



ABAC Adjudication Panel Determination Nos 92 & 93/22

Product: Alcohol
Company: South Ave Seltzer
Media: Instagram
Date of decision: 6 December 2022
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”) arises from two complaints from a single complainant received on 2 November 2022 about marketing communications for South Ave Seltzer (“the Company”) posted on Instagram.
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 November 2022.
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 sought for the marketing.

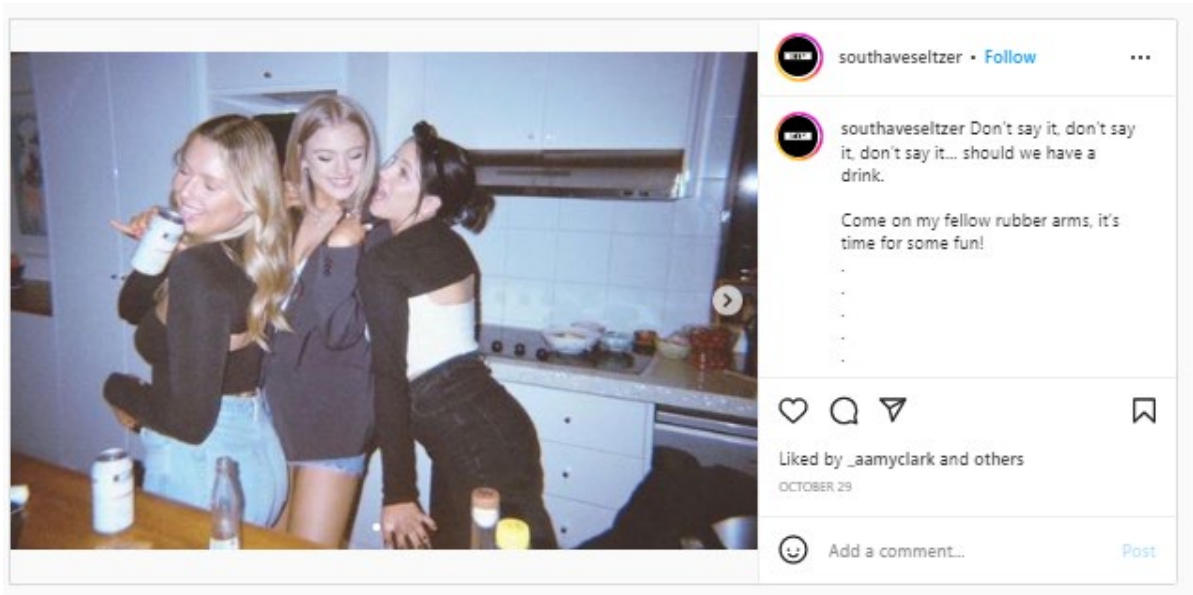
The Marketing Communication

10. The complaint relates to two Instagram posts at the following links, with screenshots also being provided below:

<https://www.instagram.com/p/CkRyZnPMWY4/>

<https://www.instagram.com/p/CjJye6LPkII/>

Instagram Post 1





southaveseltzer • Follow

Don't say it, don't say it, don't say it... should we have a drink.

Come on my fellow rubber arms, it's time for some fun!

Like by [_aamyclarck](#) and others

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Add a comment... [Post](#)

Instagram Post 2



southaveseltzer • Follow
Australia

It's a good weekend to have a good weekend!

Enjoy x

#seltzer #hardseltzer #australia #Adelaide #melbourne #Sydney #brisbane #goldcoast #darwin #perth #canberra #tasmania #summer #danmurphys #bws #thirstycamel #sinnsave #cellarhratinnc

Like by [gracie_harris...](#) and others

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Add a comment... [Post](#)

The Complaint

11. The complainant objects to the marketing as follows:

Instagram Post 1:

- *Talent is 18 years or younger.*
- *Young girls drinking.*
- *Encouraging underage drinking.*

Instagram Post 2:

- *Talent Under 18 years.*
- *Young girls drinking.*
- *Encouraging underage drinking.*

The ABAC Code

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

- (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;
- (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 2 November 2022. The principal comments made by the Company were:
- In regard to both posts, all persons photographed consented to their photographs being used on our social media/within our marketing and are most definitely not underage. We ensure all persons posted/reshared on our social media are of legal drinking age.
 - The people in Post 1 are over 18 years old, and younger than 25.
 - The people in Post 2 are 25 years old or older.
 - Our page is age restricted and has '18+' in the bio. Furthermore, the photographs were not taken in a public setting.
 - We have not paid any models for monetary or product compensation. The particular photos in question on our social media were 'tagged' by customers who purchased the product independently, and we then reposted them.
 - Please let me know if you require any additional information or require us to delete the posts and I will alert our marketing person ASAP.

