



## **ABAC Adjudication Panel Determination Nos 56, 57, 63, 64, 65, 66, 67 and 90/21**

**Product:** Basic Babe Alcoholic Sparkling Water  
**Company:** Basic Brands  
**Media:** Instagram  
**Date of decision:** 26 April 2021  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Debra Richards  
Professor Richard Mattick

### **Introduction**

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns eight different Instagram posts by Basic Brands (“the Company”), marketing Basic Babe Alcoholic Sparkling Water (“the Product”). It arises from seven complaints received from a single complainant on 6 April 2021, as well as an additional complaint received from a different complainant on 20 April 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 Complaints' Timeline

7. The complaints were received on 6 April 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 marketing.

## The Marketing

10. This determination relates to eight different Instagram posts, as shown below:



***Instagram Post 1***



**Instagram Post 2**



**Instagram Post 4**



**Instagram Post 3**



**Instagram Post 5**



**Instagram Post 6**



**Instagram Post 7**



**Instagram Post 8**

**The Complaint**

11. The complainants have the following concerns about the marketing:

For Instagram Posts 1 to 6, the complainants are concerned as follows:

*This promotes people drinking while in water. This is exceptionally dangerous and irresponsible of the brand to be promoting it. In circumstances people who drink in water can drown.*

*Swimming and drinking should not be combined in an alcohol advertisement.*

For Instagram Post 7, the complainant is concerned as follows:

*It is a woman hanging out of the window as a car while it is moving. It is moving at enough pace so her hair is pulled back by the speed of the wind.*

*This is exceptionally dangerous. She could easily fall out of the window and kill herself. It claims young wild and free which is stupid. This is reckless and should not be promoted to conduct this activity by an alcohol company.*

For Instagram Post 8, the complainant is concerned as follows:

*There is a group of girls who look 15 holding skateboards with alcohol with them.*

*There is no way these girls are old enough to drink alcohol. They are my daughter's age and she is 16! This is promoting underage drinking and it is not right they are doing it.*

## **The ABAC Code**

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (a)(ii) show (visibly, audibly or by direct implication) or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage.
  - (b)(i) have Strong or Evident Appeal to Minors.
  - (b)(ii) depict a person who is or appears to be a Minor unless they are shown in an incidental role in a natural situation (for example, a family socializing responsibly) and where there is no implication they will consume or serve alcohol.
  - (b)(iii) depict an Adult who is under 25 years of age and appears to be an Adult unless:
    - they are not visually prominent; or
    - they are not a paid model or actor or are shown in a Marketing Communication that has been placed within an Age Restricted Environment.
  - (d) show (visibly, audibly or by direct implication) the consumption of an Alcohol Beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical coordination, such as the control of a motor vehicle, boat or machinery or swimming.
13. Part 6 of the ABAC Code provides that:
- Strong or Evident Appeal to Minors** means:
- (i) likely to appeal strongly to Minors;
  - (ii) specifically targeted at Minors;
  - (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;

- (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

**Age-Restricted Environment** means:

- licensed premises that do not permit entry by Minors; or
- a non alcohol-specific age-restricted digital platform (including, for example, a social media website or application) which:
  - requires users to register and login to use the platform, including the provision of their full date of birth; and
  - is able to hide the existence of any alcohol-related pages, sites and content such that they are not visible other than to a user who has registered on the platform as being an Adult.

### **The Company's Response**

14. The Company responded to the complaints by letters emailed on 7 and 12 April 2021 and a phone call on 21 April 2021. The principal points made by the Company were:

- Thank you for your email dated the 6th of April, regarding complaints received about Instagram advertising for Basic Babe. At Basic Babe, we take our responsibility to our community very seriously and are always conscious to ensure we promote safe and responsible consumption of alcohol. As discussed, the complaints have all been lodged by a single complainant, on the same day.
- As you can imagine, we have been shocked by the complaints, however, are eager to work towards a swift resolution to ensure this does not occur in the future.

### **ABAC Alcohol Advertising Pre-vetting Service Approval**

- The Instagram posts were not approved by the Alcohol Advertising Pre-vetting Service.

### **Instagram Posts 1 to 5**

- We agree that Instagram Posts 1 to 5 breach Part 3(d) of the Code.
- It has never been the intention of the brand to promote unsafe activities or the unsafe consumption of alcohol. These images have been posted based on colour, the Australian lifestyle or are reposted images from our Basic Babe community. At the time, we did not believe the images promoted dangerous activities as they were all shot in controlled environments with risks having been mitigated.

