



ABAC Adjudication Panel Final Determination No 40/22

Products: MSC Boxtails
Company: Basic Brands & Co (Mandatory Spirit Co)
Media: Packaging
Date of decision: 22 July 2022
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Louisa Jorm
Ms Jeanne Strachan

Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 24 May 2022 and concerns the packaging by Basic Brands & Co (“the Company”) of the following single-serve, 250 ml, MSC Boxtails (“the Products”):
 - White Rum, Pineapple & Orange Mai Tai
 - Passionfruit Martini
 - Pink Gin Daiquiri.
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:
 - (b) 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;

(c) 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 received on 24 May 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.

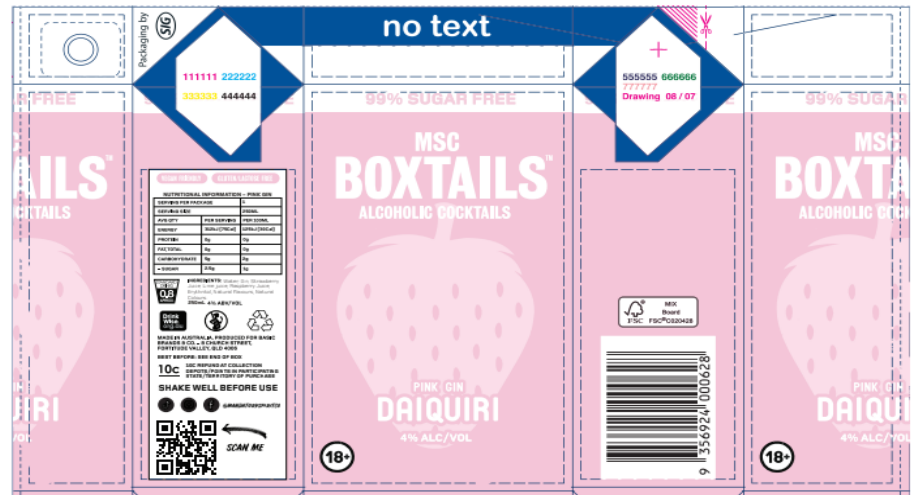
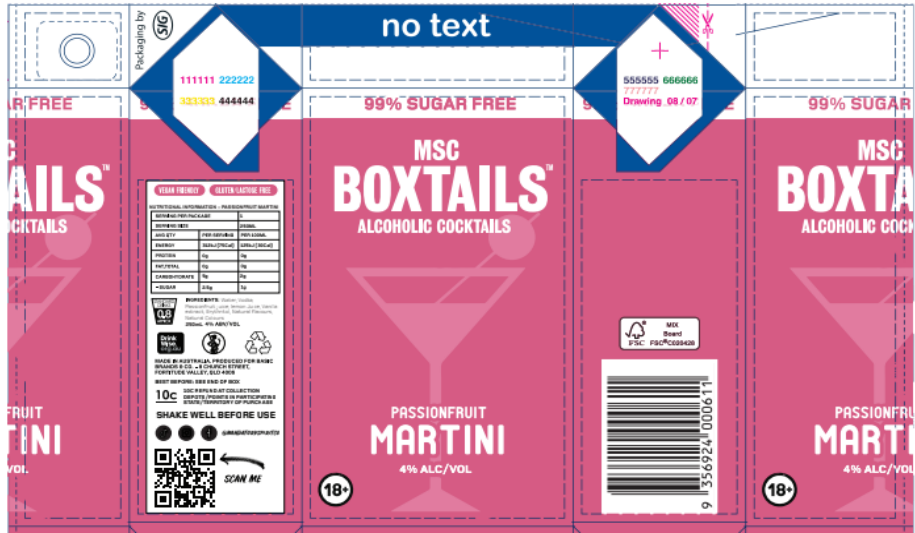
Pre-vetting Clearance

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. While pre-vetting approval was obtained for the layout of the product packaging, this did not include the packaging inclusive of the straw.

