



ABAC Adjudication Panel Determination No 203/21

Product: Alcoholic Sparkling Water
Company: Basic Babe
Media: Instagram Post
Date of decision: 2 October 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 four Instagram posts for Alcoholic Sparkling Water (“the Product”) by Basic Babe (“the Company”). It arises from a complaint received on 23 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 23 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 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 Instagram posts.

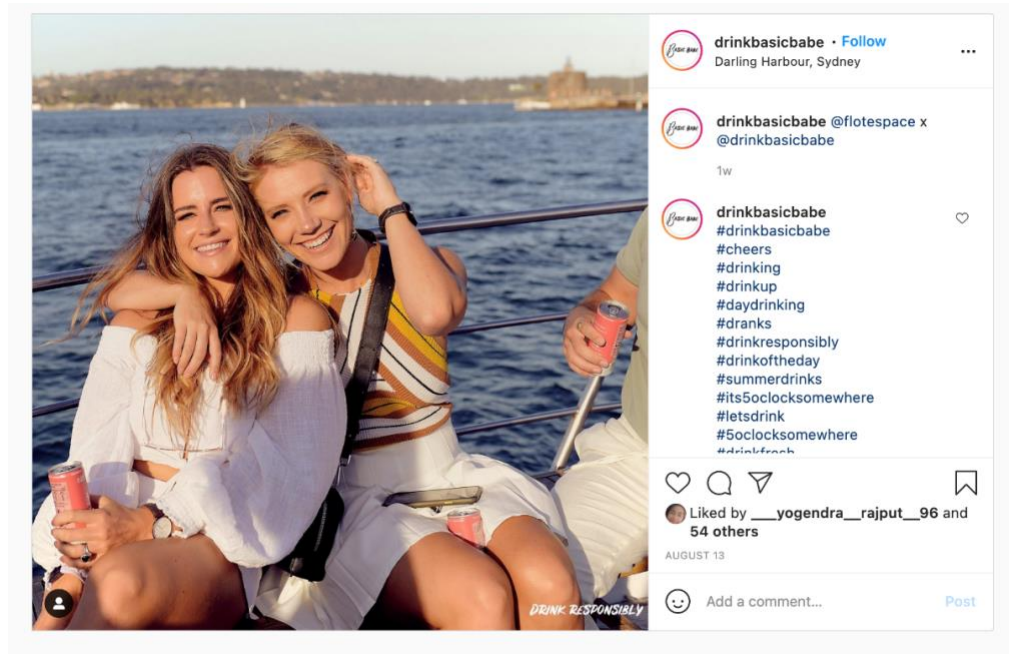
The Marketing

10. The complaint concerns the following Instagram posts:

Instagram Post 1



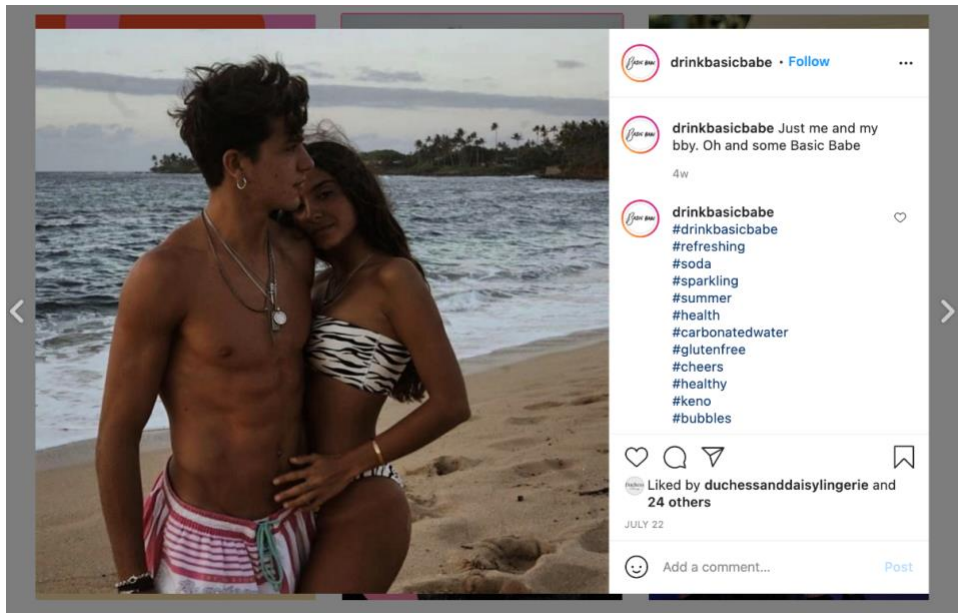
Instagram Post 2



Instagram Post 3



Instagram Post 4



The Complaint

11. The complainant objects to the marketing communication as follows:
- *Clearly promoting drinking and then swimming and doing activities. I saw that they had a breach for the same thing previously and yet continue to promote danger. Also using underage people in imagery is illegal.*

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (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 socialising 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 and 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 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 complaint by letter emailed on 2 September 2021. Its principal comments were:
- Thank you for your email dated the 24th of August 2021, regarding further complaints received about the Instagram 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. We cannot help but once again feel maliciously attacked as a brand, especially after having ensured we are compliant with the advertising guidelines.
 - Instagram post 3 depicts fully clothed people, over 25, on a boat which does not imply, either directly or indirectly that there will be alcohol consumption followed by swimming. Instagram post 5 does not even picture any Basic Babe product and contains the hashtag #drinkresponsibly.
 - After completely vetting and removing any posts from the Instagram account which could breach ABAC guidelines after the previous complaints received in April of 2021, these latest complaints are not only absurd, but are also a clear attempt to discredit and degrade the brand. As you can appreciate, Basic Brands is a start up brand and creating content is laborious and expensive. We are incredibly diligent in ensuring all companies we work with are familiar with the ABAC guidelines and create content which is acceptable for use across our social media platforms. As such, responding to these ludicrous complaints is becoming frustrating, time consuming and costly.
