. Always refreshalicious. Open your earholes and say AHHHHH

- It's very clear from the full caption that 'loose' is being used to describe the flavour and mouthfeel of the product. All of the adjectives in the caption speak to some aspect of how the product tastes or is experienced on the palate, with

a dash of the trademark Brookvale Union eccentricity and whimsy. 'Dry', 'juicy', sweet', 'citrusy', 'light', 'loose' and even 'refreshalicious' combine to give a full contextual picture of what this product tastes like, and how it will feel on the palate.

- With respect to the image of a man with an enlarged mouth, the image is a take on a well-known stock photo meme, often employed in situations where things are not quite as they seem; this is a characteristic that aligns to the Brookvale Union brand proposition of eccentricity and 'Quality Nonsense'. In this image, the mouth has been enlarged to further add to the sense of eccentric whimsy associated with the Brookvale Union brand, in particular calling back to the use of the 'mouth' device as a signifier for taste that is employed within the whole Brookvale Union brand family.
- For example, the advertising of the Ginger Beer, Vodka Peach Iced Tea, and Spiced Rum Ginger Beer products also employ this focus on a mouth device, references to the tongue and tastebuds, and the strapline 'it's a state of mouth' in order to demonstrate the product is extremely delicious, as shown below.



- References to the mouth, tongue, tastebuds, and in particular the enlarged mouth in the meme post, are very clearly references to the flavours of the various products as opposed to any implication of excessive consumption.
- As per my answer with respect to Parts 3(a)(i) and Parts 3(a)(ii), I reiterate the use of the word 'loose' is being used to describe the flavour and mouthfeel of the product. All of the adjectives in the caption speak to some aspect of how the product tastes or is experienced on the palate, with a dash of the trademark Brookvale Union eccentricity and whimsy. 'Dry', 'juicy', sweet', 'citrusy', 'light', 'loose' and even 'refreshalicious' combine to give a full contextual picture of what this product tastes like, and how it will feel on the palate. The product is not being advertised on the basis of its alcoholic strength – it is not being compared to any other product, and there is no suggestion that consuming it will lead to any effects as the caption is easily understood by consumers as referring to taste and mouthfeel.

- Great care has been taken to ensure that the word 'boozy' is presented as part of the overall informational context supplied by the can. There is no emphasis or colour around the term 'boozy', it is not designed to be eye-catching to minors, and indeed the use of the term 'boozy' is intended to mitigate the risk of appeal to minors posed by references to 'juice'. The complainant simply cannot have this both ways: 'boozy' is the cue that this product is alcoholic and as such not suitable for minors.
- Laying this discussion aside, I do not accept that that the overall impression of either of these Instagram posts is one of appeal to minors. To address each point sequentially:
 - 'Loose' and 'refreshalicious' are clearly intended to describe the product's taste and mouthfeel.
 - 'Juicy' is a very commonly applied descriptor to a range of alcoholic beverages across the categories of beer, wine, spirits and RTDs, and is further mitigated by the fact the product being advertised is a grapefruit flavour, a flavour noted for its tartness and subsequent lack of appeal to children.
 - 'Boozy' is the alcohol cue as noted above and in any case, the context of these posts is their appearance on an age-gated alcohol brand's Instagram; it is reasonable to assume that all posts are indeed a reference to the brand's alcoholic beverage products.
 - The distorted mouth is if anything more unsettling (in the broad vein of other Brookvale Union eccentric devices such as disembodied mouths, eyes and limbs) than appealing to minors, appearing as it does photoshopped on the image of an older gentlemen in which the Brookvale Union alcoholic seltzer product has also been photoshopped.
- It's very clear from the full caption that 'loose' is being used to describe the flavour and mouthfeel of the product. All of the adjectives in the caption speak to some aspect of how the product tastes or is experienced on the palate, with a dash of the trademark Brookvale Union eccentricity and whimsy. 'Dry', 'juicy', 'sweet', 'citrusy', 'light', 'loose' and even 'refreshalicious' combine to give a full contextual picture of what this product tastes like, and how it will feel on the palate.
- There is no sense of attaining a state of 'looseness' implied in this context. There is also no sense of moving from one mood to any other mood via consumption of the product. There is not even a specific reference to the act of consuming the product.
- There is no sense of relaxation or therapeutic benefit implied in this context. As always, significant care has been taken to ensure that what is being described is the flavour and mouthfeel of the product rather than any mood or feeling created by its consumption.

- CUB, and its parent entity Asahi Beverages, is committed to ensuring our promotional and marketing material, and that of our associated entities such as 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, and to uphold community standards when it comes to our advertising.