The Marketing Communication

10. The complaint relates to the packaging of the Products by the Company as shown below:





The Complaint

11. The complainant objects to the marketing as follows:

- *The Daiquiri cocktail is in a pink colour 250ml Tetra Pak Type packaging. This type of packaging is the same size, shape, and volume size as a juice box. In my opinion it can easily be mistaken by a child as a strawberry milk flavour drink box.*
- *The Mai Tai flavour is in an orange colour packaging which again can be mistaken as a juice box.*
- *The third cocktail is Martini, and it is in a reddish colour juice box packaging and again could be mistaken as a juice box by a young child.*

The complainant submitted the following photos:



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.

13. Part 6 of the ABAC Code provides that:

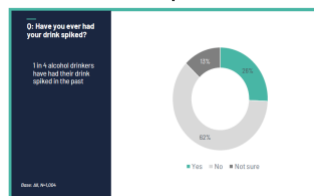
Strong or Evident Appeal to Minors means:

- (i) likely to appeal strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minors 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 emails on 25 May, 26 May and 9 June 2022. The principal comments made by the Company were:

- ABAC pre-vetting approval was obtained for the packaging (Approval Number 19970). Having obtained this approval, the Company proceeded with a significant investment in the product packaging.
- Such a disappointment to see the complaint come through, anyone with half a clue about drinks packaging or the beverage industry would understand that there are multiple incredibly valid reasons to why we chose this pack format. The main reason being, this is the only pack type within the liquor industry that is bulletproof against drink spiking, and as you will see below from the independent research we recently had done, 1 in 4 alcohol drinkers have had their drink spiked in the past.



- My younger sister was spiked a few years back, ended up in hospital and nearly died from it. We apologise to no one for launching a packaging format that actually makes the industry safer, as a brand we see this 100% as a responsible move, further to this the environmental benefits are second to none.
 - 10X Less carbon footprint than glass or aluminium.
 - The box shape means no dead space when shipping.
 - 20% greater volume per pallet than other packaging.
 - FSC approved, fully recyclable & sustainable.
- We are soon to launch a national anti-spiking campaign through press and TV as we believe this is an incredibly important thing to address. We see this packaging as progressive towards responsible drinking. We would have assumed that ABAC would agree with us that anti-spiking is an important topic and area to combat. Below is an ABC News clip showcasing the dangers of drink spiking in venues. We will be running our story through ABC News as a method to counteract spiking.

<https://www.abc.net.au/news/2022-04-27/drink-spiking-sunshine-coast-victims-urged-to-come-forward/101013606>

- To wrap it up:

Our 250ML BOXTAILS range was carefully thought out, it has the ability to keep punters safe from a nasty problem that actually effects multiple people every single week across Australia guaranteed.

VS

A very weak complaint that says thinks like *in my opinion children may get it confused*. No evidence no facts. Just someone writing a complaint to be a pest.

- I would love these people to sit in front of someone that has lost a child or had a child or friend sexually assaulted as a result of drink spiking and table their concerns around how ***'in their opinion a child might get confused!'*** A child might mistake your vodka bottle for a water bottle as well.
- People that get their drink spiked don't have a choice!

