



## ABAC Adjudication Panel Determination No 233/21

**Product:** Moon Dog Fizzer  
**Company:** Moon Dog Brewing Pty Ltd  
**Media:** Facebook  
**Date of decision:** 8 November 2021  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Debra Richards  
Professor Louisa Jorm

### Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns a competition by Moon Dog Brewing Pty Ltd (“the Company”) to win the personal use of a Moon Dog Fizzer Post Mix Machine for six months, as well as a Facebook post promoting the competition. It arises from a complaint received on 30 September 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 the 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 complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

## The Complaint Timeline

7. The complaint was received on 30 September 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 product packaging.

## The Marketing Communication

10. The complaint relates to a Facebook post at the following link:

<https://www.facebook.com/FizzerSeltzer/videos/256079133070291/>

A screenshot of the post is also shown below:



You asked...we delivered! We're putting a Moon Dog Fizzer Post Mix machine into one lucky winners house for six months so they can enjoy Fizzer refills all summer long and we're chucking in a whole heap of Fizzer merch for a full Fizzer bar at home!

To enter all you need to do is head to [bitly.com/FizzerPostMixComp](https://bitly.com/FizzerPostMixComp), tell us why having one of our alcoholic seltzer post mix machines in your house for summer is absolutely essential and upload a picture of you and your mates you'll be having over to share a fresh seltzer with! Simple!

Head to [bitly.com/FizzerPostMixComp](https://bitly.com/FizzerPostMixComp) to enter now, you don't want to miss out on this one! We'll be judging entries based on humour, originality and overall creativity!

Ts&Cs apply. Open to Australian residents 18+. Competition closes 24/10/21. We'll supply everything you need to get this one up and running at home, all you'll need is a steady water supply for the machine to operate.

Drink responsibly. 18+

## The Complaint

11. The complainant objects to the marketing as follows:

- *Post mix machines have been used almost exclusively for soft drink dispensing. This promotion attempts to blur the line between soft drinks and alcohol to the point where it is appealing to minors and creates a transition between soft drinks and alcohol.*

## The ABAC Code

12. Part 2 of the ABAC Code provides that:

The Code APPLIES to all Marketing Communications in Australia generated by or within the reasonable control of a Marketer, except as set out in Section 2(b). This includes, but is not limited to:

- brand advertising (including trade advertising)
- competitions
- digital communications (including in mobile and social media and user-generated content)
- Alcohol Beverage product names and packaging
- advertorials
- alcohol brand extensions to non-alcohol beverage products
- point of sale materials
- retailer advertising
- Marketing Collateral

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

(b)(i) have Strong or Evident Appeal to Minors.

14. Part 6 of the ABAC Code provides that:

**Marketing Collateral** means material used by a Marketer to promote a brand and support the sales and marketing of Alcohol Beverages, including gifts with purchase, competition prizes and branded merchandise.

**Strong or Evident Appeal to Minors** means:

- (i) likely to appeal to strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minors 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 confectionery or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

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

15. The Company responded to the complaint by letter emailed on 18 October 2021. The principal comments made by the Company were:

- I refer to your letter dated 30 September 2021 in respect of the above complaint concerning a competition to win the personal use of a Moon Dog Fizzer Alcoholic Seltzer (Fizzer) Post Mix Machine (Dispensing System) for six months (Competition) and a Facebook post (Post) promoting the competition (collectively, Complaint).
- Thank you for the opportunity to respond to the Complaint. I confirm that I provide this response on behalf of Moon Dog Brewing Pty Ltd (Moon Dog).

### **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.
- Moon Dog previously sought and obtained pre-vetting approval pursuant to AAPS application number 361/20 (approval number 18566) in respect of 'Final approval of revised Moon Dog Fizzer Alcoholic Seltzer packaging' and pursuant to AAPS application number 281/21 (approval number 19557) in respect of 'Final approval of Moon Dog Fizzer Alcoholic Seltzer OOH artwork

with the headline “Fizzer It’s refreshing alcoholic bubbly water” (3 versions, horizontal and vertical banners and portrait)’.

- Insofar as the Competition prize of the Dispensing System (and the image of the machine in the Post) incorporates and reproduces the logos, colours and designs of different Fizzer products, it is submitted that these pre-vetting approvals are relevant to the content of the relevant communications.

