



ABAC Adjudication Panel Determination No 239/21

Product: Hard Fizz
Company: Fizzy Mates Pty Limited
Media: Facebook
Date of decision: 15 November 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 Instagram and Facebook advertising for Hard Fizz (“the Product”) by Fizzy Mates Pty Limited (“the Company”). It arises from a complaint received on 8 October 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 complaint raises concerns under the ABAC Code and accordingly is within the Panel's jurisdiction.

The Complaint Timeline

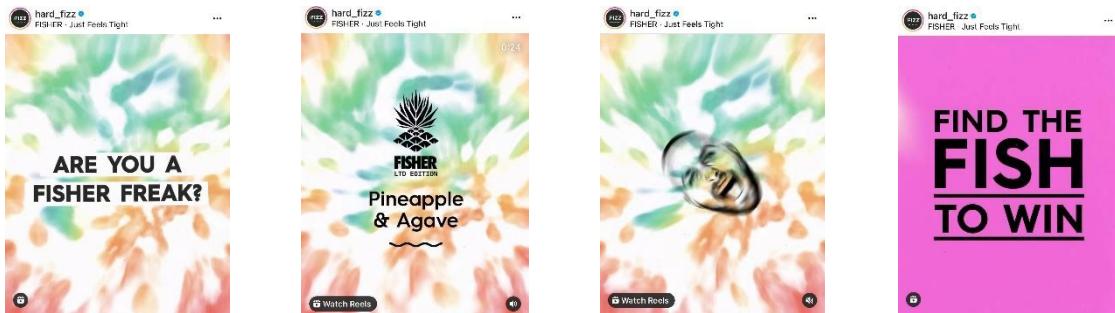
7. The complaint was received on 8 October 2021.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue.
The complaint 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 marketing.

The Marketing Communication

10. The complaint relates to Facebook and Instagram posts, at the following links:
<https://www.instagram.com/p/CUdh88vhI5D/>
<https://fb.watch/8AyyLd9Xkk/>
11. Both of the posts consist of a video, set to a soundtrack of "Just Feels Tight" by FISHER. The following are screenshots of the video, to assist with visualisation:





The following text was included with the Instagram post:

Heart Comment Share

Liked by shaneandrewsemmens and others

hard_fizz FIND THE FISH TO WIN ~ PINEAPPLE & AGAVE X10 PACKS FOR A LIMITED TIME ONLY & GUESS WHAT WE HAVE F#CKIN EPIC PRIZES TO BE WON ~ HIT THE FIZZ FINDER IN BIO TO FIND CLOSEST RETAILERS #hardfizz #letsgetfizzy #findthefish #fisher

See t's & c's www.getfizzy.co , 18+ to enter
Australian residents only

View all 69 comments

lauraenever 🍍🍍🍍🍍🍍🍍 followthefishtv LETS GO 🔥🔥🔥

1 October

hard_fizz · hard_fizz - Original Audio

The Complaint

12. The complainant objects to the marketing as follows:

- *Hard Fizz is promoting excessive consumption and appealing to minors with its Charlie and the Chocolate Factory style game. The packaging and communication have no mention of alcohol.*
- *The game is to encourage people to buy as many alcoholic beverages as possible. The Charlie and the Chocolate Factory style game appeals to minors and the packaging has no clear indication that it is alcohol.*

The ABAC Code

13. 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

14. 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.
- (b)(i) have Strong or Evident Appeal to Minors.

15. Part 6 of the ABAC Code provides that:

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 confectionary 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

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

- In relation to the Instagram and Facebook posts promoting our recent launch of HARD FIZZ Pineapple & Agave Limited edition 10 pack launch, we would like to make clear the entire promotion is guided by an in-depth set of terms and conditions as per NSW PERMIT - TP/01273
- With respect to the aforementioned complaint, we believe in no way does the marketing of this product breach Part 3 of the code by encouraging the excessive or rapid consumption of alcohol. The category of RTD and seltzer are commonly sold in 10 pack cartons due to the convenience factor and our drinks are 1 standard drink so are sold and marketed in a responsible manner. There are countless examples of Chance to win that are associated with larger pack sizes than 10 and higher ABV. We make no mention of encouraging mass consumption or multiple purchases whatsoever.
- Where the complaint claims appeal to minors and cite a children's movie as the link to appealing to minors we see no correlation to this reference in our marketing and don't see how any consumer could reasonably mistake this competition mechanic for Charlie and the Chocolate Factory.
- We also make reference to a recent and much more broadly marketed campaign from VB with a find the golden can mechanic, so it is a common game of chance mechanic seen every day in the marketplace:

https://www.danmurphys.com.au/product/DM_702545/victoria-bitter-golden-cans-30-block



Product details

Find 1 of 100 Golden Cans hidden inside specially marked packs of Victoria Bitter for your chance to win a decade of NRL Grand Final Tickets. Golden cans are only available in NSW, QLD & WA from Dan Murphy's, while stocks last.

