



## ABAC Adjudication Panel Determination No 193/21

**Product:** Hard Fizz  
**Company:** Fizzy Mates Pty Limited  
**Media:** Instagram and Facebook Post  
**Date of decision:** 13 September 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 a Facebook and Instagram post to the Hard Fizz pages by Fizzy Mates Pty Limited (“the Company”). It arises from a complaint received on 5 August 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 5 August 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 an 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 Facebook and Instagram posts.

## The Marketing

10. The complaint concerns a post made to the Hard Fizz Instagram and Facebook pages which, at the time of writing, can be viewed at the following links:

<https://www.facebook.com/watch/?v=447226490407306>

<https://www.instagram.com/p/CR8BlmUpnyh/>

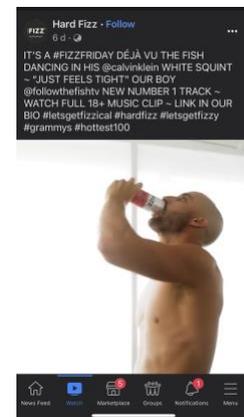
The post consists of a 17 second video of excerpts from a film clip for FISHER's latest release, "Just Feels Tight". It revolves around FISHER leading an aerobics class, as described below:



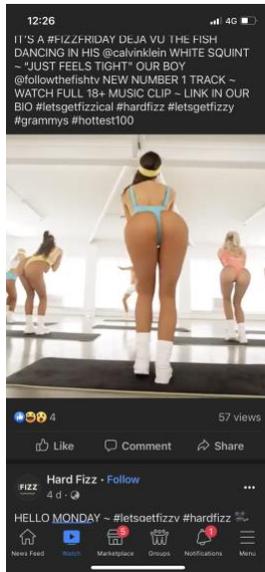
1. FISHER ascends a flight of stairs, at the top of which is an illuminated sign with a stylised face and the words "Just Feels Tight".



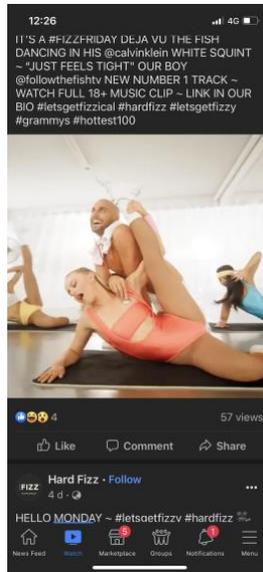
2. FISHER enters the room, and we see a close-up of a can of Hard Fizz being opened before...



3...he has a drink.



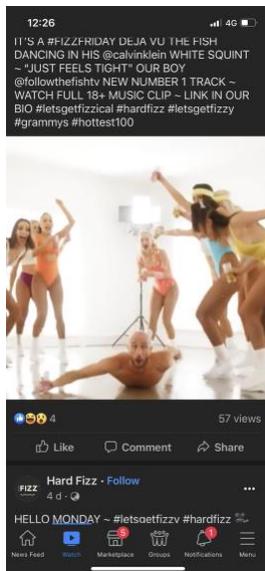
4. It then becomes apparent that he is there to lead an aerobics class, but before doing so, he discards his tracksuit bottoms so he is wearing just his underpants.



5. There are then various shots of FISHER and the aerobics class participants stretching and working out, including a scene where FISHER checks a participant's heart rate with a stethoscope.



6. The participants form a circle around FISHER.



7. The class participants hold and shake open cans of Hard Fizz, smiling, jumping and waving their arms as FISHER slides across the floor on his stomach and...



8... kneels on the floor drinking from a can of Hard Fizz.



9. The last shot is of FISHER walking towards the camera.

## The Complaint

11. The complainant objects to the Instagram and Facebook post as follows:
  - *It's such an irresponsible piece of content and shows that you have to have alcohol to get through life.*
  - *Alcohol brands objectifying women.*
  - *Portraying alcohol as a refreshment/hydration beverage in replacement of water during exercise*
  - *Misuse of alcohol: the first scene is Fisher drinking the alcohol, and then he starts acting silly depicting he is drunk, and the end scene is him skulling another can.*

## The ABAC Code

12. Part 2 of the ABAC Code applies to all Marketing Communications in Australia generated by or within the reasonable control of a Marketer...
13. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
  - (a)(i) show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines;
  - (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;
  - (c)(i) suggest that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment;
  - (c)(ii) show (visibly, audibly or by direct implication) the consumption or presence of an Alcohol Beverage as a cause of or contributing to the achievement of personal, business, social, sporting sexual or other success;
  - (c)(iv) suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation.

14. Part 6 of the ABAC Code contains the following definitions:

**Marketer** means a producer, distributor or retailer of Alcohol Beverages.

**Marketing Communications** means marketing communications in Australia generated by or within the reasonable control of a Marketer (apart from the exceptions listed in Section 2(b)), including but not limited to brand advertising (including trade advertising), competitions, digital communications (including in mobile and social media), product names and packaging, advertorials, alcohol brand extensions to non-alcohol beverage products, point of sale materials, retailer advertising and Marketing Collateral.

