



ABAC Adjudication Panel Determination No 274/21

Product: Hard Fizz
Company: Fizzy Mates Pty Limited
Media: Instagram Post
Date of decision: 14 December 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 an Instagram post advertising Hard Fizz by Fizzy Mates Pty Limited (“the Company”). It arises from a complaint received on 2 December 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 the 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 meet 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 2 December 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 communication.

The Marketing

10. The complaint concerns a post made to the Hard Fizz Instagram page. The post consists of the Island Boys viral Tik Tok video, overlaid with pictures of Hard Fizz product, and the words 'Light on the Rig'.
 - The video shows the Island Boys in and around a swimming pool singing their Island Boy song.
 - The following is a screenshot of the post:



The Complaint

11. The complainant objects to the Instagram post as follows:
 - [The post] *is a video that features The Island Boys...The Island Boys are Franky and Alex Venegas, they go by the stage names Kodyakredd and Flyysoulja. These twins were both born on 16 June 2001.*
 - *The Island Boys are only 20 years old but featured prominently in this marketing communication. This would be a breach of the code.*

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (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.

The Company's Response

13. The Company responded to the complaint by email on 8 December 2021 and a letter emailed on 9 December 2021. Its principal comments were:
 - This post is no longer published in our reels.
 - The Instagram post utilising a popular viral video featuring 'the Island boys' was not tailored content for Hard Fizz rather a graphic overlaid on an existing video.
 - It was posted on our Instagram reels only as a light-hearted tongue in cheek sarcastic view of our tag line 'Light on the Rig'.
 - We had no financial or business relationship with the Island Boys nor did they receive any remuneration for the use of the video which is commonly featured in the past few months on social channels.
 - We post only through our age-restricted medium of Instagram hence it being in an age-restricted environment.
 - We hope this post was taken as nothing more than a 'fun' dig at popular culture and nothing more than that.

- 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

14. Hard Fizz is an alcoholic seltzer product marketed through social media channels, including Instagram. This determination relates to a post on the Company's Instagram account, showing a video made by the 'Island Boys'. The video shows the Island Boys (American brothers Franky and Alex Venegas) giving a freestyle rap performance in a swimming pool. The video has attracted over 3.8 million views on the Tik Tok social media platform and 11 million views on YouTube in recent months.
15. The actual video does not contain alcohol use. Rather the Company has added an overlay to the video of a graphic of Hard Fizz products and the words - 'Light on the Rig'.
16. The complainant points out that the Venegas brothers are twins and were born in June 2001 making them 20 years old. Part 3 (b)(iii) of the ABAC provides that visually prominent adults under the age of 25 years, may only appear in an alcohol ad if they are not paid models or actors, and the ad is in an age-restricted environment.
17. It is accepted that the Island Boys are adults under 25 years old and are visually prominent within the marketing communication. The Hard Fizz Instagram page is also age-restricted which means minors cannot access the account. As a result, the complaint hinges on whether the Venegas brothers can be considered to be paid models or actors.
18. The Company has advised that it had no financial or business relationship with the Venegas brothers nor did they receive any remuneration for the use of the video. The video has become viral and has been used in numerous parodies over a variety of social media platforms. It seems the Company used the video without permission and other relationship with the content producers.
19. The Panel believes that the Instagram post falls within the exception in Part 3 (b)(iii), namely, the two visually prominent 20-year-olds depicted in the Instagram post cannot be considered to be paid models or actors remunerated by the Company. As the post was placed within an age-restricted environment, there has been no breach of the ABAC requirements.
20. Accordingly, the complaint is dismissed.