



## ABAC Adjudication Panel Determination No 20/21

**Product:** Delvi Alcoholic Seltzer  
**Company:** True East Beverages  
**Media:** Instagram  
**Date of decision:** 25 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 Delvi Alcoholic Seltzer (“the Product”) by True East Beverages (“the Company”). It arises from a complaint received on 15 February 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:
  - 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;
  - 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 complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

## The Complaint Timeline

7. The complaint was received on 15 February 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 complaint was 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 complaint refers to two marketing items, namely:
  - an Instagram post which positions a woman in a swimming pool with two open cans floating near her in Delvi pool floats and
  - the pool float itself.

A screenshot of the Instagram post and an image of the pool float is shown below:



## The Complaint

11. The complainant objects to the marketing as follows:

*Both the advertisement and the promotion itself are breaching advertising codes for alcohol by both depicting and encouraging drinking whilst swimming which is dangerous and requires a high level of alertness.*

*Alcohol advertisers must show more responsibility to consumer safety.*

*The giveaway style promotion of pool floats for alcoholic beverages is irresponsible.*

## The ABAC Code

12. Part 2 of the ABAC Code includes the following within the application of the Code:

- Marketing Collateral.

13. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:

- (a)(ii) show or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage.
- (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

14. The Company responded to the complaint by email on 21 February 2021. Its principal comments were:

### Alcohol Advertising Pre-Vetting Service

- The marketing communication did not receive any formal pre-vetting approval however we were very mindful in our approach of this campaign, taking every precaution in not encouraging irresponsible behaviour, participating in what could be deemed dangerous activity close to water or excessive consumption of alcohol. Now that I am aware there is such a formal vetting service we will endeavour to utilise this service if there is ever a campaign message being in any way questionable in meeting code.

### Marketing Collateral

- We agree that the Delvi Drink Floats are Marketing Collateral within the scope of Part 2 (a) of the Code.
- We don't believe that the Delvi Drink holder pool floats breach Part 3 (a)(ii) of the code by encouraging irresponsible behaviour that is related to the consumption or presence of an Alcohol Beverage.
- Given our geographical proximity to and love of water, it is not unreasonable to expect that hundreds of thousands of Australians enjoy a drink poolside whether it be in a spa, sitting on steps of a pool or floating on a lounge. Oceans and water are part of the fabric of Australian social and daily lives. Our campaign and collateral is not built around encouraging people to drink and swim, or partake in ANY kind of dangerous activity at all. The Delvi drink float is simply a convenient and novel way to house a can when in proximity of water and are really no different to a branded stubble holder.

### Alcohol and Safety

- We don't believe that the Instagram post breaches Part 3 (d) of the Code as there is nothing pictured in this post of anyone swimming, drinking or doing anything remotely dangerous or excessive.
  - The cans in the floats are especially shot from above so as to not blatantly appear they are even alcohol or Delvi cans - the drink float could house a can of coke or any other non-alcoholic beverage.
  - Text in the photo further supports our low key, non-excessive message and tone of voice for the Delvi brand.
  - "Get poolside" - has no reference to swimming or activities that would otherwise be dangerous during or after one drink. Poolside is usually reference to a lounge, chair or other arrangement around the pool.
  - "Crack a Delvi " - we were careful to be non-excessive and explicit in mentioning one drink "a Delvi".
  - "Chill out" - by its very meaning in the Dictionary is to be calm, slow down, relax - pretty much the opposite meaning to taking part in any kind of activity such as swimming, being irresponsible or doing anything by excess.
- Furthermore, we specifically do not show a human actually drinking in a pool or even having a can in hand. The person featured throughout the

campaign is only partly in view from the waist down relaxing on an inflatable lounge, not participating in swimming or anything remotely dangerous. The nature of the imagery positioning and wording we believe therefore, is non-encouraging of excessive drinking or partaking in dangerous activity in every way.

- Corona has arguably the most successful marketing campaign based on the presence of enjoying/drinking beer around close proximity of water and surf. It is not uncommon to see marketing campaigns giving away surfboards or other watercraft in any multitude of bottle shops. The very nature of surfing is extremely dangerous, yet common sense prevails that one shouldn't drink too much in and around an ocean. Please refer to the images below:



- The Delvi brand is actually very different in its marketing to other Hard Seltzer brands in that we are not marketing to or seeking a young party demographic. Our whole brand ethos is around a much more relaxed and subdued manner, a more mindful and mature demographic of 35 to 45 years. We are respectful and supportive of farmers, nature and take responsible drinking seriously. I encourage the board to compare our entire social media feeds to a host of other Hard Seltzer brands aimed at this younger party style demographic.
- Our drink float campaign had absolutely no intention of promoting drinking in excess or while swimming or doing any other dangerous activities around water.