### **Instagram Post 7**

- Instagram Post 7 does not depict any alcoholic beverages either in the woman's hand or in or on the vehicle. This is a static shot of a woman leaning out of a car window, with the determination of travelling at speed unable to be verified. The woman's hair is hanging away from her body as she is leaning backwards.
- The woman is sitting on the passenger side of the vehicle (this image is a stock internet image which was shot in the USA) and does not show any alcohol or alcohol consumption before or during the operation of the vehicle.
- In relation to the following hashtags: #alcohol, #drink, #drinks, #drinking, #booze, #cheers and #drinkup, we agree that these hashtags may imply the consumption of alcohol, however, believe this link to drinking and the activity depicted is weak.
- From a static shot, it is unable to be determined if the vehicle is moving. In addition to this, there is no alcohol in the picture with the woman.

### **Instagram Post 8**

- Statistically, skateboarders are an older demographic with only 45% of skateboarders aged between 12 -17, with this number decreasing annually. We do not believe that the image in Post 8 has a strong or evident appeal to minors.
- The models were sourced through an agency, we had requested they all be over the age of 25, the shoot was then left in the hands of an outsourced marketing company. On further review we have discovered that two of them were not over 25, but are still well over the actual legal drinking age. Going forward we will make sure that we actually physically view IDs from any further models.

- This is no excuse but as I'm sure you can appreciate we are a small start up business that consists of two people and we cannot be everywhere to manage every situation and occasionally rely on others. In this circumstance the process has slightly slipped and we will ensure steps are put in place to make sure this doesn't happen again
- The young women pictured in the post are not minors. Given the subjective nature of age appearance, we believe that no two people viewing this picture would assign the same, identical age to any of the women photographed. One viewer's perception of these women being minors, may not be someone else's.
- There is no implication that the people in Instagram Post 8 will consume or serve alcohol. The alcohol is stacked in a pyramid formation, which clearly indicates it is there for promotion and not consumption or serving. In addition, the location of the women further assures the viewer that there is no intent to serve or consume the product.
- The people pictured in Instagram Post 8 are paid models.
- Instagram Post 8 was not placed within an Age Restricted Environment.

### **Concluding Comments**

- There are some additional steps we would like to take at Basic Brands, to ensure we meet our commitment to our community with regards to the safe and responsible consumption of our products.
  - Ensure all photos contain the words – “Drink Responsibly”.
  - Bio to include – Must be 18+ to follow and use our hashtags. Drink Responsibly.
  - Addition of community guidelines link.
- Again, we would like to thank you for bringing this to our attention and hope that the panel find the above steps suitable in terms of ensuring we continue to support our community and meet the ABAC guidelines. In addition, we are open to any suggestions from ABAC with regards to what we can do better.

### **The Panel's View**

15. Basic Babe joined the crowded Australian alcoholic seltzer market in late 2020 and since then has been marketing its products through social media channels including Facebook and Instagram. In common with many smaller and newer

alcohol industry participants, the Company is not a member of one of the industry peak bodies which sponsor the ABAC Scheme nor is the Company a direct signatory to the Scheme. The Company does however accept that it has a social responsibility to market its products consistently with community expectations of good practice and it has co-operated with the Panel's complaint determination process.

16. This determination deals with a series of eight posts on the Company's Instagram account and arises from two separate complainants. The complaints go to three issues which will be dealt with in turn namely:
  - the depiction of the use of alcohol with swimming or activity in or near a swimming pool or the ocean - Posts 1 to 6 inclusive;
  - a post argued to show irresponsible, offensive, or dangerous behaviour - Post 7; and
  - a post argued to feature persons under the age of 25 or possibly not adults promoting alcohol use - Post 8.
17. Given the Australian lifestyle (or at least the popular culture image of the Australian lifestyle), it is very usual for marketers of products of all types to place the use of their products with outdoor pursuits particularly swimming or activities on a beach or adjacent to a swimming pool. Alcohol marketers often employ beach/pool/water scenes with their products. This is not prohibited by ABAC standards, but the standard contained in Part 3 (d) does impose some reasonably straightforward obligations when there are beach/pool/water depictions of alcohol products namely:
  - do not show or imply that alcohol is being consumed during the use of the water e.g., swimming, or playing in a pool or wading in ocean; and
  - do not create a scene where it can be reasonably implied that a person will consume alcohol and then go into the sea/pool.
18. For example, a person can be shown drinking alcohol on a beach or the foreshore or sitting on lounge adjacent to a swimming pool if it is clear that the person is not going to go into the water. This might be because the person is fully clothed, or the time of day establishes that any swimming would have finished for the day, or the person is doing any activity which makes clear that while others might be swimming, they are not e.g., they are cooking on a BBQ near a pool that others are swimming in.
19. Posts 1 to 3 are in breach of the Part 3 (d) standard. Posts 1 and 2 show people in a swimming pool consuming the product. Post 3 shows a range of the products resting on a pool float being taken by several people standing in a pool. This post

creates a direct implication that the product is about to be consumed while using the swimming pool.