The Panel's View

14. South Ave Seltzer is based in South Australia and was launched in December 2021. These complaints relate to two posts on the Company's Instagram page. The complainant is concerned that the posts encourage underage drinking by showing images of minors consuming the product.
15. Part 3 (b) of the ABAC establishes standards for alcohol marketing showing responsibility towards minors. In Part 3 (b)(ii) the standard requires that images of minors, or people who appear to be a minors, not be used in alcohol marketing unless the minor is shown in an incidental role in a natural setting (like a family BBQ) and where there is no implication that the minor will consume or serve alcohol. Part 3 b (iii) provides that adults under the age of 25 cannot be shown in a marketing communication unless:
- they are not visually prominent, or
 - the marketing communication is placed within an Age Restricted Environment, and the people shown are not paid models or actors.

16. In responding to the complaint, the Company submitted:
 - the people in Post 1 are between 18 and 24 years old;
 - the people in Post 2 are 25 years old or older;
 - the people were not actors or paid to participate in the posts; and
 - its page is age restricted and has '18+' in the bio. Furthermore, the photographs were not taken in a public setting.
17. While it can be quite difficult to assess a person's age from a photograph, the Panel understands the basis of the complaint as the women in the first post do appear to be in their teens and certainly do not look to be aged 25 or greater. That said, the age of a person is a question of fact and the Company maintains the women are not minors but are aged 21 and 22.
18. The Company supplied the women's names and in addition to assurances from the Company, the Panel made its own independent inquiries about the age of the women. Based on information gleaned from social media and internet searches it does seem the women are in their early 20's.
19. The 3 b (i) standard goes beyond the factual age of a person and requires that an adult shown prominently in alcohol marketing must not 'appear to be a minor'. The policy intent is that it is not permitted to make out that someone is a minor even if they are in fact 18 or more. This might arise through the dress of a person or a setting eg showing someone in a school uniform or engaging in an activity typically undertaken by a child.
20. In this respect the women are wearing adult clothing and appear to be in the kitchen or the living room of a private home. The scene appears to be a small gathering of friends at a home. There is nothing inherent in the images to conclude that the women are being made out to be minors as opposed to adults.
21. The standard then goes on to provide that generally speaking, adults shown in alcohol marketing must be at least 25 years old. There are two qualifications to the 25 years requirement, namely an adult shown in non visually prominent manner or marketing placed in an Age Restricted Environment not featuring actors or paid models. The women in the posts are visually prominent, so the issue turns on whether the Company's Instagram account is an Age Restricted Environment and the women are not actors or paid to participate in the posts.
22. The Code defines an Age Restricted Environment to mean a non-alcohol specific digital platform (such as Instagram) that requires users to register and login to use

the platform including their full date of birth and the platform enables alcohol related pages or content not to be served to minors. The Company advises its Instagram account has been age restricted.

23. Instagram does permit alcohol companies to age restrict their accounts. Further social media influencers are able to age restrict individual posts that reference alcohol use or products. The age restriction controls on Instagram and other platforms such as Facebook are now quite effective. Not only do the platforms rely on an account holder to enter their date of birth, but analytic profiles built up on users regarding their viewing habits, likes and preferences provide clear indications of a person's actual age even if they entered initially a wrong date of birth ie a minor seeking to pretend they are an adult will be identified through the analytics of their actual use of the platform.
24. To verify the Company's contention that their Instagram account is age restricted, the Panel had an independent check conducted. Based on this, it can be confidently accepted that the Instagram posts complained about did appear in an age restricted environment for the purposes of the ABAC standards. Further the Company has confirmed that the women are not actors or were paid to participate in the posts.
25. Drawing this together;
 - the women in the posts are all aged over 18, with the youngest woman being 21 years of age;
 - while the women in the first post (the women in the second post appear older and are in fact aged in their mid to late 20's) are youthful looking, they are not made out to be minors;
 - the women in the first post are aged under 25 and are shown in a visually prominent manner however the Instagram posts were placed on an account that was age restricted and could not be viewed by minors;
 - the women are not actors nor paid to participate in the posts; and
 - this means the ABAC requirements have been met.
26. The complaint is dismissed.