## **Responsibility toward Minors**

### Background - Moon Dog Fizzer post-mix

- It is noted at the outset that the Dispensing System itself is not the subject of the Complaint. A mode of beverage dispensing is not a Marketing Communication and cannot be considered ‘product packaging’ in the relevant sense. Accordingly, insofar as this response addresses issues raised in the Complaint in connection with the Dispensing System, it does so only on the basis that the specific Dispensing System being offered as a prize constitutes Marketing Collateral (as defined in the Code) in connection with the Competition and Post that are the subject of the Complaint.
- Alcoholic (or ‘hard’) seltzer is a high-growth beverage category in Australia, attracting strong consumer demand driven by seltzers’ refreshing taste, variety of flavours and low sugar and caloric content. Globally, the seltzer category has been very successful off-premises in packaged form – typically cans – but has gained limited traction in bars, clubs and other venues.
- The alcoholic seltzer category’s lack of on-premises penetration to date can be directly linked to limitations on available bulk dispensing options within venues. Existing taps in venues are already allocated to beer (including in many instances under exclusive contracts which dictate what products are permitted to be put ‘on tap’) and many venues are understandably reluctant to lose a dedicated beer tap in order to pour seltzer through that tap instead. In addition, with alcoholic seltzer being a flavour-led category, it is important that venues are able to offer a variety of different seltzer flavours (rather than pouring a single flavour that may not on its own cater to all customers’ preferences). There are few venues that would be prepared or able to replace four to eight existing beer taps in order to be able to provide a sufficiently broad range of alcoholic seltzer flavours. Installing four to eight new dedicated seltzer taps at a venue is also costly and impractical in most circumstances.

- Moon Dog's response to these impediments to seltzer's success on-premises has been to develop a world-first<sup>1</sup> and patent-pending post-mix alcoholic seltzer production and dispensing solution for venues. Post-mix seltzer involves the specialised brewing and manufacture of a highly concentrated (17%) non-carbonated alcoholic seltzer that is packaged in conveniently compact boxes and mixed and diluted down, at the point of dispensing, with carbonated water. It solves the beer tap substitution issue by providing an elegant counter-top solution pouring four to six (or more) alcoholic seltzer flavours without the need for much bulkier and heavier kegs. Post-mix is also more environmentally friendly than both draught and packaged alternatives, given the reduced transport/distribution required, and using compact boxes rather than kegs improves occupational health and safety for venue and supply-chain staff.
- Moon Dog commenced its post-mix seltzer project in October 2020 and has invested over \$7 million to date in research and development for the solution, which has involved amongst other things developing a new manufacturing process, procuring bespoke dispensing systems which are suitable for alcohol, custom brewing plant, processing and filtration equipment, dosing skid and 'Bag-in-Box' packaging equipment. Moon Dog has employed five additional full-time equivalent employees in connection with the development and implementation of this project, with an expected further 20 FTE to be employed over the next 12 months as alcoholic seltzer post-mix systems are rolled out to venues nationally.

Strong or evident appeal - 'attractive and relatable to minors' or 'transition from non-alcoholic to alcoholic beverages'

- Contrary to the Complaint, the Competition and Post do not 'attempt ... to blur the line between soft drinks and alcohol'. It should be clear from the background set out above that Moon Dog's post-mix dispensing solution for Fizzer alcoholic seltzer is an innovative response to an identified industry need for alternative (to traditional draught) modes of bulk seltzer dispensing in venues, involving the repurposing of existing post-mix technology.
- The Competition, and the Post promoting it, are designed to raise awareness of, and generate consumer – and industry – interest in relation to, the Dispensing System. There is no intention or attempt whatsoever to target minors in doing so and any suggestion to this effect is rejected absolutely.

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<sup>1</sup> <https://theshout.com.au/moon-dog-to-launch-worlds-first-post-mix-seltzer/>

- The ultimate issue is whether the Competition or the Post breach the standard set down in Part 3(b)(i) of the Code by having strong or evident appeal to minors. This requires a holistic assessment of what is conveyed by each 'marketing communication' as against the Part 3(b) standard, by reference to the probable understanding of a reasonable person.
- While it can be accepted that carbonated beverage dispensers of this kind, involving a dispensing valve actuated by pushing a glass against a lever, are typically used to dispense soft drink (as well as sparkling water), this does not in and of itself render the Competition or the Post in contravention the Part 3(b) standard. Soft drink is not consumed exclusively or even predominately by minors.<sup>2</sup> Other than the bare fact that the Dispensing System uses a mechanism that is ordinarily used for soft drink dispensing, no other characteristics of the Competition or the Post are identified as allegedly contributing to a 'strong or evident appeal to minors'. This is unsurprising as none of the (non-exhaustive) characteristics identified by the Panel in various prior determinations concerning contravention of the Part 3(b) standard are evident in either the Competition or the Post.
- The Dispensing Unit featured in the Competition and depicted in the Post is a sleek, modern black box with stainless steel features (handle, levers and drip tray). Its faceplate states 'MOON DOG FIZZER ALCOHOLIC SELTZER' in white text on a dark purple background. Four decals depict the FIZZER logo in colours which correspond to the four Fizzer flavours being dispensed. It is a sophisticated design that would appeal to adults, not minors (or if it might hold any appeal to minors, such appeal would be incidental only and not greater than it would be for adults).
- The Post itself contains no additional features that could be said to be attractive to minors. In addition to the image of the Dispensing Unit, the Post features an adult's arm filling a glass with a clear carbonated liquid from one of the dispensing heads. There are two parallel scrolling banners with a green background and white text, referring to the opportunity to win a seltzer post mix machine for home and have seltzer on tap all summer long.
- The text of the Post is in the following terms:

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<sup>2</sup> Based on NSW health department data, the highest consumers of sugar-sweetened soft drinks are young adult males aged 19-24 years: <https://www.health.nsw.gov.au/heal/Publications/soft-drinks-report.pdf>, pages 11-12. Other research data (<http://www.roymorgan.com/findings/6098-more-young-australians-drinking-soft-drinks-201502270132>) indicates that soft drink consumption in Australia is relatively consistent across the 14-24, 25-34 and 35-49 age brackets, with around 55% of people in each of these age brackets consuming soft drink in the seven day period surveyed.

*You asked...we delivered! We're putting a Moon Dog Fizzer Post Mix machine into one lucky winner's house for six months so they can enjoy Fizzer refills all summer long and we're chucking in a whole heap of Fizzer merch for a full Fizzer bar at home!*

*To enter all you need to do is head to the link in our bio, tell us why having one of our alcoholic seltzer post mix machines in your house for summer is absolutely essential and upload a picture of you and your mates you'll be having over to share a fresh seltzer with! Simple!*

*Head to the link in our bio to enter now, you don't want to miss out on this one! We'll be judging entries based on humour, originality and overall creativity!*

*Ts&Cs apply. Open to Australian residents 18+. Competition closes 24/10/21. We'll supply everything you need to get this one up and running at home, all you'll need is a steady water supply for the machine to operate.*

*This competition is in no way sponsored, administered, or associated with Instagram. Drink responsibly. 18+*

- The following elements of the Post make it clear that the prize is an alcoholic seltzer dispensing system for the home, and available only to adults:
  - (a) 'Drink responsibly' (top left corner of accompanying image);
  - (b) 'MOON DOG FIZZER ALCOHOLIC SELTZER' (accompanying image);<sup>3</sup>
  - (c) 'full Fizzer bar' (text);
  - (d) 'alcoholic seltzer post mix machines' (text);
  - (e) 'Open to Australian residents 18+' (text);
  - (f) 'Drink responsibly. 18+' (text).
- Viewed as a whole, the Post clearly relates to an alcoholic product and is directed to adults, not minors. The Post is age-restricted on the Instagram platform to users 18 years and over. Any perceived link between soft drinks

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<sup>3</sup> Though small, the words 'ALCOHOLIC SELTZER' on the front face of the pictured Dispensing System are clearly evident when viewing the Post itself in Instagram, whereas the low resolution of the partial extract of the post annexed to ABAC's letter makes these words illegible.

and alcoholic seltzer arising from the use of post-mix technology is incidental only and, taken as a whole, the Post is not strongly appealing to minors.

- Many alcoholic beverages, including most ready-to-drink spirits and the entire alcoholic seltzer category itself, can be said to be reminiscent of or otherwise linked to soft drinks in various ways, either because they contain soft drinks (in the case of many RTDs) or have a similar appearance or flavour profile to soft drinks (in the case of many hard seltzers and RTDs). The existence of a nexus between an alcoholic beverage and a soft drink is not sufficient in and of itself to cause a contravention of the Part 3(b) standard by reason of an illusion of a smooth transition from non-alcoholic to alcoholic beverages. Something more must necessarily be required, noting that the whole of the relevant communication must be taken into consideration, for the communication to be taken to be 'strongly appealing to minors'. As noted above, there are no features of the Competition or the Post, other than the particular dispensing method utilised in the Dispensing System, which are said to be (or are) linked to soft drinks.
- Similarly, the Competition itself (including the prize of the in-home use of the Dispensing System for six months) is not especially attractive or appealing to minors. No minors are permitted to participate in the Competition, and the Competition terms and conditions require that the winner produce photographic proof of age in order to claim the prize.<sup>4</sup>
- It is submitted that neither the Competition (with the prize being the Dispensing System), nor the Post, breach the Part 3(b) standard under the Code. We ask that the Panel dismiss the Complaint accordingly.

