



ABAC Adjudication Panel Determination No 82/24

Product: Spirit Fingers Alcoholic Ice Blocks
Company: Spirit FingersAUS
Media: Packaging and Instagram
Date of decision: 10 July 2024
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 29 May 2024 in relation to the packaging of and Instagram marketing for Spirit Fingers alcoholic ice blocks (“the product”) by Spirit Fingers AUS (“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:
 - 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 are within the Panel’s jurisdiction.

The Complaints Timelines

7. The complaint was received on 29 May 2024.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline is not applicable when a Code breach involves product packaging or a brand name. This is because of a two step process of firstly a provisional determination and the allowance to a marketer to seek a re-hearing of the provisional determination.

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 sought for the marketing.

The Marketing Communication

10. The complaint relates to the packaging of and Instagram marketing for Spirit Fingers alcoholic icy poles:

Vodka & Grape:



Gin & Juice



Rum & Cola:



Instagram Post:



The Complaint

11. The complainant objects to the marketing as follows:
 - *The complaint relates to packaging and associated digital marketing of products on their Instagram account known as @spiritfingers_au.*
 - *We believe these advertisements are in breach of Standard 3 (b)(i) of the ABAC Responsible Marketing Code whereby a marketing communication and product must NOT have Strong or Evident Appeal to Minors.*
 - *The product is designed to be prepared and consumed like popular ice-block treats (commonly referred to as Zooper Doopers), whereby the liquid is frozen and the packaging is used as the vessel. We contend that this product design has strong appeal to minors, beyond general appeal. We contend that these products historically are marketed towards minors. The following images (images 1 – 5) are comparable products available at supermarkets for general consumption. We contend that these products have strong appeal to minors, and accordingly, the Spirit Fingers packaging would have the same appeal.*



- Associated digital marketing of the Spirit Fingers products uses cartoon-like imagery (See <https://www.instagram.com/p/CvvyJiPIPU/?hl=en>)



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, in particular;

(A) specifically target Minors;

(B) have a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;

(C) use imagery, designs, motifs, language, activities, interactive games, animations or cartoon characters that are likely to appeal strongly to Minors;

(D) create confusion with confectionery, soft drinks or other similar products, such that the marketing communication is likely to appeal strongly to Minors; or

(E) use brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

The Company's Response

13. The Company responded to the complaint by email on 4 July 2024. The principal comments made by the Company were:

- Whilst it wasn't pleasant to receive a complaint like this the points are very useful to how we can shape our brand. Below I have provided a bit of background into our approach so far and let you know what action we are taking.

Advertising

- We tested out a very small amount (less than \$100) of Meta advertising from April 14 to April 30, 2024. All of this was targeted at audiences 21+. The advert in question is a 'dynamic ad' in Meta which automatically draws in product pictures from the website and is why the product is sitting like that without any clear messaging around it.
- Ads stopped Apr 30.
- Dynamic ads is something we will address in future to ensure everything we communicate has sufficient context.

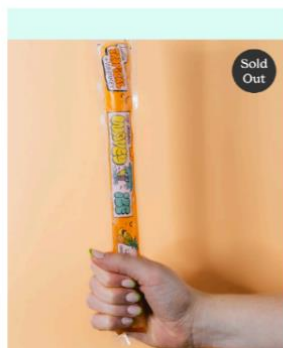
- We will use <https://www.abac.org.au/abac-pre-vetting-service/> for future advertising.

Social & Website

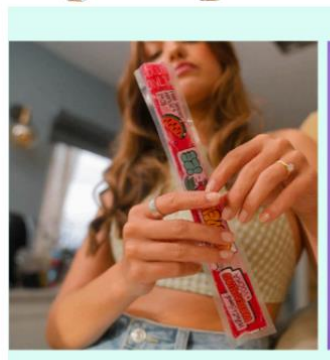
- Our Instagram account and website is restricted from anyone under the age of 18. We post organically on Instagram but given we are age restricted that content won't reach audiences below the age of 18. We do not post organically on Facebook so have control over the demographic through advertising.
- Remove artwork/imagery which does not include sufficient context of the product.

Sleeve Packaging

- Thank you for your useful feedback on our packaging. Below is imagery of other very similar brands using very similar packaging to us i.e. alcoholic frozen beverages in plastic vessels similar to zooper doopers etc.



99
sted Tropical & Whiskey Ice Pops
of 15



- To make it visually clear what our products are they include;

- *"adults only"*
- *the ingredients i.e. "Vodka, Rum and Gin" along with "6% ABV"*
- *We have now added "18+" to the front of the packaging.*

Design

- The ghost is a link to the name "Spirit" and was created by my co-founder Holly who is a graphic designer. I can totally appreciate that the two pictures you have included of our products, when not viewed in the context of our website, social profiles or including any descriptive copy, could be taken a different way.
- These images have been removed from our social profiles and won't be used again.
- We are in the process of reworking our product visuals based on your feedback
- Our products were designed to be enjoyable and nostalgic. As a business we are fully committed to ensuring they are not attractive or accessible to minors, and we are doing this by starting off small so we can assess all of our touch points and make the right moves. Your report has certainly helped in shaping that, so thank you again for bringing it to our attention.