### The Panel's View

15. The Company produces a range of alcoholic seltzers. In part the Company promotes its products via social media channels such as Instagram. This determination concerns a complaint about an Instagram post and an item of marketing collateral, namely a branded swimming pool float for holding a can of drink.
16. The post features an image of the legs of a woman lying on an inflatable pool raft in a swimming pool. Also in the pool is a pool float holding an opened drink can. The pool float is printed in Delvi branding. Accompanying the image is text which reads - 1. Crack a DELVI  2. Get Poolside   3. Chill   . The Company is making the pool float, i.e. the drink holder, available as a giveaway to purchasers of a four pack or case of product. The details of a website with the offer is also provided.
17. The complainant believes the Instagram post and the giveaway pool float to be irresponsible marketing on the basis that it encourages alcohol use while swimming which is dangerous. The ABAC provides that alcohol marketing communications must not:
  - encourage irresponsible behaviour that is related to the consumption or presence of an alcohol beverage (Part (a)(ii)); and
  - show the consumption of alcohol (visibly, audibly or by direct implication) before or during any activity that for safety reasons requires a high degree of alertness or physical co-ordination such as swimming.
18. The Company accepts that the pool float is 'marketing collateral' and is captured by the ABAC but contends neither the pool float or the Instagram post breaches ABAC standards. It is argued:

- the pool float is a novel branding item but is really no different to a branded stubbie holder;
- the Instagram post does not show anyone drinking or doing anything dangerous;
- while the float has a can in it, the can is not shown to be an alcohol product and could be a non-alcoholic beverage;
- other alcohol brands such as Corona associate their product around enjoying a drink near water without promoting dangerous activity and the Company's Instagram post is similar in this respect; and
- the Company's brand ethos is subdued, directed at an older demographic and does not have partying themes found in other alcoholic seltzer brand marketing.

19. The assessment of the consistency of a marketing communication with an ABAC standard is from the standpoint of the probable understanding of the marketing by a reasonable person taking the content of the marketing as a whole. The 'reasonable person' is a legal construct which means the life experiences, values, and opinions found commonly in most of the community is the benchmark. A person who has a different understanding is not 'unreasonable' but possibly their interpretation would not be shared by the majority of the community.
20. A 'marketing communication' for ABAC purposes is a wide concept and includes social media posts on platforms such as Instagram as well as 'marketing collateral'. Marketing collateral is defined in the Code to mean material used by a marketer to promote a brand and support the sales and marketing of alcohol beverages including gifts with purchases, competition prizes and branded merchandise. The pool float is branded merchandise and is captured by the ABAC.
21. Turning first to the pool float, the application of the ABAC standards which are naturally designed for depictions of the use of alcohol beverages sit a little awkwardly when applied to non-beverage items. This means the standards must be applied in a common-sense way, guided by the intent of the relevant provision, but adapted to the reality of the merchandise item. The pool float is obviously intended to be used to hold drinks in a swimming pool. While the float is adorned with alcohol product branding, as the Company points out, functionally the float can be used to hold alcohol and non-alcohol products alike.
22. The question is how a reasonable person would interpret the item of marketing collateral. The Panel believes that an alcohol branded pool float would be understood by a reasonable person as suggesting that it is acceptable to consume alcohol while using a swimming pool. This conclusion is buttressed by:

- the Instagram post is promoting the product and float and a reasonable person would assume the image of the can held by the float would be Delvi seltzer and not a soft drink; and
  - The Seltzer Store website, mentioned in the Instagram post, promotes the float as a giveaway with the purchase of a 4 pack or case of the product and would be understood as messaging that Delvi seltzer can be consumed in a swimming pool.
23. The Instagram post shows a woman in a swimming pool lying on a pool raft with the pool float holding an opened can nearby. The Company contends the post does not show any dangerous activity and is like other alcohol brand marketing which place alcohol products with the sea e.g., Corona advertising. It is common for alcohol marketing to associate products with outdoor pursuits such as swimming or surfing. This is not prohibited by the ABAC standards. What is not permitted is messaging that it is acceptable for alcohol be consumed before or during an activity such as swimming which requires a high degree of alertness or physical co-ordination.
24. When it comes to swimming in the ocean or using a pool, the Code does not envisage a sliding scale of dangerous activity as suggested by the Company. The requirement is clear cut - do not message that it is ok to consume alcohol while using a swimming pool. It is not difficult to design a marketing communication which places alcohol use in pleasant outdoor settings adjacent to water consistent with messaging that has no swimming/surfing etc occurring or establishes that alcohol consumption takes place after swimming/surfing has been completed and will not resume.
25. The Panel believes the Instagram post is in breach of the Part 3 (d) standard. The Panel noted:
- the context of the post would be understood by a reasonable person as a can of the product being in the pool float;
  - the can is opened and near to the woman on the pool raft which raises a direct implication that the product is being consumed by the woman while using the swimming pool; and
  - the accompanying text, while not decisive of itself, taken with the image gives some support to the interpretation that the product is being consumed by the woman.
26. Accordingly, the Panel finds the marketing collateral branded pool drink float in breach of Part 3 (a)(ii) by encouraging the irresponsible behaviour of consuming alcohol while using a swimming pool and the Instagram post in breach of Part 3(d) by showing the consumption of alcohol during the use of a swimming pool.