



ABAC Adjudication Panel Determination Nos 184/20 & 197/20

Product: Hard Fizz
Company: Fizzy Mates Pty Limited
Media: Digital - Instagram
Date of decision: 6 January 2020
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns Instagram advertising for Hard Fizz (“the Product”) by Fizzy Mates Pty Limited (“the Company”). It arises from two complaints received on 3 December 2020 and 17 December 2020.
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 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 meeting 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 complaints raise concerns under the ABAC Code and accordingly are within the Panel’s jurisdiction.

The Complaint Timeline

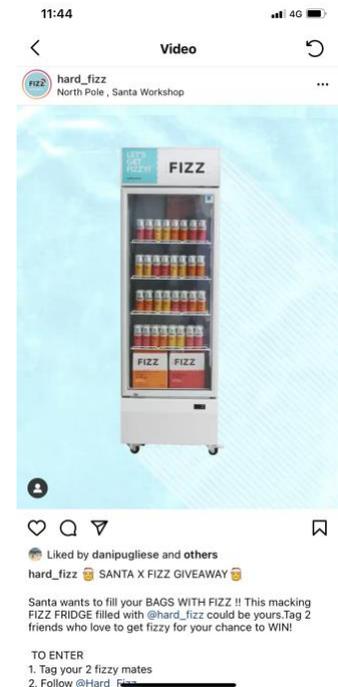
7. The complaints were received on 3 December 2020 and 17 December 2020.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaints were completed in this timeframe.

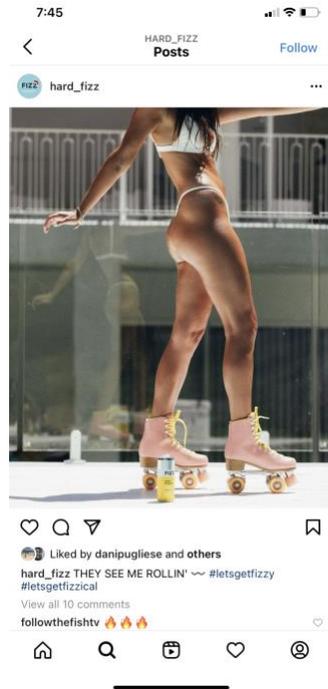
Pre-vetting Clearance

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

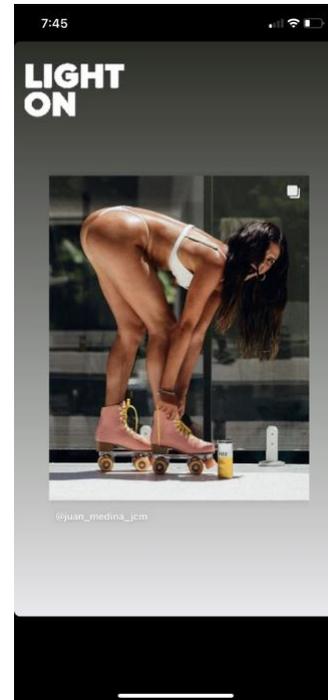
The Marketing Communication

10. The complaints relate to the following Instagram posts:





Instagram Post 4



Instagram Post 5

The Complaint

11. The first complainant is concerned that Instagram Post 1 shows the consumption of alcohol while swimming. The second complainant is concerned about the sexualisation and objectification of women underpinning the Company's approach to marketing and evident in Posts 2, 4 and 5. Further the second complainant contends:
 - Post 3 encourages binge drinking; and
 - Posts 1 and 2 indicate unsafe practices such as jumping into a swimming pool drunk.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (a)(i) show or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines.
 - (d) show the consumption of an Alcohol Beverage before or during any activity that, for safety reasons, requires a high degree of alertness or

physical co-ordination, such as the control of a motor vehicle, boat or machinery or swimming.

The Company Response

13. In response to the first complaint received on 2 December 2020 the Company advised the following by email on 14 December 2020:
 - *(We) have been debating our action across our board of directors and on this occasion we will not be taking any action re removal of posts.*
 - *We are aiming to market in an authentic way and feel this post depicts an authentic Australian poolside scene.*
 - *Hard Fizz won't be sending a full written response at this stage for Panel consideration and will keep in touch when and as we need.*
14. The Company did not respond to the complaint received on 17 December 2020.