The Panel's View

Introduction

14. Spirit Fingers is a small start up alcohol producer based in Yarraville, Melbourne. From the Company's Instagram account it seems the business commenced operations in or about August 2023 with its first online sales in early 2024. The Company produces a range of three alcoholic ice blocks and it is the packaging design together with the Instagram marketing of these products that has drawn the complaint.
15. The Company is not a signatory to the ABAC Scheme and hence has not given a prior commitment to market its products consistently with the standards of good marketing practice contained in the Code. That said, the Company has responded to the complaint in a thoughtful manner and expressed its willingness in the future to engage with the ABAC pre-vetting service. This speaks well of the Company's sense of corporate responsibility and is consistent with its commitment to allocate some proceeds from the sale of its products to charitable purposes such as support of deaf children.

16. The complainant's concern about the packaging and some Instagram posts is that they have strong or evident appeal to minors. This determination will assess if the marketing material is consistent with the ABAC standard and is structured as follows:

- Alcoholic Ice Blocks - some threshold points;
- Product Packaging and strong appeal to minors;
- The Instagram posts; and
- Conclusion.

Alcoholic Ice Blocks - some threshold points

17. The Company's products are a 100ml alcoholic ice block containing 6% alc/vol that comes in three flavours namely Vodka & Grape, Rum & Kola, and Gin & Juice. The packaging is a clear plastic sleeve that on the front shows the product name as well as a ghost image in coloured printing on a clear background, so that the colour of the product is visible. The rear of the sleeve has the words - Flavor Flav's and contains the name of each of the flavours associated with a rap performer as follows:

- Ghost Face Chillah - Rum and Kola
- Big Poppa - Vodka and Grape
- The D - O Double G - Gin and Juice

18. The complainant contends that the products are designed to be consumed like popular ice blocks such as Zooper Doopers. It is argued that these non-alcoholic products are historically marketed towards children and the Company's products will have evident appeal to minors beyond their general appeal to adults because of their resemblance to ice blocks.

19. Some threshold points should be noted:

- while the ABAC name references 'beverages' the Scheme captures the marketing of alcohol products beyond beverages and includes related consumable products such as ice blocks or vapours etc;
- the Scheme does not regulate physical products but is confined to the marketing of the products. This means the taste, texture, colour etc of an alcohol product is not within the ambit of the Code standards as such, but

how these characteristics are described or appear in marketing communications including product packaging is captured; and

- physical alcohol products are regulated by various government agencies such as Food Standards - Australia New Zealand and to some extent by State government Liquor Licensing Authorities.
20. This last point is important. The complainant's argument is based not simply on the nature of the packaging but also about the products themselves. In other words, it is contended that it is inherently undesirable that alcohol should be available in an ice block form given the similarity and popularity of ice blocks with minors.
21. The desirability or otherwise of alcohol products on public policy grounds is not a matter for the ABAC Scheme but properly rests with government. In New South Wales, the Parliament has taken direct regulatory action to prohibit the sale of alcoholic ice blocks on the basis of the product type being 'undesirable'.
22. The NSW Liquor Act (section 100) permits the making of a regulation to declare a specified liquor product to be an 'undesirable liquor product' if amongst other things:
- the name of the liquor product, or its design or packaging is likely to be attractive to minors;
 - or the liquor product is likely, for any reason, to be confused with soft drinks or confectionery; or
 - the liquor product is, for any reason, likely to have special appeal to minors.
23. By regulation 86(1)(a) of the Liquor Regulation 2018 'alcoholic ice blocks' have been declared as undesirable . This captures a product that is sold in an individual package or individual packages for consumption in frozen form and that, at 20° Celsius, contains more than 1.15% ethanol by volume.
24. While this is clearly an issue for NSW Liquor and Gaming to determine, on its face it would appear that the Company's product will fall within the class of alcoholic ice block that cannot be lawfully sold in NSW.

Product Packaging - strong appeal to minors

25. The issue for the Panel to assess is whether the design of the packaging of the product has strong or evident appeal to minors and hence is in breach of the ABAC standard in Part 3 (b)(i) of the Code.
26. This 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;
 - uses imagery, designs, motifs, language, activities, interactive games, animations or cartoon characters that are likely to appeal strongly to minors; and
 - creates confusion with confectionery, soft drinks or other similar products, such that the marketing communication is likely to appeal strongly to minors.
27. 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.
28. 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.
29. Product packaging can give rise to strong appeal to minors if it creates confusion with confectionery or a soft drink. Confusion with confectionery might occur if:
- the packaging does not clearly identify the product as an alcohol product through use of an alcohol term like beer, ale, vodka, style of wine etc;
 - the packaging has a visual design that resembles a soft drink such as the display of fruit images, bright colours and the use of a font style 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 is similar to that used by soft drinks, fruit juices or other products used extensively by minors e.g. prima style juice box.
30. In assessing if a Code standard has been breached the Panel is to have regard to the probable understanding of the packaging by a reasonable person taking the contents of the packaging as a whole. The reference to a 'reasonable person' is drawn from the common law system and means that the opinions, values and life experiences common in a majority of the community is to be the benchmark.
31. The Company has taken the complaint and the questions posed by the Panel as 'useful feedback' and indicated the packaging will be altered. It has explained:
- its packaging is similar to other alcoholic frozen beverages and several examples were supplied;
 - the products are designed to be enjoyable and nostalgic;
 - to make it visually clear what the products are, the packaging includes "adults only", the alcohol ingredients i.e. "Vodka, Rum and Gin" and "6% ABV"; and

