



## ABAC Adjudication Panel Final Determination No 23/22

**Product:** Sex Machine Cider  
**Company:** Funk Cider  
**Media:** Packaging, Outdoor & Website  
**Date of decision:** 21 April 2022  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Jeanne Strachan  
Professor Richard Mattick

### Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) concerns the packaging and outdoor and website marketing of Sex Machine Cider (“the Product”) by Funk Cider (“the Company”). It arises from a complaint received on 21 February 2022 and then elaborated by emails on 2 March 2022.
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:
  - Commonwealth and State laws:
    - Australian Consumer Law – which applies to the marketing of all products or services, and lays down baseline requirements, such as that marketing must not be deceptive or misleading;
    - legislation administered by the Australian Communications and Media Authority – which goes to the endorsement of industry codes that place restrictions on alcohol advertising on free to air television;

- State liquor licensing laws – which regulate the retail and wholesale sale of alcohol, and contain some provisions dealing with alcohol marketing;
  - Industry codes of practice:
    - AANA Code of Ethics – which provides a generic code of good marketing practice for most products and services, including alcohol;
    - ABAC Responsible Alcohol Marketing Code (“ABAC Code”) – which is an alcohol-specific code of good marketing practice;
    - certain broadcast codes, notably the Commercial Television Industry Code of Practice – which restricts when advertisements for alcohol beverages may be broadcast;
    - Outdoor Media Association Code of Ethics and Policies – which place restrictions on the location of alcohol advertisements on outdoor sites such as billboards.
3. The codes go either to the issue of the placement of alcohol marketing, the content of alcohol marketing or deal with both matters. The ABAC deals with both the placement of marketing i.e. where the marketing was located or the medium by which it was accessed and the content of the marketing irrespective of where the marketing was placed. The ABAC scheme requires alcohol beverage marketers to comply with placement requirements in other codes as well as meet the standards contained in the ABAC.
  4. For ease of public access, Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the Ad Standards, a copy of the complaint is supplied to the Chief Adjudicator of the ABAC.
  5. The complaint is independently assessed by the Chief Adjudicator and Ad Standards and streamed into the complaint process that matches the nature of the issues raised in the complaint. On some occasions, a single complaint may lead to decisions by both the Ad Standards Community Panel under the AANA Code of Ethics and the ABAC Panel under the ABAC if issues under both Codes are raised.
  6. The complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

## The Complaint Timeline

7. The complaint was initially received on 22 February 2022 and then elaborated upon on 2 March 2022.
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 an independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. The Company did not obtain pre-vetting approval for the packaging/name of the Product.

## The Marketing

10. The complaint concerns the packaging/name of the Product as well as outdoor and website advertising by the Company:

### Product label:



Outdoor (bollard) advertising:



**Website:**

- <https://www.funkcider.com.au/ciders>



## The Complaint

11. The complainant objects to the marketing as follows:
- *Contravenes Code of Ethics, "ABAC Responsible Marketing Code".*
  - *In the context of the ABAC Code, my view is that the name of the product "Funk Sex Machine Cider" is foolish and irresponsible. It clearly contravenes 3 (c)(ii) in relation to the implication of contributing to sexual success.*
  - *It also appears to contravene 3 (c)(i) in terms of suggesting that use of the product "may create or contribute to a significant change in mood or environment"; 3 (b)(i), in terms of likely appeal to minors; and probably 3 (b)(iv) in the context of placement of an advertising device in a location where young people are likely to be exposed to this promotion.*

## 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
  - (c)(i) suggest that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment
  - (c)(ii) show (visibly, audibly or by direct implication) the consumption or presence of an Alcohol Beverage as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success.
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).

**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 confectionery 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 letters emailed on 25 February 2022 and 11 March 2022. Its principal comments were:

**Alcohol Advertising Pre-Vetting Service Approval**

- The marketing communication did not receive Alcohol Advertising Pre-vetting Service Approval.

