



ABAC Adjudication Panel Final Determination No 33/21

Products: Unicorn Vodka Liqueur range
Company: Local Spirit Group
Media: Packaging
Date of decision: 5 May 2021
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Louisa Jorm

Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 15 March 2021. The complaint concerns the labelling and packaging by Local Spirit Group (“the Company”) of a range of Unicorn Vodka Liqueur products (“the Products”).
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 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 meeting 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 15 March 2021.

8. Generally, the Panel endeavours to make a decision within 30 business days of the receipt of a complaint but this timeline is not applicable due to the two-part process involved in determinations concerning product names and packaging.

Pre-vetting Clearance

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

The Marketing

10. This determination relates to the following labels and packaging:



Miss pINK - Strawberry Vodka Liqueur



Unicorn Elixir - Tropical Vodka Liqueur



Unicorn Elixir Tropical GIN Liqueur



Unicorn Kisses, Strawberry Vodka Liqueur



Unicorn Tears - Salted Caramel Vodka Liqueur



Unicorn Espresso Martini

The Complaint

11. The complainant has the following concerns about the labelling and packaging:

Colourful sparkly unicorn branded vodka...is very attractive to minors.

The way that the products are promoted, branded and labelled is very appealing to children, against the ABAC code.

Their website...to purchase the vodka is also not protected by an age gate and hence attracted minors can easily be directed to purchase the products without any barriers.

The ABAC Code

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

- (b)(i) have Strong or Evident Appeal to Minors.
- (b)(iv) be directed at Minors through a breach of any of the Placement Rules.

13. Part 6 of the ABAC Code provides that:

Placement Rules means:

- (i) A Marketing Communication must comply with codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy).
- (ii) A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.
- (iii) If a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, a Marketing Communication may only be placed where the audience is reasonably expected to comprise at least 75% Adults (based on reliable, up-to-date audience composition data, if such data is available).
- (iv) A Marketing Communication must not be placed with programs or content primarily aimed at Minors.
- (v) A Marketing Communication must not be sent to a Minor via electronic direct mail (except where the mail is sent to a Minor due to a Minor providing an incorrect date of birth or age).

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

14. The Company responded to the complaint by letter emailed on 1 April 2021. The principal points made by the Company were:

Date product first offered for sale

- The Products with their current packaging were first offered for retail sale in Australia on various dates from May 2018.

Alcohol Advertising Pre-vetting Service Approval

- Alcohol advertising pre-vetting service approval was not obtained as we were not aware of this process.

Responsibility toward Minors - Age restrictions

- Firstly, we take our age protection very seriously to ensure our products don't get into the hands of minors.
- We use the Australia Post Wine Delivery Service which is a service provided by Australia Post for the specific delivery of alcohol whereby the service requires a signature on delivery and receipt only by a person over the age of 18 or over.
- As part of this service, all of our packages have a special "Wine Delivery Service" sticker clearly indicating that the parcel contains alcohol. The buyer is not allowed to opt out of this and the parcels cannot be left unattended or dropped off at the premises without this signature, otherwise it is taken to the nearest post office where they too must

adhere to a signature collection by a person over 18 verified by a drivers licence or equivalent government approved ID.

- We have age restrictions on all social media pages (Which are just Facebook and Instagram) so the pages can only be viewed by adults.
- We have an age gate to our website where users have to confirm their age is 18+. This is shown once per customers visit to the site and shows on any page that they land on as their first visit to the site. This is also active on mobile and tablet viewing of the website.
- Advertising – all of our direct advertising through Facebook and Instagram has targeting and content restrictions applied ensuring that it does not get displayed and is not accessible to minors.
- Our products do not and have never specifically targeted minors, as demonstrated by our age restrictions verifications, social media blockers and RSA compliant delivery methods.

Responsibility toward Minors – Content

- We do not believe the word or imagery of a unicorn has any evident appeal to minors above its general appeal. I would relate this to Captain Morgans Rum with depictions of a pirate or Green Fairy Absinthe, with a fairy on their labels which are both the theme of children's parties, dress ups, clothes, books, movies and TV shows. Bundaberg with depictions of a bear on the front. Jagermeister with a reindeer. Unicorns are no different in this context. They are the national animal on the coat of arms for Scotland, hugely popular amongst the 28-45year old female demographic and are an icon for unique expression and in the LGBTQIA+ community.
- Expanding on the confusions with confectionary, this is not possible due to product placement in the store and the bottle shape being clearly a spirit bottle which is not similar to anything on the market for kids.
- The shimmer effect of the product is not evident unless the bottle is shaken. Its colour choices are no more appealing than a bottle of Hpnotiq or Midori which display their bright coloured liquid prominently. The labels are no more colourful or contrasting than the Rainbow edition of Absolute Vodka or the Aurora Crystal Head Vodka bottles to name just a couple of large international brands.
- With regards to ABAC's question about promoting on the labels to "Flip and Shake to Shimmer" and "Shake Me" - an instruction of use would not reasonably be confused as a game with strong or evident appeal to

minors. This is a small part of the label and not a major view point or feature. Like a pre-mixed espresso martini or any product with sediment, this instruction is necessary to be displayed for proper use of the product.