 - Whilst we appreciate that we are not to imply, either directly or indirectly the consumption of alcohol before or during an activity that requires a high level of coordination, you would have to agree that a static image is subject to perception and individual interpretation, something we will never be able to control as this subjectivity is based on each individual's lens. Please see responses to posed questions below:

Alcohol Advertising Pre-vetting Service Approval

- The alcohol marketing communications referred to in the complaint did not receive Alcohol Advertising Pre-vetting Service Approval for their

content and/or placement, due to previous clarification of the standards as well as not being in breach of the standards.

Responsibility toward Minors

- The people shown in the Instagram posts are all over 25 years old.
- They do not appear to be Minors.
- In relation to Instagram Post 3, the people depicted in the photo are blurry and at a significant distance from the cans of Basic Babe product. There is nothing in this picture that suggests the women are associated with the product.
- The Company took steps to ensure that the people depicted were over 25 years old. ABAC guidelines were provided to our marketing partner with clear direction around the ages of any models used in content shoots.
- The Instagram Posts were placed within an Age Restricted Environment.

Alcohol and Safety

- In relation to Instagram Post 1, the person is a significant distance from the water. A reasonable person would believe that this man is simply sitting on the beach.
- In relation to Instagram Post 3, the people in the background are a significant distance from the product. The picture does not imply either directly or indirectly that the women in their swimwear are in any way associated with the items in the foreground.
- We are deeply concerned by this ongoing attack and our primary focus must continue to be protecting our brand and our community. We have taken all the necessary steps to ensure that we promote the safe and responsible consumption of alcohol including removing any images which may breach ABAC standards, however it is clear that the brand is being unnecessarily and maliciously attacked by someone within the industry who understands how the ABAC process works.

The Panel's View

14. Basic Babe is an alcoholic seltzer product marketed through social media channels, including Instagram. This is the third determination resulting from complaints about marketing communications promoting Basic Babe. The

Company is not a signatory to the ABAC Scheme but has fully cooperated with the Panel process on each occasion.