**Product first provided for retail sale**

- The Sex Machine Cider was first supplied for bone fide retail sale in November 2016 and it has been part of Funk Cider's core range since then.

**Responsibility toward Minors**

- Funk Cider does NOT believe the product name is likely to appeal to minors in their mid-teens wishing to feel older. Funk Cider is an alcoholic beverage brand with a target market of professionals between 25-44 years old, skewed female - all of Funk Cider's branding initiatives and advertising are directed at the outlined target market.
- Funk Cider's branding is minimalistic - focusing on the single release colour is unfair to the classic, modern and elegant Pantone Colour on Black brand pattern that Funk Cider uses for all of our products, designed to appeal to our target market as outlined above.
- The Sex Machine colour is Pantone 192 c. The use of Pantone 192 c on the outdoor advertising allows the highlight to be on the black can with the clear information on Alcohol by Volume.

- Funk Cider believes the words Real Cold-Pressed Juice on the website will NOT cause confusion with a soft drink because:
  - All craft ciders are made with real cold-pressed juice - cider is fermented apple juice;
  - The website is: [www.funkCIDER.com.au](http://www.funkCIDER.com.au) with the name of the alcoholic beverage on the URL;
  - The website clearly displays the Alcohol by Volume of the ciders;
  - On an educational note about our brand: Funk Cider's Unique Selling Proposition (USP) is our high-quality ciders, made with local apples sourced directly from local farmers and juiced by Funk Cider, with no natural flavourings, no concentrates, free from preservatives and free from added sugar - promoting the fact that our ciders are made with Cold-Pressed Juice is an important aspect of our USP.
  
- The packaging, as well as the outdoor and internet advertising, contain sufficient cues that the Product is alcoholic and not for the consumption of Minors. Please see further clarification below:
  - The product is called Sex Machine CIDER.
  - In line with Funk Cider's minimalistic branding, there are only three text blocks on the FRONT of the packaging, and two of them have clear references to the alcoholic contents of the beverage:
    - Funk
    - Sex Machine CIDER
    - Alcohol by Volume (ABV) 4.5%
  - The word CIDER is evident on all means of advertising: packaging, twice on the outdoor advertising and on the website;
  - The URL provided <https://www.funkcider.com.au/ciders> has pictures of all of funk cider's core range cans, with their respective labelling as per the flat lay provided previously where ABV is visible. The page has many references to cider as well as the funk cider logo at the top of the page.
  - The outdoor advertising sent via photo by the Complainant is a bollard sign. Bollard signs are provided ONLY to liquor stores upon request and are positioned in front of liquor stores indicating the



product is alcoholic and sold inside the liquor store, hence the “available here” at the bottom of the sign.

- The product is alcoholic and only sold/promoted at licensed venues, requiring Identification for purchase;

### **Responsible depiction of the effects of alcohol**

- The Packaging, name and advertising for the Sex Machine Cider do NOT in any way imply that its consumption may lead to a significant change in mood.
- The name is a play on words, on the attributes of how the cider is made, using the method of ageing the cider in French oak.
- Funk Cider believes the name Sex Machine Cider does not breach Part 3(c)(ii) as it does not show the consumption or presence of an alcoholic beverage as a cause of or contributing to the achievement of sexual success. It is also not implied that the consumer will have considerable sexual prowess.
- The name of the cider is a play on words on how we have made the cider sexier by ageing it in French Oak, this process gives the apple cider a sweeter flavour profile with vanilla notes and a deeper body. It is a reference to the contents of the cider itself and it is not and it was never the intent of Funk Cider to imply the consumer will have considerable sexual prowess or achieve sexual success by consuming this cider.
- This cider has been in the market since 2016 and this is the first complaint we had over its name.
- It is one of our core range ciders and it was just awarded the best in its category at the Australian Cider Awards. The Sex Machine cider is sold at a premium price (average \$22 for a 4-pack of 375ml cans) and we have built a reputable product with loyal customers since it was first sold at Funk Cider’s cellar door in Caversham.

