



ABAC Adjudication Panel Determination No 128/24

Product: Knickers Agave Spirit
Company: Bunsters
Media: Social Media - Instagram
Date of decision: 30 September 2024
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Louisa Jorm
Ms Jeanne Strachan

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 30 August 2024 about social media posts marketing Knickers Agave Spirit (“the product”) by Bunsters (“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 places 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, and 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 is within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaint was received on 30 August 2024.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint and this determination was made within the target timeframe.

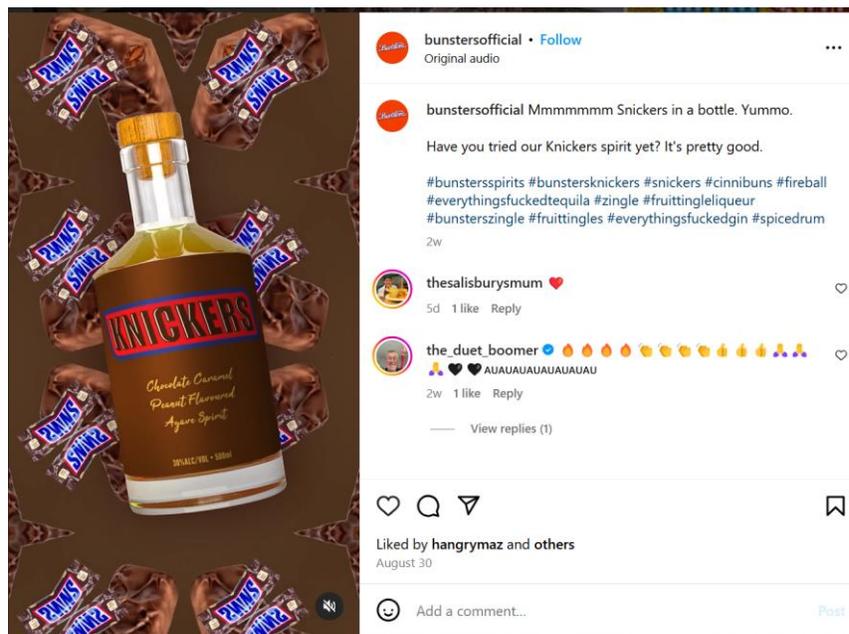
Pre-vetting Advice

9. A component of the ABAC Scheme is an advice service by which an alcohol marketer can obtain an independent opinion of a proposed alcohol marketing communication against the ABAC standards before public release. Pre-vetting advice is separate from the complaint process and does not bind the Panel but represents best practice on behalf of alcohol marketers. Pre-vetting advice was not obtained for the marketing item.

The Marketing

10. The complaint relates to a video Instagram post, showing a bottle of the product moving from side to side in front of moving Snickers chocolate bars. The post can be viewed at the following link, and a screenshot is shown below:

[Bunsters Hot Sauce \(@bunstersofficial\) • Instagram photos and videos](#)



Complaint

11. The complainant objects to the marketing as it is “Agave Spirit advertised as a chocolate bar”.

The ABAC Code

12. Part 3 (b) of the Code provides that An Alcohol Marketing Communication must NOT:
- (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 Response

13. The Company responded to the complaint by letter emailed on 16 September 2024. Its primary comments were:
- Thank you for inviting us to provide comments for the Panel's consideration in determining this complaint. Bunsters wishes to confirm our support and commitment to upholding the ABAC Responsible Alcohol Marketing Code (ABAC), as well as best-practice marketing standards.
 - In the interest of not wasting the panel's time it should be noted that Bunsters does not have much stock of this product left so by the time ABAC looks at this advertisement the product may already be sold out. If the panel would like to check to see if the product is still available before commencing, please email us.
 - It should also be noted by ABAC that Bunsters only sells products online via advertising targeted at people over the age of 35. Our core consumer is a mature adult Spirits consumer who enjoys indulgent and delicious adult treating. While a minor might be able to see one of our organic posts online, they would then have to undertake multiple actions that may prove challenging, before eventually receiving the products in the post weeks later.
 - Pre-vetting advice was not requested for the marketing.

- In response to questions asked by ABAC:
 - Bunsters was not aware that the ABAC code covers "words that rhyme" with products that could have an evident appeal to minors. Candy rhymes with Brandy for instance. Rum with Gum.
 - The name of the product is "Knickers" which is a common term for undergarments. Any reasonable person would agree this word does not have any evident or obvious appeal to minors.
 - The Snickers logo is trademarked. It is Blue writing on a white background in a red right leaning parallelogram. Our Knickers logo is Black Writing on a red background with a blue outline. It has been substantially transformed from the Snickers logo so as not to have evident appeal or confusion to minors but enough saliency so that intelligent adults will make a connection to a Snickers Bar.
 - It should also be noted by ABAC that the majority block colour of the product is "poo brown". This colour traditionally does not have strong or evident appeal to minors.
 - In the context of packaging that is directly targeted at minors (bright colours, cartoons, fruit drawings etc) the packaging of a Snickers Bar does not evidently appeal to minors either.
 - The flavour profile of this drink cannot be said to be consumed primarily by minors. Caramel, chocolate and peanuts are a flavour combination that is enjoyed by the general public of all ages.
 - The flavours present in the liquid have been stated on the front label so when the product is picked by someone new to it they know what it tastes like, as opposed to having to guess.
 - We have also called out "Agave Spirit - 30% ALC VOL" so it's clear this is an alcoholic beverage with no obfuscating words used. It is unlikely that the packaging could create confusion with confectionary or soft drinks.
 - The bottle is shown in front of chocolate bars to visually convey the information that the 30% Alcohol Agave Spirit tastes like the flavours you would find in a Snickers bar. Chocolate bars are not exclusively appealing to minors. They are enjoyed by the general public of all ages so it can't be argued that Bunsters is deliberately targeting minors by using a kaleidoscope image of Snickers Bars in the advertisement.