20. Post 4 is slightly more ambiguous. It shows a woman in swimwear standing either in the sea or at the immediate edge of the water holding a can of the product. It's not clear if the can has been opened. The Panel believes the most probable understanding of the post is that alcohol consumption is occurring or will occur, and that the woman is going to swim or go into the water. On this basis the post also breaches the Part 3 (d) standard.
21. Post 5 shows a woman holding an unopened can of the product while resting on her knees in the water at a beach. The Panel believes the most probable understanding of the post is that consumption is about to occur while the woman is in the water and this messaging breaches the ABAC standard.
22. Post 6 shows three women in bikinis sitting on the edge of a swimming pool with their feet in the pool. Next to the women are two opened cans of the product. The direct implication of the opened cans and the women being partially in the pool is that alcohol consumption will likely occur in conjunction with swimming or other activity in the pool. This breaches the Part 3 (d) standard.
23. The next issue concerns Post 7 which shows a woman hanging out of the front passenger window of a car. While it's not entirely clear, the woman's body position and the appearance of her hair implies the car is moving although the speed the car is travelling cannot be determined. The complainant contends the post is encouraging reckless behaviour which is unsuitable for alcohol marketing. The Company argues the post is not in breach of any ABAC standard, pointing out:
  - no alcohol beverage or use is shown in the post;
  - the speed of the car or whether it is moving at all is not clear; and
  - any link to alcohol consumption is weak at best.
24. The post cannot be said to breach Part 3 (d) of the Code as there is no depiction of alcohol consumption, nor can it be directly implied the woman or anyone else is about to consume alcohol. Part 3 (a)(ii) of the Code provides an alcohol marketing communication must not show or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an alcohol beverage. Again, given that no alcohol beverage or use is shown in the post, the Panel does not believe the post can be found in breach of the ABAC.
25. It is hardly sensible behaviour to hang out of window of a moving car, irrespective of the speed of the vehicle. It is possible the post might offend the AANA Code of Ethics which in section 2.6 provides advertising shall not depict material contrary

to prevailing community standards on health and safety. The Code of Ethics applies to advertising irrespective of the product or service being promoted. Decisions on the Code of Ethics are taken by Ad Standards and not the ABAC Adjudication Panel. The Panel finds Post 7 is not a breach of the ABAC.

26. The final issue concerns Post 8 which shows four young women in bikinis posing with skateboards. A stack of five cans of the product is shown with the women. The accompanying text foreshadows a promotion with a 'giveaway' will be announced shortly. The concern raised about this post is about the age of women who the complainant believed 'look 15' and that the post is promoting underage drinking.
27. The Company explains that the models for the photograph were sourced 'through an agency' and that the instructions given by the Company was that the models should be all aged over 25. It seems despite these instructions, two of the models are under 25 but older than 18. The Company argues more generally that the post would not have strong appeal to minors (under 18 year olds) as skateboarding is a sport pursued by mostly by adult participants. It is pointed out the photograph is staged and while the product is present, there is no suggestion the women will consume the product.
28. Part 3 (b)(iii) of the Code provides that adults appearing in alcohol marketing communications (which includes Instagram posts) must not be under the age of 25. As two of the models are under 25, this requirement has been breached. More generally, the post must not have strong or evident appeal to minors. This might arise if the post has an appeal to minors beyond the appeal it has generally for adults.
29. The Panel has considered the appeal of skateboarding in previous determinations - see Determination 51/18 and Determination 185/20 - and noted that while the sport/activity has appeal across demographic groups (it will make its debut at forthcoming Tokyo Olympic Games) there is data which indicate the largest cohort of skateboarders are aged under 18. The Company asserted that only 45% of skateboarders are minors. A brief internet search indicates that skateboarding has a higher male to female participant rate but that skateboarding, and rollerblading is a significant activity for minors - for instance ABS Sports and Physical Recreation: A statistical Overview showed 21% of Australian children engaged in skating. Other data indicated the predominant group of skaters are aged between 15 and 30 - see National Survey by the Australian Skateboarding Community Initiative
30. While statistical information on the age of skaters is a relevant background factor, the assessment of the consistency of the post with the Part 3 (b) standard is how a reasonable person would probably understand the messaging in the post. The Panel does not believe the passive positioning of the skateboards being held by

the models in a posed photograph would have strong appeal to minors beyond its appeal to a general audience of adults.

31. Drawing this together the Panel finds as follows:

- Posts 1 to 6 inclusive are in breach of Part 3 (d);
- Post 7 is not in breach of the ABAC; and
- Post 8 is in breach of Part 3 (b)(iii) in relation to the age of two of the models being under 25 but not in breach of Part 3 (b) in relation to the post having strong appeal to minors.