The Panel's View

Introduction

15. Mandatory Spirit Co, formerly known as Basic Babe, produces and retails pre-mixed cocktails called "MSC Boxtails". Initially the Company offered a two-litre product range, sold in boxes, similar to those used for cask wine, and in early 2022 expanded its range to include ready-to-drink cocktails available in 250ml Tetra Paks. These single serve boxes have a straw attached to the side and are presented in a shrink wrapped six pack for sale.
16. In designing the 250ml product packaging the Company advised that it was conscious of several advantages of this style of packaging including:
 - a lesser carbon footprint compared to glass or aluminium alternatives;
 - more efficient transportation characteristics; and
 - fully recyclable.
17. The Company particularly argues that the packaging is tamper proof and points out that drink spiking is a major safety issue in public bars and nightclubs. It is noted a marketing campaign to promote the safety advantages of the packaging style has been planned.
18. Prior to launching the products, the Company submitted materials for consideration by the ABAC pre-vetting service resulting in approval of certain artwork and layouts. It seems, however, the final packaging, inclusive of the straw, was not submitted for pre-vetting.
19. The complainant came across the product in a take-away alcohol retail outlet. The complainant argues the packaging is inappropriate due to its similarity to that used for juice and milk beverages. It is submitted that the packaging means the product will be mistaken by minors as milk or fruit juice and hence is strongly appealing to minors.
20. On 5 July 2022 the Panel made a provisional determination that the product packaging is in breach of Part 3 (b) 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 has not sought a rehearing, but did express its dissatisfaction with the provisional determination again pointing out that pre-vetting approval was obtained and that only a single complaint has been received about the product packaging. The relationship between pre-vetting and the public complaints is outlined below, while some

concluding observations deal with the Company's options following this determination.

Pre-vetting and public complaints

21. The ABAC Scheme forms part of the overall regulatory framework governing the sale and marketing of alcohol beverages. The Scheme consists of three parts namely:
 - the ABAC containing the standards of good marketing practice;
 - the pre-vetting service providing advice to marketers on the consistency of a marketing communication to Code standards prior to the marketing item being used; and
 - the public complaints process where complaints about alcohol marketing not meeting good marketing standards are determined by the Panel against the ABAC.
22. While the ABAC standards are the foundation for both the pre-vetting service and the complaints process, these two elements of the Scheme are independent of each other in regard to decision making. Pre-vetting provides a marketer with an independent opinion as to whether a marketing communication is consistent with the ABAC standards, and in providing this view the pre-vetter is guided by a range of guides and other materials. Most importantly, past decisions of the Panel in determining public complaints act as a precedent bank of how the ABAC standards are to be interpreted and applied.
23. A marketing communication that has been given pre-vetting approval is not however immune from the public complaints process. This means that it is open to a member of the community to submit a complaint about an item of alcohol marketing irrespective of whether the marketing item has received pre-vetting approval or not.
24. When considering a complaint about a marketing item that has been pre-vetted, the Panel notes that pre-vetting has occurred. Under the rules applying to the Scheme, however, the Panel makes its own decision as to the consistency of the marketing material with the relevant ABAC standard raised by the nature of the complaint.
25. Statistically it is unusual for a marketing communication that has been approved by pre-vetting to be subsequently found in breach of an ABAC standard by the Panel following a complaint. For instance, in 2021, the Panel made 153 determinations resulting in 80 breaches of marketing

communications. Of these 80, only one related to material that had been pre-vetted. Pre-vetting represents best practice and prudent risk management by an alcohol company. It is not, however, a guarantee that a complaint won't be received about the pre-vetted marketing item nor that the fresh and independent Panel consideration of the marketing might reach a different conclusion about the marketing material and the ABAC standard.

26. It is also important to note that a pre-vetter can only assess the material supplied and judgments are made based upon the medium and manner in which it is submitted the marketing material will be used. In the current case, it seems the information about the packaging coming with a straw was not before the pre-vetter although the design and layout of the tetra pak was considered by the pre-vetter.

Is the packaging consistent with the ABAC standard?

27. The complainant's concern raises Part 3 (b) of the ABAC. This standard provides that an alcohol marketing communication (including product packaging) must not have strong or evident appeal to minors. The standard might be breached if the marketing:
- 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. 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 are to be the benchmark.
29. 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.
30. 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 that shapes how a reasonable person will understand the item.
31. Product packaging can give rise to strong appeal to minors if it creates confusion with confectionery 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 the 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.