## The Panel's View

15. Funk Cider was established in the Swan Valley of Western Australia in 2016. The Company produces a range of alcoholic ciders that adopts a standardised branding approach on the product cans. This sees the top three quarters of the can having a black background and the bottom third a bright colour such as red or blue. The Company name and the product name is printed on the black background on the front of the can. The sides and rear of the can has small font product information. Overall, the packaging style is clean and minimalist.
16. One product in the Company's range is 'funk - sex machine cider' and it is the branding of this product that has drawn the complaint. The complainant pointed to an outdoor installation near a liquor store showing an image of a sex machine cider can and images of the product on the Company's website. The complainant initially contended that the marketing contravenes the ABAC. After being contacted for further detail as to the nature of the concerns, the complainant submitted:
  - Principally the branding (product name) is foolish and irresponsible and contravenes Part 3 (c) (ii) implying the use of the product will lead to sexual success;
  - Further the branding suggests the use of the product may contribute to a significant change in mood or environment - Part 3 (c)(i); and
  - The branding is likely to have strong or evident appeal to minors and the outdoor installation will expose the product branding to minors
17. Each of these concerns will be considered in turn. In assessing if a marketing communication is compliant with an ABAC standard, the Panel is to adopt the viewpoint of how a reasonable person would probably understand the marketing material. This means the benchmark is the values, life experiences and opinions found in most members of the Australian community.
18. On 4 April 2022 the Panel made a a provisional determination that the product packaging is in breach of Part 3 (c)(ii) 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. As the Company has not sought a rehearing, the Panel has proceeded to make a final determination on this complaint.

### **Product name and branding - achievement of sexual success**

19. The principal concern of the complainant was that the 'sex machine' product name implied that the product would lead to sexual success. The applicable ABAC standard provides that an alcohol marketing communication (including

product names) must not show the consumption or presence of an alcohol beverage as a cause of or contributing to the achievement of sexual or other success.

20. The Company provided background about the name of the product, contending that 'Sex Machine':
- Is a play on words on how the Company made the cider sexier by ageing it in French Oak, a process that gives the apple cider a sweeter flavour profile with vanilla notes and a deeper body;
  - Is a reference to the contents of the cider itself and it is not and it was never the intent of Funk Cider to imply the consumer will have considerable sexual prowess or achieve sexual success by consuming this cider; and
  - has been on the market since November 2016 and has not previously attracted any public complaints.
21. It is unusual but not impossible that a product name alone can lead to a breach of Part (c)(ii) of the Code. Most commonly a name alone won't imply product characteristics or be suggestive of actions or behaviours likely to be understood as offending an ABAC standard. This means a marketing communication that breaches the standard will usually combine a product name with other imagery or messaging that together leads a reasonable person to conclude that the product is conveying that its presence or use achieves sexual or other success.
22. One case where a product name was considered in breach of Part 3 (c)(ii) is Determination 216 & 217/21. In this case the Panel considered the product name 'Wet Pussy'. The product name was considered by the Panel as carrying a strong implication of the achievement of sexual success. It was noted:
- the Part 3 (c)(ii) standard is broadly framed and captures both the presence and consumption of alcohol;
  - the intention of the marketer as to the genesis of the name is not the test, but rather how the product name and packaging would be understood by a reasonable person;
  - 'wet pussy' in common Australian colloquial use refers to a sexually aroused woman and a reasonable person is sufficiently worldly to readily recognise the reference; and
  - a reasonable person would probably understand the product name and packaging was suggesting that the product might contribute to the achievement of sexual success.

