



ABAC Adjudication Panel Determination No 12/23

Product: Pina Colada Sparkling Hard Seltzer
Company: Fizzy Mates Pty Ltd
Media: Instagram
Date of decision: 20 February 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Jeanne Strachan

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 13 January 2023 and concerns Instagram marketing of Pina Colada Sparkling Hard Seltzer (“the Product”) by Fizzy Mates Pty Ltd (“the Company”).
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 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 13 January 2023.
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

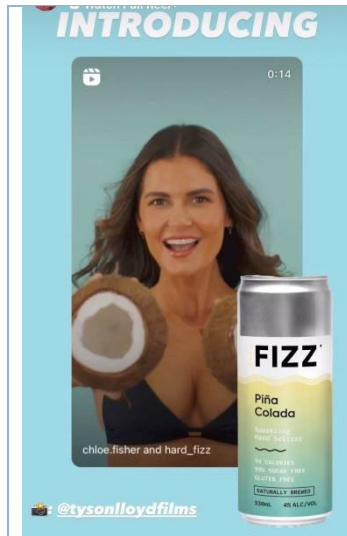
10. The complaint relates to a story post made to the Company's Instagram page, which can be viewed at the following link:

[Link to Instagram Story](#)

Video from the Instagram Story is also used in other posts to the Company's Instagram page.

The following is a description of the Story post, with screenshots provided in chronological order to assist with visualisation. The accompanying soundtrack is Escape (The Pina Colada Song) by Rupert Holmes.

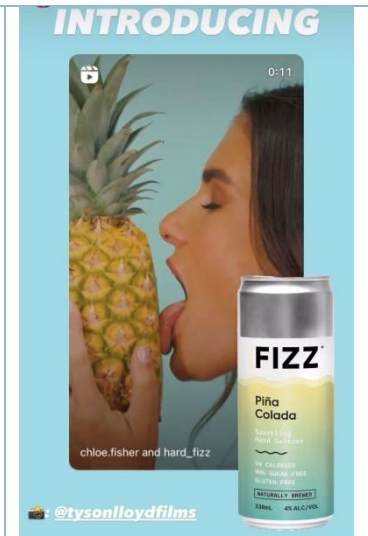
		
<p>1. The post commences with moving video footage of a woman licking a pineapple.</p>	<p>2. A still screen with the words "New Fizz" and the date 06-01-23.</p>	<p>3. A still photo collage of the model holding the Product and food props, presumably outtakes from the making of the video.</p>



4. Moving video footage of the model holding two halves of a coconut in front of her.



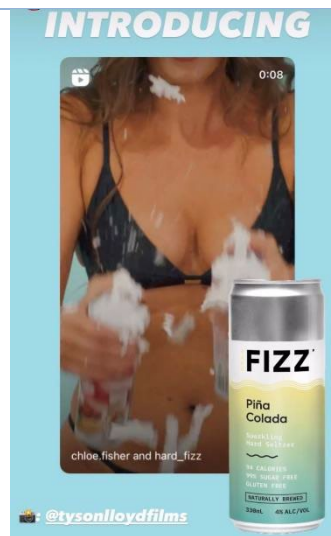
5. Moving video footage of the model sucking on a cherry, with the title "Introducing" and superimposed with a can of the Product.



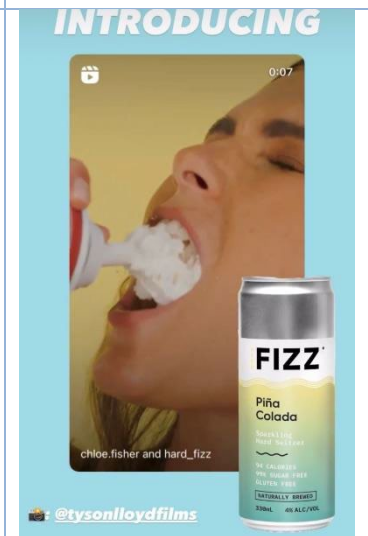
6. Moving video footage of the model licking a pineapple, with the title "Introducing" and superimposed with a can of the Product.



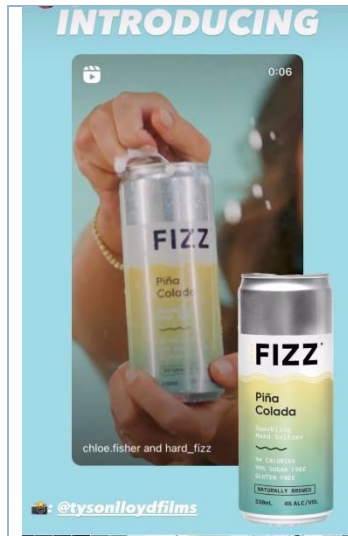
7. Moving video footage of cream being poured onto cherries, with the title "Introducing" and superimposed with a can of the Product.



8. Moving video footage of the model shaking two cans of whipped cream, with the title "Introducing" and superimposed with a can of the Product.