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

15. The Company responded to the complaint by letter emailed on 11 August 2021. Its principal comments were:

- In relation to the Instagram post, this was Hard Fizz sharing the content produced by one of our Founders Paul Fisher, aka FISHER. This content is a 'film clip' produced by his production and management team to support his new track 'Just Feels Tight', which was globally launched on the same day as the aforementioned Instagram post on Youtube amongst other music platforms globally.
- This content is not an advertisement produced by Hard Fizz and was simply sharing the success of one of our FIZZ family which has been mooted as Grammy award-winning music and worthy of celebration for an Australian artist.
- It was not the intent of the post in question to offend or promote irresponsible behaviour and we refute the claim that there are many images and videos on our pages that promote irresponsible drinking.
- We will continue to build the brand in the marketplace in a responsible manner and will be consulting industry along the way

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

16. Paul Fisher is an Australian music producer, DJ, and entrepreneur. Mr. Fisher initially gained a public profile as a professional surfer and vlogger. Later he teamed up with fellow surfer Leigh Sedley to form DJ duo Cut Snake. Mr. Fisher, known by the stage name of FISHER, is also a co-founder of the alcoholic seltzer producer Hard Fizz.

17. In July 2021 FISHER released a new single 'Just Feels Tight'. A video of the song has been made and it is a clip from this video posted on the Company's social media accounts that have drawn the complaint. The video shows Mr. Fisher as an aerobics class instructor with a group of female class members performing exercises/dancing to Just Feels Tight. At points in the clip cans of Hard Fizz are seen and the beverage is consumed.
18. The complainant raises several objections to the post. It is argued that it shows irresponsible alcohol use, implies excessive consumption, and the use of alcohol for hydration in replacement of water during exercise. The Company responds to the complaint at two levels. Firstly, it is argued that the clip is not an advertisement created by the Company and its posting 'was simply sharing the success of one of our Fizz family'. Secondly, it is contended the clip does not promote irresponsible drinking.
19. It is also noted that the complainant was concerned that the post objectified the women in the video and was offensive on this basis. The particular issue falls under the AANA Code of Ethics and not the ABAC and is the subject of a decision of Ad Standards.
20. Simply because material found on social media platforms references an alcohol beverage does not automatically bring the post within the ambit of the ABAC Scheme. To be subject to the ABAC standards the alcohol reference must be an alcohol marketing communication generated by or within the reasonable control of an alcohol marketer. As a general proposition, a music video clip created by a musician will not be an alcohol beverage marketing communication even if the video shows alcohol use. The same will be the case with a movie or TV drama that shows characters drinking alcohol within a scene in the production.
21. There will be occasions when a specific brand of alcohol is depicted in a music video, and this arises from a commercial relationship between the artist and an alcohol company. This form of marketing is called product placement, and this can fall under the ABAC Scheme. In the current case, however, there is no need to examine how the Hard Fizz product came to be present in the music video, as a clip taken from the video has been posted on the Company's Facebook and Instagram accounts. As these accounts are under the control of the Company, the posts become an alcohol marketing communication for ABAC purposes and need to meet the ABAC standards of good marketing practice.
22. The assessment of a marketing communication against ABAC standards is from the probable understanding of the marketing material by a reasonable person. This means that the life experiences, values, and opinions found in most of the community are the benchmark.

23. The ABAC standards requiring assessment by the complaint and the nature of the posts are whether the marketing is:

- showing or encouraging excessive alcohol consumption or misuse or abuse of alcohol - Part 3 (a)(i);
- showing or encouraging irresponsible or offensive behaviour related to alcohol use - Part 3 (a)(ii);
- suggesting that alcohol may create or contribute to a significant change in mood or environment - Part 3 (c)(i);
- showing alcohol as a cause of or contributor to the achievement of personal, social, or other success - Part 3 (c)(ii); and
- suggesting alcohol consumption offers any therapeutic benefit - Part 3 (c)(iv).

24. The Panel does not believe the posts breach the ABAC standards. In reaching this conclusion the Panel noted:

- the post would be recognised to be a clip taken from a music video and the depiction of FISHER and the performers/dancers in the clip would be understood by a reasonable person to be consistent with the style often used in videos of this kind;
- neither FISHER nor the dancers are shown consuming any more than a mouthful of the product and do not appear to be affected by alcohol use;
- the clip shows a sexualised style of dance/performance but it is clear this is not caused by the presence or consumption of the product but is consistent with music videos of this genre; and
- it cannot be fairly concluded that the product is being suggested as offering a positive health benefit by simply placing it within the context of the aerobics class.

25. The clip is hardly a subtle association of the product with a sexualised dance routine within the music video and the complainant would not be alone in being dismayed about the portrayal of female performers. That said, the same critique can be made about many music videos. The issue is the Panel is confined to the portrayal of alcohol as a product. And while the product is gratuitously placed in the music video, it would be seen as a prop and incidental to the dance/performance and not shaping the performance or the behaviours depicted.

26. The complaint is dismissed.