- Furthermore, our social channels and associated marketing are age-gated to 18+ in accordance with the ABAC code of conduct so not targeted at minors in any way.
- It was not the intent of the post in question to promote irresponsible behaviour nor to appeal to minors.
- We will continue to build the brand in the marketplace in a responsible manner and will be consulting the industry along the way.

The Panel's View

17. Alcoholic seltzers are a very popular alcohol product in the United States and this popularity has spawned a virtual explosion in alcoholic seltzers in Australia from both global alcohol brands and independent producers. Hard Fizz is an independent producer based on the Gold Coast and one of the principals behind the Company is the DJ and entertainer Paul Fisher better known by his stage name of FISHER.
18. With a large number of producers competing with very similar products, not surprisingly a point of difference between brands has been the marketing approach adopted. The Company often utilises the profile of FISHER in cross promotional activities to promote both Hard Fizz products and FISHER music releases. This determination arises from a cross promotional activity that offers as a prize to a Hard Fizz competition, entry to a FISHER show amongst other prizes.
19. The competition comprises the placement within a 10 pack of Pineapple & Agave of a golden coloured can featuring the face of FISHER. A consumer finding one of the gold cans is able to scan a QR code on the can to claim the prize. The competition is promoted by a video accessible on the Company's Instagram and Facebook accounts.
20. The complainant raises several concerns about the video and the competition itself. Firstly, it is argued the competition and its marketing will encourage consumers to buy as many alcohol beverages as possible (to increase the chance of winning the prize) and this will encourage excessive consumption. Secondly, the competition uses a 'Charlie and the Chocolate Factory' style game which will appeal to minors.
21. These concerns raise two ABAC standards, namely that alcohol marketing communications must not:
 - encourage excessive consumption - Part 3 (a)(i); and
 - have strong or evident appeal to minors – Part 3 (b)(i).
22. The Company argues the marketing, inclusive of the competition, is consistent with the ABAC standards. It is argued competitions are a common marketing technique and would not be mistaken for the Charlie and the Chocolate Factory Story. It was pointed out that a similar gold can competition concept was used by CUB as another alcohol producer.

23. The use of the ‘golden ticket’ prize originated in the 1964 Roald Dahl book - Charlie and the Chocolate Factory. The book in turn became a very well known movie in 1971 with the title ‘Willy Wonka and the Chocolate Factory’. There has been a 2005 remake of the movie starring Johnnie Depp and currently there is a stage show adaptation of the story.
24. It would be fair to say the ‘golden ticket’ trope has moved beyond the Roald Dahl book and the movies into broader use in popular culture, particularly in reference to competitions. For instance, a brief internet search revealed the golden ticket is being used:
- for a current competition in the National Rugby League (prize of 2022 State of Origin game tickets);
 - for the Collingwood AFL Club (prize of free club membership, signed footballs and guernseys); and
 - for prizes at the 2021 Royal Sydney Show.
25. The Panel does not believe the competition or the associated social media posts encourage excessive consumption. The Panel noted:
- the ABAC standard goes to the encouragement of consumption rather than the encouragement of the purchase of alcohol;
 - there is a significant difference between an incentive to consume alcohol quickly or immediately eg ‘happy hour’ at a pub or club and an incentive to promote the purchase of alcohol which is taken away from a retailer and consumed at a later time;
 - even if the competition encouraged a consumer to purchase more than a usual amount of alcohol products in order to maximise the chance of finding a golden can, it does not follow that the purchased products will be consumed excessively given:
 - alcohol has a long shelf life and can be stored for many months before being consumed; and
 - the purchased product might be consumed by multiple people not just one person in an excessive manner.
 - there is nothing in the marketing which suggests a particular pattern of consumption; and

- it's more likely that the impact of the marketing is to encourage a consumer to purchase the Company's product over a competitor product which does not offer a possible prize than it is to encourage binge drinking or other excessive consumption.
26. The Panel acknowledges the complainant's point about the origins of the 'golden can' and its links to the Charlie and the Chocolate Factory story. It is considered, however, that the golden ticket trope has moved well beyond its origins as a children's story and now is recognised as meaning something that gives the holder the chance of a significant opportunity. The marketing material and the posts are not considered as breaching the Part 3 (b) standard. The Panel noted:
- the competition is not open to minors;
 - FISHER is not a performer aimed at minors and the competition prizes of attending a FISHER show and a tour of the Company's distillery is not likely to appeal strongly to minors;
 - the video post promoting the competition is engaging and would have appeal across age groups including minors; and
 - taken as a whole, the marketing would not have strong appeal to minors with any appeal more likely being incidental.
27. The complaint is dismissed.