- The ghost image is a link to the name "Spirit" and was created by a co-founder who is a graphic designer.
32. While the Company may have taken some guidance from the other alcoholic ice block products it referenced, it should be noted that compliance with the ABAC standards is not based on industry practice as such but on the notion of community expectations in relation to responsible alcohol marketing. It is of course the aspiration that industry practice will align with community expectations, but other marketing examples are not the benchmark.
33. Moreover, the examples of the other products supplied by the Company all appear to be from other countries. A brief review suggests that two of the products are from Canada and another is from the UK. None of the products appear to be on sale from Australian retailers. Each country has its own regulatory standards and system regarding alcohol products, and it does not follow that alcohol marketing material used in another country will necessarily be consistent with the Australian regulatory requirements.
34. In contrast, the Panel has considered the packaging and branding of alcoholic ice block products from Australian alcohol companies in several previous cases. In Determination 52/19, the Panel found the packaging of a product called 'Skinny Freezers' breached the Part 3 (b)(i) standard. The Panel noted:
- the use of clear plastic gives prominence to the bright colours of the product and this combined with fruit depictions are highly likely to attract the attention of children;
 - the packaging is similar to that commonly used for icy poles and a reasonable person would likely draw a ready comparison of the packaging with that used on icy poles popular with children;
 - some of the range uses terms like lemonade and lemon which is commonly employed on non-alcoholic children's soft drinks; and
 - each of these elements in combination would lead a reasonable person to probably understand that the packaging has an evident appeal to minors.
35. Determination 45/24 concerned a product '24 Ice'. The Panel believed the packaging of this alcoholic ice block had strong appeal to minors, noting:
- the packaging of the individual servings is similar to that used for non-alcoholic icy pole style products that are popular with minors and will likely appear very familiar to minors;

- while the individual serving packaging has references to the product being alcohol, these references are not prominent within the context of the packaging design as a whole increasing the possible confusion of the products with non-alcoholic ice blocks;
 - the packaging adopts bright colours likely to be eye-catching to minors;
 - these factors combine to create an illusion that the product would be a smooth transition from a familiar non-alcoholic product to an alcohol product; and
 - taken as a whole, a reasonable person would probably understand that the packaging was similar to that commonly used for icy poles popular with children.
36. While some guidance can be taken from the earlier decisions and similar cases should be treated in a similar fashion, each case must always be assessed on its own merits.
37. The Panel believes the product packaging breaches the Part 3 (b)(i) standard. In reaching this conclusion the Panel noted:
- the packaging does not unambiguously establish the product as being alcoholic, with no reference to alcohol on the front of the sleeve and the alcohol references on the back of the sleeve not being prominent within the context of the overall packaging design;
 - the packaging is similar to that used for non-alcoholic ice blocks products that are popular with minors and will likely appear very familiar to minors;
 - inadequate identification of the product being alcoholic together with the similarity of the product with common non-alcoholic ice blocks means there is a high likelihood the product could be confused with non-alcoholic products;
 - the packaging adopts bright colours likely to be eye-catching to minors and the ghost image is similar to that used in publications or cartoons familiar to minors and together enhances the likely relatability of the packaging to minors;
 - these factors combine to create an illusion that the product would be a smooth transition from a familiar non-alcoholic product to an alcohol product; and

- taken as a whole, a reasonable person would probably understand that the packaging has strong or evident appeal to minors.

Instagram posts

38. The Instagram account of the Company contains posts with images of the products. Further, some images use arms and hands with the products. The complainant argues this image in particular has strong appeal to minors.
39. The Company explains it has only modestly undertaken social media marketing and while not expressly conceding a breach of the ABAC standard has occurred, it advised it will remove artwork/imagery that does not provide sufficient context of the products.
40. The Panel believes the post identified by the complaint breaches the Part 3 (b) standard.

Conclusion

41. On 10 July 2024, the Panel made a provisional determination that the packaging of Spirit Fingers is in breach of Part 3 (b)(i) of the ABAC Code.
42. Under the rules applying to breach determinations concerning brand names and packaging, the provisional determination was provided to the Company and it was advised that it can, within 10 business days, seek a rehearing, including making additional submissions.
43. As of 31 July 2024, and following further communication from ABAC, the Company had not advised whether or not it would be seeking a rehearing. Due to the time lapsed and the lack of response from the Company, the Panel finalises its finding that the packaging of Spirit Fingers is in breach of Part 3 (b)(i) of the Code.