15. This determination relates to four posts on the Company's Instagram account and arises from a single complaint. Each of the posts referenced in the complaint include beach or boating scenes. The complaint goes to two issues, namely:
 - including images of underage people, which is illegal; and
 - promoting drinking and swimming activities.

Age of Talent

16. The complainant has raised a concern that the posts include images of underage people. The Company refutes the concern and states that the people shown in the posts are all aged over 25 years, and do not appear to be minors.
17. Part 3 (b)(ii) of the Code provides that an alcohol ad must not include an image of a person who is or appears to be a minor unless they are shown in an incidental role in a natural situation and where there is no implication they will consume or serve alcohol. Part (b) (iii) provides that adults in alcohol ads must be aged at least 25.
18. The Company has advised that all the people in the Instagram posts are over 25 years of age. The Panel must determine whether they also have the appearance of being over 18 years of age. The age of a model is a subjective assessment; however, the Panel does not believe that any of the models appear to be under the age of 18, and therefore the posts do not breach either of the Part 3 (b) standards.

Alcohol and Swimming

19. Promoting an alcohol product using beach or ocean scenes is not prohibited by ABAC standards, but the standard contained in Part 3 (d) does impose some reasonably straightforward obligations when there are beach or ocean 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 wading in the ocean; and
 - do not create a scene where it can be reasonably implied that a person will consume alcohol and then go into the ocean.
20. For example, a person can be shown drinking alcohol on a beach or the foreshore if it is clear 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.

21. Each of the posts depicts a beach or water scenario. Post 1 shows a man wearing swimwear and sitting on a towel on a beach with the ocean in the background while lifting a can of Basic Babe toward his mouth. Post 2 shows two women on a boat with cans of the product. Post 3 shows several sets of white sandals and cans of Basic Babe on the beach in the foreground of the shot and in the background a blurred image of a group of women at the water's edge. Post 4 is a couple embracing on a beach in swimwear. The scene is set in the early evening.
22. The Company argues that:
 - Post 1, the person is a significant distance from the water and a reasonable person would believe that this man is simply sitting on the beach;
 - Post 2 shows fully clothed people on a boat and nothing in the scene implies swimming will occur
 - Post 3, the people in the background are a significant distance from the product and the picture does not imply either directly or indirectly that the women in their swimwear are in any way associated with the items in the foreground; and
 - Post 4 does not even depict any product
23. Assessment of the consistency of a marketing communication with a Code standard is from the viewpoint of a reasonable person taking the content of the marketing item as a whole. This means if a marketing communication can be understood in several ways, it is the most probable interpretation which is to be preferred over a possible but less likely interpretation.
24. The Panel does not believe Posts 2 and 4 are in breach of the ABAC standard. In reaching this conclusion the Panel noted:
 - Post 2 depicts clothed people on a boat or yacht sailing on Sydney Harbour and there is no implication to be drawn that the people shown will be swimming nor do they appear to have control of the boat;
 - Post 4 shows a couple on the beach in swimwear but the time of day and the fact no product is shown with the couple does not raise a reasonable implication that swimming after alcohol consumption will occur.
25. Posts 1 and 3 involve a more finely balanced decision. Post 1 shows a man in swimwear on a towel sitting on the beach drinking the product. It is possible to interpret the post as argued by the Company that the man is simply on the beach

and he will not be swimming after consuming the product. The Panel however believes the post does breach the Part 3 (d) standard as:

- the scene is set at a time of day when swimming at the beach is highly likely;
- the man is on the sand, not simply adjacent to the beach; and
- the man is wearing swimwear.

26. Post 3 is a cropped photograph of a beach scene showing in the foreground three sets of sandals and three cans of the product. In the background is the blurred image of four women in swimwear approaching the water's edge. While it is not entirely clear, it seems at least one of the cans has been opened. On balance the Panel believes the post does breach the standard as:

- the most likely interpretation is that the foreground image of the product and the shoes is connected to the background image of the women ie the shoes and the product belong to the women;
- the women appear to be about to enter the water; and
- a reasonable implication is that consumption of the product has occurred.

26. The Panel finds Posts 1 and 3 breach Part 3 (d) of the ABAC Code and otherwise dismisses the complaint.