- The sound 'Mmmmmm' and word 'Yummo' are used as a signifier of the pleasure of consuming, or at the prospect of consuming food or liquid that tastes good, in this case the deliciousness of the liquid that tastes like peanuts, caramel and chocolate. It also represents the informality of the Bunsters tone of voice. It cannot be said that these words are more commonly used by minors than adults.
- The use of hashtags for Snickers and Fruit tingles allows people on Instagram searching for these hashtags to find our products that taste like Snickers and Fruit Tingles. It cannot be said that there is anything strongly appealing to minors about a hashtag that relates to a flavour in an alcoholic beverage. Numerous alcoholic beverages have a flavour that in isolation could sound appealing to a minor. That being said, only 7% of Instagram users in Australia are minors. It is very unlikely that a minor would search for a Snickers hashtag on Instagram, find our product, then go through the necessary illegal steps to procure it online, wait weeks for the delivery and then consume it. It's not impossible, but it's very unlikely.
- In conclusion the packaging of this product and the Instagram advertisement was not designed to appeal to minors or specifically target minors. Our advertising and design elements were selected to be attractive to our target customer, the mature adult Spirits consumer who enjoys indulgent and delicious adult treating and a flavour profile that is enjoyed by the general public, not just minors.

The Panel's View

14. Bunsters is a Perth based company that commenced in 2014 by producing a range of hot sauces before expanding more recently into alcoholic beverages. One product in the Company's alcohol range is Knickers Agave Spirit and it is an Instagram post for this product that has drawn the complaint.
15. The post shows a video of a bottle of Knickers Agave Spirit moving from side to side in front of a kaleidoscope of Snickers chocolate bars. The background alternatively shows the Snickers bars in their wrapping and unwrapped and displaying their makeup of chocolate, nuts and caramel. The video is accompanied by text reading "Mmmmmm Snickers in a bottle. Yummo".
16. The complaint states the post is advertising the product as a chocolate bar. While the complainant doesn't expand further on the concern, the Panel takes the complaint to be that by associating a bottle of alcohol with the Snickers chocolate bar, the social media post will have strong or evident appeal to minors.

17. The complaint brings into play the ABAC standard in Part 3 (b)(i) of the Code which provides that an alcohol marketing communication must not have strong or evident appeal to minors. 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.
18. 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.
19. 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.

20. Assessment of the consistency of a marketing communication with a Code standard is from the probable understanding of the marketing item by a reasonable person. This means the life experiences, values and attitudes found commonly in the community is the benchmark.
21. The Company argued the post was consistent with ABAC standards, contending that:
 - the packaging of this product and the Instagram advertisement was not designed to appeal to minors or specifically target minors;
 - the target of the product is adults aged over 35 and the online sales platform makes it highly unlikely the product would be accessed by minors;
 - the name "Knickers" is a common term for undergarments and does not have any evident or obvious appeal to minors;
 - the product label has been substantially transformed from the Snickers logo so as not to have evident appeal or confusion to minors but enough saliency so that intelligent adults will make a connection to a Snickers Bar;
 - the majority block colour of the product is "poo brown". This colour traditionally does not have strong or evident appeal to minors;
 - the product flavour profile is not consumed primarily by minors. Caramel, chocolate and peanuts are a flavour combination that is enjoyed by the general public of all ages;
 - the alcoholic nature of the product is clear, and it would not be confused with a soft drink or confectionery; and
 - chocolate bars are not exclusively appealing to minors. They are enjoyed by the general public of all ages and using a kaleidoscope image of Snickers Bars does not appeal particularly to minors.
22. It can be accepted that there was no intention to direct the marketing towards minors, but the test is not the Company's intention but how a reasonable person would probably understand the marketing material. Equally, it is a valid point that the product may not be easily purchased or accessed by minors, but compliance with core liquor licensing and responsible service of alcohol requirements will not by itself excuse marketing that strongly appeals to minors.

23. The Panel does believe the social media post has strong appeal to minors and hence is in breach of the Part 3 (b)(i) standard. In reaching this conclusion the Panel noted:
- the product's name of "Knickers" combined with images of Snickers bars readily identifies the post's imagery with a confectionery product likely to be familiar and popular with many minors;
 - the association with the confectionery is further reinforced by the accompanying text;
 - the post's imagery is relatable to minors and creates an illusion of a smooth transition from a non-alcoholic to alcoholic beverage;
 - while the Snickers imagery might have appeal to adults this does not mean it cannot have strong or evident appeal to minors;
 - taken as a whole, a reasonable person would probably understand that the post has a strong or evident appeal to minors.
24. It is noted that while the Company is not a signatory to the ABAC Scheme it has fully cooperated with the complaints process and has advised of its support of ABAC Code standards. This speaks well of the Company's sense of corporate and social responsibility.
25. The Panel recommends that the Company avails itself of the training resources available on the ABAC website and engages with the ABAC pre-vetting service when developing core branding and marketing materials for its alcohol beverage range.
26. The complaint is upheld.