The Panel's View

Introduction

14. The ABAC Scheme is comprised of three components namely:
 - the Code which contains the standards of good practice which alcohol marketing communications are to satisfy;
 - the pre-vetting service which enables an independent assessment of marketing material against the Code standards prior to the marketing being publicly used; and
 - the public complaints process which provides a mechanism for members of the community to submit any concerns about alcohol marketing material and to have those concerns independently adjudicated against the relevant standards in the Code.
15. When marketing material is pre-vetted, the consistency of the material against each Code standard is assessed. In contrast, the complaint process is driven by the nature of the concerns expressed by the complainant and only those Code standards relevant to the concerns of the complainant are considered in the adjudication process. This means it is possible that an alcohol marketing communication can be considered in more than one Panel determination if multiple complaints are made about the marketing material and different issues are raised in these complaints. Most commonly if a marketing communication attracts multiple complaints, the complaints will be received more or less at the same time and the Panel deals with the multiple issues in a single determination. If, however, the complaints are received months apart, then the subsequent complaint raising a new issue can result in a second determination.
16. This is what has occurred in relation to the marketing of an alcoholic seltzer branded as 'Juicy Juicy Grapefruit Boozy Seltzer' by the producer Brookvale Union. Determination 103/20 dated 10 August 2020, considered an argument that the term 'boozy' within the context of the product packaging (can design) promoted excessive consumption and the choice of the product based on its perceived alcoholic strength. In part the current complaint raises the same concern about the product packaging considered in the earlier determination but also raises a different issue namely that the packaging will be considered 'cool' by minors and will encourage underage drinking. Further the complaint goes beyond the product packaging and raises concerns about a post on the Company's Instagram account.
17. The balance of this determination therefore deals with matters not canvassed in Determination 103/20, namely:

- is the product packaging strongly appealing to minors in breach of Part 3(b)(i) of the Code; and
- is the Instagram post consistent with the Code standards in Part 3(a) and (b)?

The Product Packaging

18. The complainant contends that the term boozy used on the can will be considered cool by younger consumers and will encourage minors to drink. Part 3(b)(i) of the ABAC provides that an alcohol marketing communication (which includes a brand name and product packaging) must not have strong or evident appeal to minors. This standard might be breached if the marketing material:
- targeted minors;
 - had 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 that create confusion with confectionary or soft drinks.
19. The Company argues that the packaging is consistent with the Code standard. It is contended:
- the term 'boozy' signifies the product is alcoholic and the design establishes the product is not a soft drink;
 - the design ensures 'boozy' is not overly eye-catching to minors;
 - an 'absurdist scene' is depicted on the can which is eccentric yet mature and sedate; and
 - there are no references or themes used which would appeal strongly to minors.
20. 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;
 - 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.
21. 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 which shapes how a reasonable person will understand the item.
22. Product packaging can give rise to strong appeal to minors if it creates confusion with confectionary 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 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.
23. On balance the Panel does not believe the packaging breaches the Part 3(b) standard. In reaching this conclusion the Panel noted:
- the packaging adopts a design style which is mature using images akin to surrealism art and this is considered unlikely to be relatable to most minors;
 - the colour scheme is muted rather than bright and eye-catching;
 - the product does not unambiguously establish it is an alcoholic beverage with alcohol cues of 'boozy' and the alc/vol percentage less prominent than the reference to 'seltzer' and the grapefruit references and hence there is potential for the product to be confused with a soft drink;

- the graphics and illustrations used on the packaging is, however, not like that used for recognised fruit juices or soft drinks e.g. block colours are not used;
- the term 'boozy' is not considered a word used particularly by minors as opposed to its use in the community more generally; and
- taken as a whole, the packaging design features would not have strong appeal to minors.

The Instagram Post

24. The Instagram post is a combination of fast-moving different images showing the product with effects and graphics consistent with the brand's use of absurdist or surrealism themes. One of the images shows a cherub and a palm tree with an overlay strapline of "light but loose". The post is accompanied by a short text message which reads – "It's dry but juicy. Sweet but citrusy. Light but loose.< 90cals. Always refreshalicious. Open your earholes and say AHHHHH." The complainant contends the Instagram post encourages excessive consumption and the use of alcohol for relaxation and to lose inhibitions.
25. The Code provides that alcohol marketing must not encourage excessive consumption nor suggest that alcohol use may contribute to a significant change in mood or offer any therapeutic benefit or is necessary for relaxation. Assessment of the consistency of a marketing item to a Code standard is from the viewpoint of a reasonable person taking the content of the material as a whole.
26. The Company submits that the post would not be interpreted as argued by the complainant. It is contended the phrase "light but loose" is contextualised by the post and text to relate to the flavour and the impact on the palate of the product and does not mean the product causes relaxation or loss of inhibitions. The entire post is argued to be consistent with the "quality nonsense" brand of the product.
27. The Panel does not believe the post is inconsistent with the ABAC standards. The post does not depict actual consumption of the product and none of the images show people who appear impacted by alcohol use. Rather the images are photoshopped memes of various types produced in a style which older viewers might believe reminiscent of the 'Monty Python' TV show of the 1970's. The phrase "light but loose" would not be taken by a reasonable person as a reference to alcohol consumption causing a loss of inhibitions but rather to a reference to the low-calorie content of the product. This is reinforced by the accompanying text referring to "<90 cals" immediately after the light and loose reference. The post does not mention "boozy" other than the word being on pictures of the product packaging.
28. The complaint is dismissed.