The Panel's View

Introduction

15. This is the second determination concerning Instagram posts from the Gold Coast based alcoholic seltzer producer Hard Fizz. The first decision (Determination 172,173,174&176/20) saw the Company respond to the complaints by removing the Instagram posts in question. The Company has taken a different approach on this occasion contending the posts depict authentic scenes and will not be removed. As mentioned in paragraph 2, alcohol marketing falls within a shared regulatory space, and the nature of the concern expressed in the complaints together with the Company's position means multiple regulatory streams have been or might be enlivened. It is useful by way of introduction to provide a brief explanation of the processes in play. Alcohol marketers are required to meet several, and to some extent overlapping, regulatory regimes namely:
 - State liquor licensing regimes which include requirements on the responsible promotion of alcohol;
 - Federal legal requirements such as those stipulating mandatory disclosures on alcohol packaging e.g., alcohol to volume contents of a product; and
 - Industry codes of practice such as the AANA Code of Ethics and the ABAC.
16. As alcohol marketing occurs in this shared regulatory space, from time to time a public complaint about alcohol marketing material can result in several regulatory processes being conducted. This is one of these occasions, with the complaints

triggering both this determination and a decision and further consideration of the posts by the Ad Standards Community Panel under the Code of Ethics. This arises as the complaints raise safety concerns about alcohol use and swimming and rolling skating. Further, the Community Panel will consider the issue of whether some of the posts employ sexual appeal in an exploitative or degrading manner and whether the posts treat sex and sexuality with sensitivity.

17. The Code of Ethics applies to all marketing irrespective of the product involved. This means alcohol marketing is captured by the Code of Ethics provisions regarding sexual appeal and the treatment of sex and sexuality. The ABAC is an alcohol specific code and applies a more detailed and customised set of requirements about the responsible portrayal of alcohol. Overlap between the ABAC and the Code of Ethics occurs most usually when a complaint raises concerns about safety as both codes contain provisions on marketing modelling safe behaviours. As these provisions are framed differently, it is possible for the ABAC process and the Code of Ethics process to result in different conclusions about the consistency of the marketing communication's treatment of safety with the respective code requirements.
18. There is also a high degree of commonality between the ABAC, and the good marketing promotion requirements contained in State and Territory liquor licensing regimes. While the State regimes apply to alcohol marketing across the board, as a matter of focus, the liquor licensing bodies are directed towards the promotional activities which occur within licensed premises while the ABAC is directed at marketing to the community at large. Again, it is possible for a given marketing communication to be subject to both an ABAC determination and licensing enforcement action by a liquor licensing authority.
19. Drawing this together, the following processes will occur resulting from the complaints:
 - this determination deals with Posts 1 to 5 under the ABAC and will consider the issues of whether one or more of the posts breach Part 3 (a) - encouraging excessive alcohol consumption and Part 3 (d) - showing alcohol use during an activity requiring alertness or physical co-ordination;
 - Ad Standards Community Panel case 0372-20 dealt with Post 1 under the Code of Ethics on the issue of health and safety; and
 - Ad Standards Community Panel will consider Posts 2, 4 and 5 under the Code of Ethics on the issues of sexual appeal, and treatment of sex and sexuality.

The Instagram Posts

Post 1

20. Post 1 shows a private swimming pool. The pool is being used by three women and two men. All of the group are shown with cans of the product and it seems most of the group are consuming the product while using the pool. The first and second complainants contend the post is irresponsible as it shows alcohol consumption while swimming or jumping into a pool.
21. Part 3 (d) of the ABAC provides that a marketing communication (which includes an Instagram post) must not show the consumption of alcohol before or during any activity that for safety reasons requires a high degree of alertness or physical co-ordination such as swimming. Assessment as to whether an ABAC standard has been breached is from the viewpoint of the probable understanding of the marketing by a reasonable person.
22. As mentioned, the post has been considered under the Code of Ethics. Section 2.6 of the Ethics Code provides that advertising shall not depict material contrary to prevailing community standards on health and safety. The Ad Standards Community Panel looked at Post 1 and concluded it did not breach this requirement. It was found that because the post did not indicate excessive alcohol consumption, the consumption of a single beverage while swimming in a private pool would not be an unusual occurrence in Australia and would not be contrary to community standards of safe practice.
23. The Company chose not to respond to the complaints in a substantial way. It did contend however that it believes the post depicts an authentic Australian poolside scene. By implication, the argument is that most members of the community would not be concerned about how alcohol use was being portrayed.
24. The Panel acknowledges the point made by the Company which is an assertion of the 'prevailing community standard' accepted by the Ad Standards Community Panel in applying the Code of Ethics. And it may be that most people think moderate alcohol use and swimming in a backyard pool is acceptable, but it is not the standard which the alcohol industry has set within the terms of the ABAC. The ABAC standard is quite clear - marketing material is not to show alcohol consumption before or during swimming. The standard is not qualified by notions of 'excessive' consumption. It is clear cut, and it is evident the standard is breached by the Company's Instagram post as people are shown drinking while using the swimming pool.
25. In policy terms the ABAC standard makes good sense. Alcohol by its nature affects mental and physical abilities and it should not be used in conjunction with activities which are inherently dangerous. It is recognised that moderate amounts of alcohol can be consumed, and the physical impacts are not significant in