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

16. Alcoholic seltzers have come on to the Australian market in large numbers over the last 5 years. As explained by the Company in its response to the complaint, a barrier confronted by the product type has been the limited availability of alcoholic seltzers in bars, clubs and other on-premise alcohol retailers. The Company's answer to this issue has been to develop a post-mix dispensing machine that can be used in bars without the licensed venue having to give up a dedicated beer tap.
17. The Company's seltzer post-mix machine is based upon the type of machine used commonly for dispensing soft drinks. These machines would be familiar to most consumers and are used in many different settings from fast-food chains, to

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<sup>4</sup><https://static1.squarespace.com/static/5f74298a81d58a6a45adcf07/t/614c0071b77edc41b48d8d2b/1632370802927/Fizzer-Post-Mix-at-Home-terms.pdf>

licensed venues. It would be reasonable to assume the machines are as recognisable to minors as they are to adults.

18. The complaint arises from the Company seeking to increase knowledge of its adaption of the post-mix machine to its alcohol seltzer range through a competition that offers a prize of a Moon Dog Fizzer post-mix machine for 6 months. The competition has been promoted via a post on the Company's Facebook account. The complaint argues that the competition and the Facebook post 'blurs the line' between soft drinks and alcohol and is strongly appealing to minors.
19. Part 3 (b)(i) of the ABAC provides that an alcohol marketing communication must not have strong or evident appeal to minors. The standard might be breached if the marketing communication:
  - specifically targets minors;
  - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; and
  - uses imagery, designs, motifs, animations, or cartoon characters that are likely to appeal strongly to minors or create confusion with confectionery or soft drink.
20. Assessment of the consistency of a marketing communication with an ABAC standard is from the probable understanding of a reasonable person. This means that the life experiences, values, and opinions held by a majority of the community is to be the benchmark.
21. The Panel has considered the Part 3 (b) standard on many past occasions. While each marketing communication must always be assessed individually, some characteristics within marketing material which may make it strongly appealing to minors include:
  - the use of bright, playful, and contrasting colours;
  - aspirational themes that appeal to minors wishing to feel older or fit into an older group;
  - illusion of a smooth transition from non-alcoholic to alcoholic beverages;
  - creation of a relatable environment by use of images and surroundings commonly frequented by minors;
  - depiction of activities or products typically undertaken or used by minors;

- language and methods of expression used more by minors than adults;
  - inclusion of popular personalities of evident appeal to minors at the time of the marketing (personalities popular to the youth of previous generations will generally not have strong current appeal to minors);
  - style of humour relating to the stage of life of a minor (as opposed to humour more probably appealing to adults); and
  - use of a music genre and artists featuring in youth culture.
22. It should be noted that only some of these characteristics are likely to be present in a specific marketing communication and the presence of one or even more of the characteristics does not necessarily mean that the marketing item will have strong or evident appeal to minors. It is the overall impact of the marketing communication rather than an individual element that shapes how a reasonable person will understand the item.
23. The post and competition are captured by the ABAC because they are an example of alcohol beverage marketing communication. The Code by way of Part 2 (a) describes the application of the Code to marketing communications and includes 'marketing collateral' within a non-exhaustive list of marketing communications. Marketing collateral is then defined in Part 6 to mean material used to promote a brand and support the sales and marketing of alcohol beverages including gifts with purchase, competition prizes and branded merchandise.
24. It should be noted that the ABAC is limited to the competition and the Facebook post and does not apply to the post-mix machines themselves. This means that the placement of the machines in licensed venues would not fall within the scope of the ABAC. The Code applies only to the marketing of alcohol beverages.
25. The Company makes a detailed argument as to why the competition and the Facebook post are consistent with the Code standard. In short, it is contended that the marketing clearly relates to an alcoholic product and the association with soft drinks due to the post-mix machine is incidental and does not create a strong appeal to minors.
26. The Panel does not believe the marketing communications are in breach of the Part 3 (b) standard. While the complaint raises a novel point, offering a post-mix machine as a prize is not considered likely to be strongly appealing to minors noting:
- the competition is not open to minors;

- a post-mix machine is not considered likely to be an item like, for instance, a game console, that will be regarded by minors as a desirable item to own and to use;
- while a generic post-mix machine will be associated with the dispensing of soft drinks, this does not make the machine or a competition to win a machine strongly appeal to minors;
- the Facebook post advising of the competition and its terms and conditions is essentially factual and does not employ language or imagery considered likely to be appealing to minors.

27. The complaint is dismissed.