- With regards to ABAC's question about "Flip and Shake to Shimmer" having strong or evident appeal to minors due to the craze of "bottle flipping" - Bottle flipping was a fad many years ago and was done with plastic water bottles. There is no reasonable relation here with a glass spirit bottle which was never part of that fad.
- With regards to ABAC's question about promoting the Products as "Colour Changing", which may have strong or evident appeal to minors - Colour changing spirits are well established in the market, Ink gin is a successful and prominent example.
- In relation to ABAC's question about "Miss pINK - Strawberry Vodka Liqueur" and "Unicorn Kisses, Strawberry Vodka Liqueur" - This was a limited edition product for a show we sponsored, it has since been removed from our site. Strawberry liqueurs and strawberry alcohols are common place in the alcohol market. Strawberry ciders, liqueurs and vodkas are extremely common.
- In relation to "FUCK 2020 - Unicorn Elixir", "Fuck Boy Tears - Vodka Liqueur" and "Grump Tears Salty Loser - Salted Caramel Vodka Liqueur" - This was a limited edition product, it has since been removed from our site.
- The word Liqueur, Vodka or Gin are all prominently on the front label. Given the bottle type and shape and being glass it would not be confused with a confectionary, soft-drink or cordial.
- For any of the issues you have raised if you require any further clarification or responses please let us know. We welcome any recommendations or adjustments that can be made. If the panel could list in detail, specific things and recommendations that can be adjusted we are happy to work with you.

The Panel's View

15. The Local Spirit Group is the corporate vehicle of Mr Ben Osbourne, who at a young age has embarked on several entrepreneurial ventures in the alcohol industry. In 2017, aged 20, Mr Osbourne started a tour business of Canberra based small batch distilleries and in 2018 he moved into alcohol production with the creation of Unicorn Spirits. With production commencing initially in Melbourne, the now Canberra based Company produces a range of vodka liqueurs. It is the

branding and packaging of these products which has attracted the complaint and is the subject of this determination.

16. On 20 April 2021 the Panel made a provisional determination that the product packaging is in breach of Part 3 (b)(i) of the Code. Consistent with the rules and procedures applying to decisions concerning product packaging, the Company was afforded an opportunity to seek a re-hearing of the provisional determination by making further submissions. The Company did not seek a re-hearing and the Panel has proceeded to make a final determination on this complaint.
17. A distinctive feature of the Company's products is their striking colour which is often combined with a property which enables the liqueur to change colour upon being mixed. Other products in the range are made with a pearl glitter which causes the beverage to shimmer, particularly if the bottle is shaken. The Company's range appears to include ongoing products and limited-edition products. The limited-edition products have carried provocative brand names such as 'Fuck Boy Tears' or topical branding such as 'Grump Tears Salty Loser' which references the less than gracious departure of former US President Donald Trump. The focus of this determination however is the branding and packaging of the 'Unicorn' products, all of which feature a stylised unicorn logo.
18. The complainant's concern is that the branding is very appealing to children. A second contention is that the Company's website is not protected by an age gate and is hence accessible by minors. This concern brings into play Part 3 (b) (i) of the ABAC which provides that an alcohol marketing communication (which includes product labels and packaging) must not have strong or evident appeal to minors. This standard might be breached if the branding:
 - specifically targets minors;
 - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; and
 - uses imagery, designs, motifs, animations, or cartoon characters that are likely to appeal strongly to minors or create confusion with confectionery or soft drink.
19. The Company argues that its branding and packaging does not breach the ABAC standard. It is submitted:
 - that the delivery service used through Australia Post for on-line sales of the product ensures that minors cannot be supplied with product;
 - social media sites for marketing and the Company website all employ age restriction controls;
 - the use of the unicorn name and imagery has no evident appeal to minors beyond its general appeal to adults;
 - unicorn imagery is widely used, and for alcohol products it is little different than a range of animal or mystical references employed for branding on numerous products;