32. The Company contends that the packaging is consistent with the ABAC standard. It points out that pre-vetting approval was obtained and particular emphasis is placed on the safety advantages of this style of packaging in protecting a drinker from possible drink spiking. It is noted there will be similarities in packaging between alcohol and non-alcoholic beverages, for instance vodka in a glass bottle could be conceivably mistaken by a child for water.
33. It is accepted that drink spiking is a serious issue and that if a type of alcohol packaging makes drink spiking more difficult, then that is a worthwhile outcome. The ABAC standards for responsible marketing however cannot be 'traded off' against another desirable outcome. That is, the ABAC does not envisage a marketing communication that is inconsistent with a Code standard will be allowed if the marketing communication serves some other worthwhile purpose.
34. It also recognised that soft drinks and alcoholic beverages will invariably come in similar packaging styles. For instance, both beer and soft drinks are sold in cans. A fruit juice and alcohol spirit may both be sold in glass bottles. The ABAC does not seek to mandate the type of container an alcohol beverage must be packaged in or prohibit any particular type of packaging for use by alcohol producers.
35. That said, particular types of packaging are most commonly associated with types of beverages and a tetra pak would generally be associated with a fruit juice or milk based product. Equally this style of packaging has been employed with products marketed more heavily with children. This does not mean that a tetra pak cannot be used for an alcohol product, but the common use of the packaging type for non-alcohol beverages needs to be recognised. The inherent potential for confusion with a soft drink and a consequent appeal to minors created by use of a tetra pak for alcohol needs to be carefully managed.
36. It is acknowledged that the Company's use of the ABAC pre-vetting process reflected that the Company was conscious of the need to design the layout of the packaging carefully. As noted, there are statistically few occasions when the Panel reaches a different view on a marketing item than that reached at pre-vetting, but invariably some assessments are closely balanced. On occasion the Panel does reach a different conclusion from that arrived at during pre-vetting.
37. The Panel believes that the packaging does breach the Part 3 (b) standard. In reaching this conclusion the Panel noted:

- individual serve, 250ml Tetra Pak type packaging, with a straw attached to the side is associated with non-alcoholic beverages commonly consumed by children, as is the presentation in a shrink wrapped six pack;
- the colours used are muted rather than bright and contrasting however the images of fruit on the pineapple & orange Mai Tai and Pink Gin Daiquiri add to the likely appeal of those products to minors;
- the packaging gives an illusion that the product could be a smooth transition from a non-alcoholic to alcohol beverage for a minor; and
- taken as a whole a reasonable person would probably understand the packaging has a strong or evident appeal to minors.

38. Accordingly, the Panel makes a final determination that the product packaging is in breach of Part 3 (b)(i) of the Code.

Concluding Observations

39. The Company is not a signatory to the ABAC Scheme and has not made any prior commitment to market consistently with the ABAC standards nor to comply with the outcome of the public complaints process. In this respect the position of the Company is like many smaller alcohol producers. Since its commencement in 1998 the ABAC public complaints process has received, and the Panel has considered complaints about the advertising of alcohol entities which are not members or signatories to the Scheme. Almost universally the alcohol entities involved have cooperated with the Panel process (as has occurred in the current case) and accepted the views reached by the Panel. This occurs not because of strict legal obligation but because of an acceptance of the social and corporate responsibilities that come with being a participant in the alcohol industry.
40. While there is almost universal acceptance by alcohol companies of Panel determinations, at its heart, compliance with the ABAC standards and Panel decisions is voluntary. Accordingly, the Company might accept and act on the Panel's determination or it might not. On the very rare occasion that an alcohol company respondent has not acted on a Panel determination which concluded that a marketing communication be removed or modified due to inconsistency with an ABAC provision, the matter is referred to the relevant liquor licensing authority for consideration against their alcohol promotion requirements. These requirements largely match those contained in ABAC standards such as alcohol marketing not strongly appealing to minors. Any action then taken is for the government regulator to decide.