23. Even accepting the Company's explanation that the product name references its production process, this background about the ageing of the cider in French Oak is not readily apparent to a consumer coming across a can of the product on a retailer's shelf or when an image of the product is displayed on an outdoor installation. The average consumer will be assessing the product packaging based on the 'Funk Sex Machine' name displayed on the front of the can. A side panel on the can does contain the phrase 'french oaked cider' but it seems unlikely that most consumers would extrapolate from this an explanation about the 'sex machine' name.
24. The question is whether a reasonable person would take the product name as presented on the packaging as suggesting the product leads to sexual success. In essence - what would a reasonable person make of the name 'sex machine'?
25. While most consumers would be unlikely to seriously believe any alcoholic cider, irrespective of its name, will lead to achieving social or sexual success, it is difficult not to interpret the product name as doing anything other than associating the product with active sexual connotations. The Panel does believe the product name breaches the Part 3 (c)(ii) standard noting:
- Colloquially, the term 'sex machine' is used to refer to someone with considerable sexual prowess;
  - The packaging does not contextualise the name 'sex machine' on the front of the label to the process employed to make the product in a manner that a reasonable person would find readily apparent;
  - The 'stay sexy' phrase on the side panel, while not influential compared to the front of the can, adds to the inference that the product contributes to sexual success; and
  - A reasonable person would conclude that the product name is implying that the product is a contributor to the achievement of sexual success.

### **Change in mood or environment**

26. The complainant submitted that the product name and branding implied that use of the product may create a significant change in mood or environment. The Panel does not believe the branding and name alone can be fairly understood in this way. This standard envisages that the marketing communication conveys a journey whereby the presence or consumption of an alcohol beverage alters a mood e.g. from sad to happy or boring to exciting. No such implication can be reasonably drawn from the product name and packaging. There is no journey or transition created by the branding.

## **Strong appeal to minors and the ABAC Placement Rules**

27. The complainant suggested the branding would have strong appeal to minors and its location on an outdoor installation would be seen by many young people. This brings into play Part 3 (b) of the ABAC. Part 3 (b)(i) provides that an alcohol marketing communication 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.

28. 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;
- the 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.

29. The Company argued the product branding is not likely to appeal to minors, arguing:
- company marketing is directed towards adults aged 25 to 44;
  - the branding uses a minimalistic style with a mature feel; and
  - the product packaging identifies the beverage as being alcoholic in nature
30. The Panel does not believe the packaging nor the image of the product can on the outdoor installation has strong appeal to minors. The Panel noted:
- the term 'cider' and the alc/vol information on the front of the can establishes sufficiently that the product is an alcohol beverage and the packaging colour plate and design does not resemble well recognised soft drinks;
  - the minimalist design of the packaging would not likely attract the attention of minors and is generally mature and adult in tone; and
  - the branding is not considered strongly relatable to minors nor does it create an illusion of an easy transition from non-alcoholic to alcoholic beverages.

### **Placement Rules**

31. The second issue housed on Part 3 (b) of the Code relates to the outdoor installation and the exposure this provides to the product branding to minors. The complainant advised the outdoor installation was positioned adjacent to an alcohol retailer and near shopping areas frequented by minors. While an exact street address was not supplied, the complainant advised the location was not within 150 metres of a school.
32. The ABAC Placement Rules seek to limit the exposure of alcohol marketing to minors by creating a differential set of obligations on marketers related to the technical capacity of the communications medium to target audiences. Accordingly, digital medium has the highest obligation given its greater ability to exclude minors from being served with alcohol marketing. In contrast, outdoor advertising on billboards and the like must rely on location restrictions to position advertising away from areas of where minors are likely to be present in high concentrations.
33. The regulatory regime applying to outdoor alcohol advertising is a combination of some direct government measures and industry codes of practice. In some States, the government has imposed restrictions on outdoor alcohol advertising on publicly owned sites such as areas around railway stations. The Outdoor Media Association (the industry body for outdoor media sites) has rules that restrict alcohol advertising to outdoor sites positioned more than 150 metres of a

school. ABAC Placement Rule 1 adopts the Outdoor Media Association requirements.

34. In the current case it is evident that the outdoor location identified by the complainant was not within 150 metres of a school. This means the applicable Placement Rule has not been breached.
35. Accordingly, the Panel makes a final determination that the product packaging is in breach of Part 3 (c)(ii) of the Code. In other respects, the complaint is dismissed.