



## ABAC Adjudication Panel Determination No 47/22

**Product:** MSC Fruit Tingle Cocktail Boxtails  
**Company:** Basic Brands & Co (Mandatory Spirit Co)  
**Media:** Packaging  
**Date of decision:** 26 July 2022  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Professor Louisa Jorm  
Ms Debra Richards

### Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 28 June 2022 and concerns the packaging of Fruit Tingle alcohol cocktail by Basic Brands & Co (“the Company”).
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 the 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 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**

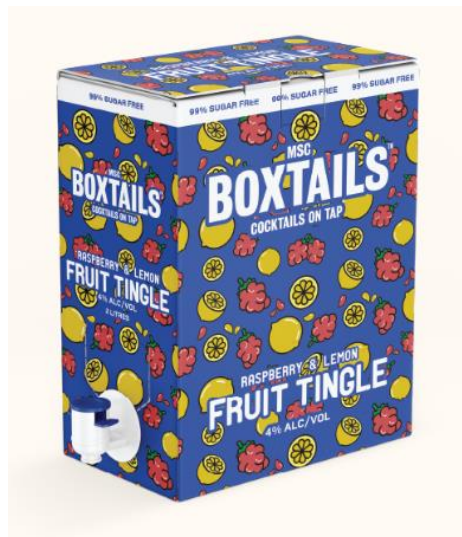
7. The complaint was received on 28 June 2022.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint was completed in this timeframe.

### **Pre-vetting Clearance**

9. The quasi-regulatory system for alcohol beverage marketing features an independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for product packaging.

### **The Marketing Communication**

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



## The Complaint

11. The complainant objects to the marketing as follows:

- *Appealing to children - cocktail juice boxes and boxes with candy flavours:*

<https://mandatoryspiritco.com.au/products/boxtail-fruittingle/>

## 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 email on 30 June 2022. The principal comments made by the Company were:

- I can see the complaint was directed at our website. We are sold in over 1700 stores exclusively to BWS and Dan Murphy's nationwide and have been selling for the last 6 months without a single complaint. A bit strange the complaint comes in around the same time as the last complaint and even mentions the word "juice box" which Fruit Tingle has nothing to do with.

- Mandatory Spirit Co Fruit Tingle cocktails are housed in Australia's most iconic alcoholic vessel - 2 litre wine goon box. Literally invented by Angove Wine group, Australian Winery. This 2 litre packaging type has never ever been used in anything in correlation to children and has only ever been associated with wine products. This packaging type was literally created for alcohol.
- Fruit Tingle is one of Australia's most famous alcoholic cocktails and 2nd highest sold bar cocktail. Multiple brands around Australia have Fruit Tingle as a flavour. Fruit Tingle as an alcoholic cocktail is about 40 years old!
- The images we have on the box are images of fruits we use in the cocktail, not images of candy. We state in multiple places on the box we are a cocktail and are 4% alcohol.
- We are only sold in BWS and Dan Murphy's where you have to be 18 to purchase.
- This product cannot be classed as confusing to children considering all the points above.

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

15. Mandatory Spirit Co, formerly known as Basic Babe, produces and retails a range of pre-mixed cocktails called "MSC Boxtails". This determination relates to the packaging of the Company's Raspberry & Lemon Fruit Tingle cocktail contained in a 2 litre carton. The complainant contends the packaging appeals to children.
16. The packaging adopts a 2 litre cask style with a tap. The background colour is deep blue with images of lemons and raspberries. The lettering on the cask has the 'Boxtail' name in the largest font, with the product name 'Fruit Tingle' in slightly smaller font. Smaller again are the descriptors 'raspberry & lemon' and 'cocktail on tap' although both terms are easily visible. The alc/vol information is also provided.
17. The complainant's concern goes to the 'candy flavour' and the packaging, which is argued to together make the product appealing to children. It should be noted that the complaint also referenced a 'juice box' that relates to another packaging style in the Company's range. As the Panel has made an earlier and

separate determination regarding the tetra pak packaging type, this decision is confined to the 2 litre cask product.