safety/risk terms. For instance, drink driving laws permit the consumption of some alcohol i.e. a blood alcohol level of below 0.05% before an offence is committed. The ABAC standard however avoids endeavouring to assess a marketing communication as to whether moderate consumption is depicted when safety is the question. The ABAC adopts a clear line of not permitting the depiction of alcohol consumption in such circumstances. And given that there are countless ways to market alcohol, including scenarios near a swimming pool, which do not require depictions of alcohol use while actually swimming, the standard is not overly restrictive on creative marketing messages.

Post 2

26. Post 2 shows a woman in a swimming pool, leaning half out of the pool on the pool edge and positioned next to her is an opened can of the product with a straw. Again, the issue is showing alcohol use while swimming. For the reasons detailed above regarding Post 1, it is evident this post is also in breach of the Part 3 (d) standard. While the woman is not shown physically drinking from the can, a reasonable person would conclude that the woman is consuming the product while using the pool.

Post 3

27. Post 3 shows a retail store style refrigerator filled with cans and cartons of the product. The accompanying text explains that the fridge is a prize in a competition. The second complainant believes the post encourages binge drinking. Part 3(a)(i) of the ABAC provides that alcohol marketing must not encourage the excessive consumption of alcohol beverages.
28. The Panel does not believe the post is in breach of the ABAC standard. The post merely shows a refrigerator containing product. It does not suggest any pattern of consumption and the photo is contextualised by being explained as the prize in a competition. Simply showing a stock of alcohol does not mean a person is being encouraged to binge drink. Alcohol has a long shelf life, and a stock of alcohol could be consumed by multiple people and over a prolonged period.

Posts 4 and 5

29. Post 4 shows a bikini wearing woman on roller skates with a can of the product positioned next to her skates. Post 5 shows the same woman but leaning over to tie up the laces on her skates. The second complainant's concern about the two posts raises issues under the Code of Ethics rather than the ABAC and relate to sexualisation and objectification. The relevant ABAC standard concerns whether the posts would be fairly interpreted as depicting alcohol consumption during the activity of rolling skating. Certainly, skating is an activity which for safety reasons requires a high degree of alertness and physical co-ordination.

30. The Panel does not believe the posts breach the Part 3 (d) standard. It is permissible to associate a sporting activity, such as skating, with an alcohol product. It is not permitted to show alcohol consumption before or during the performance of the activity. The post is a staged shot to position the product next to the attractive (and bikini clad) woman. It does not seem the woman is drinking the product. The issue here is why a bikini clad woman needs to be depicted in this manner, but this is a matter for the Ad Standards process and is not related to alcohol as such. For instance, the complainant would be raising the same concern about portraying a woman in this way if the product was a non-alcoholic seltzer.

Compliance with the Panel Determination

31. The Company is not a signatory to the ABAC Scheme and has made no prior commitment to meet ABAC standards in its marketing, nor to abide with Panel decisions on complaints about its marketing. In this regard the Company is like many smaller alcohol producers who are not ABAC members. The history of the ABAC Scheme since 1998 is that non signatories have agreed with the sentiments in the ABAC standards and accepted independent oversight by way of Panel determinations of public complaints about their marketing. This reflects a basic sense of corporate social responsibility. It would be very disappointing if the Company joined a literal handful of instances where this has not occurred.
32. While the ABAC Scheme is at its heart a self-regulatory initiative, the Scheme does work cooperatively with Australian governments including State and Territory Liquor Licensing authorities in terms of promoting industry compliance with good standards of alcohol marketing promotion. This is particularly the case given that the ABAC standards and alcohol promotion requirements or guidelines issued by Liquor Licensing bodies invariably have common themes in the responsible depiction of alcohol use. It is hoped the Company will comply with this determination and remove the two offending posts. Failing this, the matter will be referred to the liquor licensing body for action under the Queensland Liquor Act 1992.
33. The complaints are upheld in relation to Posts 1 and 2 and dismissed in relation to Posts 3, 4 and 5.