9. Moving video footage of the model squirting whipped cream into her mouth, with the title "Introducing" and superimposed with a can of the Product.



10. Moving video footage of the model opening a can of Product, with the title “Introducing” and superimposed with a can of the Product.



11. Moving video footage of the model at the beach drinking from a can of the Product, with the title “Introducing” and superimposed with a can of the Product.



12. Moving video footage of the model at the beach drinking from a can of the Product, titled “Introducing” and superimposed with a can of the Product and the words “Pina Colada Now Fizzin”.



13. A still shot of the model licking a pineapple, titled “New Flavour Alert!!”, and showing a can of the Product and the words “Pina Colada!”.



14. A number of still shots follow, listing the stores at which the Product may be purchased. A beach scene with a picture of a pineapple, half a coconut, palm trees and the product is shown.

The Complaint

11. The complainant objects to the marketing as follows:
 - [The] *model in [the] ad performs provocative acts with food types and intimates sexual success as a result of the product.*

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (c)(ii) show (visibly, audibly or by direct implication) the consumption or presence of an Alcohol Beverage as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success.

The Company's Response

13. The Company responded to the complaint by letter emailed on 19 January 2023. The principal comments made by the Company were:
 - The content in question was conceived, directed and acted by one of our owners of HARD FIZZ Chloe Fisher. No paid models were used in the making of the content and it was captured in a controlled, private setting. Our diverse ownership group plays an integral role in much of our marketing and brand vision and it was not our intent to offend, nor to imply that the consumption of alcohol leads to sexual or personal success. The intent was to pay homage to a retro flavour of Pina Colada which is experiencing a resurgence in drink trends currently.
 - At Hard Fizz our brand marketing will always feature light-hearted humour, with a “tongue in cheek approach”, which was consistent in the social media content the complaint refers to. The overwhelming response to these posts was positive and we intend to continue to market to the majority in an appropriate way rather than market to a minority.
 - We have an established internal governance structure which we will continue to follow, to review all content and ensure it meets community guidelines prior to making it public. We will continue to diligently follow this process, taking into account this point of view.
 - 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 story posted to the Company's Instagram account promoting the launch of its new Pina Colada flavour.
15. Marketing from the Company has drawn several complaints since 2021 and similar to some other Instagram and social media posts employed by the Company, the current example is a homage to the old advertising adage of 'sex sells'. The story shows an attractive bikini clad woman (one of the owners of the Company) highlighting the ingredients of a Pina Colada in a sexually suggestive fashion - from a slow lick of a pineapple to spraying whipped cream into her mouth.
16. No doubt the marketing has garnered a range of reactions and not surprisingly it has attracted a public complaint. The complainant contends that the Instagram marketing intimates that sexual success will result from the use of the product. This concern raises Part 3 (c)(ii) of the ABAC which provides that an alcohol marketing communication must not show the consumption or presence of alcohol as a cause of or contributor to the achievement of personal, sexual, or social success.
17. In response to the complaint, the Company explained that:
 - it was not our intent to offend, nor to imply that the consumption of alcohol leads to sexual or personal success. The intent was to pay homage to a retro flavour of Pina Colada which is experiencing a resurgence in drink trends currently;
 - our brand marketing features light-hearted humour, with a 'tongue in cheek approach', which was consistent in the social media content the complaint refers to;
 - the overwhelming response to these posts was positive, with the complainant's concerns being a minority view.
18. It should be noted that the ABAC does not contain standards going to the treatment of sex, sexuality, or nudity as such. It's not that the way in which marketing deals with these issues is not important, but rather these issues are not confined to marketing of alcohol as a product and hence the applicable standards are contained in the AANA Code of Ethics. The Code of Ethics applies to all marketing irrespective of the product or service being advertised whereas the ABAC is solely concerned with the way which alcohol as a product is modelled.

19. Accordingly, the Panel is not being asked to assess if the depiction of a bikini clad woman is consistent with community standards, but rather whether the reasonable interpretation of the marketing is that the presence or consumption of the product causes or contributes to the achievement of sexual success.
20. The assessment of the consistency of a marketing communication with a Code standard is from the viewpoint of the probable understanding of the marketing by a reasonable person. This means the life experiences, attitudes and values held by most members of the community is the benchmark.
21. The key concept is the Part 3 (c)(ii) standard is causation. Specifically, would a reasonable person believe the marketing communication is showing that an alcohol product will cause or contribute to sexual success. An item of marketing can show attractive people and it is permissible to depict a person as socially and sexually confident. What cannot be shown is that alcohol is a cause of why the person is socially or sexually successful.
22. On balance, the Panel does believe the Instagram post breaches the Part 3 (c) (ii) standard. The Panel noted:
 - a reasonable person is sufficiently worldly to associate the women's actions with the fruit and whipped cream to have underlying sexual connotations;
 - the story places images of the product with the woman as she is being sexually provocative; and
 - taken as a whole, the series of story images and scenes give rise to a reasonable implication that the product is a contributor to the sexually provocative actions of the woman.
23. The complaint is upheld.