18. The concern raises Part 3 (b) of the ABAC that provides that alcohol marketing communication (which includes 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.
19. 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.
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;
  - 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.
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 that 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 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.
23. The Company argues that the packaging does not breach the ABAC standards. It is submitted:
- There is no large volume of complaints or public outcry in respect of the product packaging;

- The 2 litre cask packaging type was developed for and is predominately used for alcoholic products, not for products commonly consumed by minors;
  - “Fruit Tingle” is the name of a popular alcoholic cocktail consumed throughout Australia and widely available for about 40 years;
  - Multiple alcohol brands around Australia have “Fruit Tingle” as a flavour;
  - The fruit illustrations are used to demonstrate the raspberry and lemon flavour of the product;
  - The packaging indicates that the cask’s contents are alcoholic, by using the word “cocktail” and showing that the ABV is 4%;
  - The product is sold by Dan Murphy’s and BWS, where controls are in place to ensure that purchasers are 18 years or older.
24. The complainant’s concern is based upon both the ‘candy flavour’ and the packaging of the product. The ABAC does not regulate physical beverages but only the marketing of alcohol beverages. This means that the colour, the taste profile or other physical characteristics of a product are not within the scope of the ABAC. To the extent these properties are regulated, it is by direct government requirements such as those in the national Food Standards Code. Accordingly, the complainant’s contention about a candy flavour appealing to minors is not a factor in assessing the packaging.
25. The Company argues that a ‘fruit tingle’ is an alcoholic cocktail of longstanding origins. While the precise origins of the cocktail were not readily revealed by a brief search, it is reasonably apparent:
- a cocktail called a ‘fruit tingle’ based on a combination of vodka, blue curacao, grenadine and lemonade has been commonly available at bars and nightclubs in Australia since at least the 1990’s;
  - in turn the cocktail draws its name from the fruit tingle lollies made and sold in Australia since the 1930’s; and
  - there are a number of alcohol products bearing the fruit tingle name on the Australian market with some products being a cocktail kit for make at home cocktails and others a pre-mixed version of the cocktail.



26. It can be accepted that an alcoholic cocktail called a 'fruit tingle' has antecedence in Australia and from that, would be recognised by some adult consumers as an alcohol beverage. That said, the more common association of the fruit tingle name is with the longstanding and widely available lolly from which the cocktail drew its name. This means that care is needed in marketing alcohol products employing a name associated with confectionery as there will be an inherent potential for the marketing material to be relatable to minors. While there is no prohibition on the use of a name such as 'fruit tingle', the context of its use will be vital to ensure that the marketing, as a whole, does not strongly appeal to minors.
27. For instance, in Determination 222/21 the Panel found certain social media posts which referenced a fruit tingle cocktail to breach the Part 3 (b) standard. This decision noted that strong appeal to minors arose from a combination of:
- the product name;
  - images of its packaging in a plastic bottle more commonly used for fruit juices and milk products consumed by minors;
  - the failure of the images of the packaging to clearly identify the product as an alcohol beverage; and
  - direct reference in the accompanying text to the images to fruit tingle lollies.
28. In the current case, the product name and the fruit images on the cask are elements that would be relatable to minors. On the other hand, other elements such as the type of packaging are not likely relatable to or used by minors. On balance the Panel does not believe the packaging is inconsistent with the Part 3 (b) standard. In reaching this conclusion the Panel noted that:
- the cask style packaging is not generally used for beverage products commonly consumed by minors and is far more closely associated with alcohol products, particularly wine;
  - the packaging through a combination of the cask style packaging type and the clear descriptors 'cocktail on tap' and the reasonably prominent alc/vol information means it is unlikely the product would be confused with a soft drink;
  - the potential association with a confectionery is mitigated by the fact that the colour scheme and images on the cask do not resemble the fruit tingle

lollies e.g. the well known rainbow pattern and colours used on the lolly packaging is not present; and

- taken as a whole, the appeal to minors of the packaging would be incidental as opposed to strong and evident.

29. The complaint is dismissed.