



ABAC Adjudication Panel Determination Nos 10/21 & 11/21

Product: Vacay Alcoholic Seltzer
Company: Vacay Seltzer Pty Limited
Media: Instagram
Date of decision: 9 February 2021
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”) concerns Instagram advertising for Vacay Alcoholic Seltzer by Vacay Seltzer Pty Limited (“the Company”). It arises from two complaints received from a single complainant on 18 January 2021.
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 18 January 2021.
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 advertising.

The Marketing

10. The complaints refer to a photo and video posted on Instagram. Image 1 is the photo showing a person in a swimming pool holding a can of Vacay Alcoholic Seltzer. Image 2 is representative of the scenes shown in the video, which featured people wearing swimwear, holding cans of Vacay Alcoholic Seltzer in and around a swimming pool.



Image 1



Image 2

The Complaints

11. The complainant is concerned about the advertising as:
 - *[The posts] demonstrate drinking and swimming, a high-risk activity not appropriate for an alcohol ad.*

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (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's Response

13. The Company responded to the complaints by emails on 19 and 20 January 2021 advising that it had removed both of the Instagram posts.

The Panel's View

14. The summer of 2020/21 has earned the name in alcohol industry circles as the 'Summer of Seltzers' reflecting the ponderance of new alcoholic seltzers which have come onto the Australian market. Each of the brands seek to find a point of difference, with Vacay alcoholic seltzer relying on the involvement of a well-known sommelier to develop its flavour range and the Company committing to donate 10% of its profits to the charity Cure Cancer.
15. In marketing positioning, the brand emphasises the compatibility of the product's low calorie and low alcohol content with an active lifestyle and a love of outdoor activities. It is not surprising therefore that the Company's social media posts on Instagram often place the product in outdoor scenes near water such as a beach. The complaints go to two Instagram posts, one a video and the other a photograph showing the product being consumed by persons in a swimming pool.
16. The ABAC permits alcohol brands to be associated with outdoor activities including water pursuits such as swimming or surfing. The Code however makes clear in the standard contained in Part 3 (d) that an alcohol marketing communication (which includes Instagram posts) 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. This means it is permitted to position an alcohol beverage near a swimming pool, provided it is clear no one swimming in the pool is consuming alcohol or a reasonable implication can't be drawn that a person will swim after consuming alcohol.

17. Both the video and the photograph posts show people in a swimming pool with cans of the product. A reasonable viewer would conclude the people were consuming the product while swimming and using the pool. It is evident therefore that the ABAC standard has been breached.
18. The Company upon receiving the complaints, removed both posts but did not otherwise respond to the complaint. The Company is not a signatory to the ABAC Scheme and is not bound to comply with Panel determinations or participate in the complaint process. As the Cure Cancer social responsibility initiative demonstrates, the Company does take its social license to operate seriously, and it is hoped the Company might engage with the ABAC pre-vetting service in the future when developing core branding and marketing campaigns.
19. The complaint is upheld.