- the product uses a bottle type which is used for alcohol spirits and is not like packaging used for children's drinks or confectionery;
 - the labelling uses terms which identify the product as an alcohol beverage;
 - the shimmer effects are not evident unless the product is shaken, and the label is no more appealing to minors than a range of other products on the market; and
 - colour changing alcohol beverages are well established in the market.
20. While the Company's response raises some valid points, several of the arguments are not relevant to the assessment of the consistency of the product branding and packaging to the ABAC standard. For instance:
- All alcohol retailers are required to take measures to ensure under 18 year olds cannot purchase alcohol beverages, and this is a requirement of State Liquor Licensing laws. Public policy settings of Australian governments go beyond the mandating that minors cannot be sold or served alcohol and extend to the requirement that alcohol marketing not appeal to minors or encourage underage drinking.
 - Pointing to the branding of other products on the market is not an answer to a question about the branding of the Company's products. The ABAC Scheme is triggered by the lodgement of a public complaint, and if complaints are lodged about other products, these will be assessed on their own merits.
21. Before turning to the substantive issues of the consistency of the product labelling and packaging with the Part 3 (b) standard, it is important to note that the ABAC does not regulate physical alcohol beverages. This means the nature of the beverages, i.e. their alcohol to volume content, their colour or the fact the beverages can change colour when mixed or shaken is not within the remit of the ABAC Scheme. The colour of a product can be a factor in how a reasonable person will understand the appeal of the packaging as a whole, but it is unlikely that the colour alone would be the basis of a breach of a Code standard.
22. Assessment of the consistency of a marketing communication with an ABAC standard is from the probable understanding of a reasonable person. This means that the life experiences, values, and opinions held by a majority of the community is to be the benchmark. A person who interprets a marketing message in a different way is not 'unreasonable' but possibly their understanding would not be shared by most people.
23. The Panel has considered the Part 3 (b) standard on many past occasions. While each marketing communication must always be assessed individually, some characteristics within marketing material which may make it strongly appealing to minors include:
- the use of bright, playful, and contrasting colours;
 - aspirational themes that appeal to minors wishing to feel older or fit into an older group;

- illusion of a smooth transition from non-alcoholic to alcoholic beverages;
 - creation of a relatable environment by use of images and surroundings commonly frequented by minors;
 - depiction of activities or products typically undertaken or used by minors;
 - language and methods of expression used more by minors than adults;
 - inclusion of popular personalities of evident appeal to minors at the time of the marketing (personalities popular to the youth of previous generations will generally not have strong current appeal to minors);
 - style of humour relating to the stage of life of a minor (as opposed to humour more probably appealing to adults); and
 - use of a music genre and artists featuring in youth culture.
24. It should be noted that only some of these characteristics are likely to be present in a specific marketing communication and the presence of one or even more of the characteristics does not necessarily mean that the marketing item will have strong or evident appeal to minors. It is the overall impact of the marketing communication rather than an individual element which shapes how a reasonable person will understand the item.
25. Product packaging can give rise to strong appeal to minors if it creates confusion with 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 e.g., 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 like that used by soft drinks or fruit juices e.g., prima style juice box.
26. As the Company points out, unicorn imagery has become quite ubiquitous and is used on many products. For instance, a cursory internet search revealed products and services branded with the unicorn name or employing unicorn imagery including:
- financial services;
 - a Sydney hotel;
 - various children's toys;
 - arts and craft supplies;
 - numerous children's videos and some video games;
 - clothing lines; and
 - a television series about a father coping alone with teenage daughters.

27. Interestingly, the name has been used on other alcohol products, including a USA vodka which like the Company's product also changes colour. The American product is branded using the 'unicorn' name but does not feature unicorn imagery but rather a sedate black label with an oversized 'U'. In the UK, a gin liqueur branded 'Unicorn Tears' featured an image of a unicorn head. This branding was the subject of a ruling by the Portman Group- a similar scheme to the ABAC- and in 2019 was found to be in breach of the Portman Code provision 3.2 (h) which states 'a drink, its packaging and any promotional material should not in any direct or indirect way have a particular appeal to under 18's'.
28. The Panel does believe the labelling of the Company's unicorn range of products is in breach of Part 3 (b) (i), noting:
- the unicorn name and imagery is used on many products and services which are directed towards minors and while this does not preclude the use of the unicorn name or images on alcohol branding it does create an inherent possibility of the branding having a strong appeal to minors; and
 - the Company's labelling uses a unicorn image, which combined with the colour of the products and the addition of the 'shake me' message, gives the label a strong appeal to minors due to:
 - the creation of an illusion a smooth transition from non-alcoholic to alcohol beverages;
 - the use of imagery familiar to minors; and
 - the creation of a relatable product for minors.
29. The Company's website does use a (very basic) age gating requirement for entry onto the site. As the ABAC Placement Rule does not mandate a particular type of age restriction control, the Panel dismisses that element of the complaint.
30. Accordingly, the Panel makes a final determination that the product packaging is in breach of Part 3 (b) (i) of the Code.