



ABAC Adjudication Panel Final Determination No 65/23

Product: Easy Seltzer
Company: Easy Seltzer
Media: Packaging
Date of decision: 28 June 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Debra Richards

Introduction

1. This final determination by the ABAC Adjudication Panel ("the Panel") arises from a complaint received in relation to the packaging of Watermelon, Coconut, Lemon Lime and Passionfruit Seltzer products ("the products") by Easy Seltzer ("the Company"). The complaint was received on 11 April 2023.
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

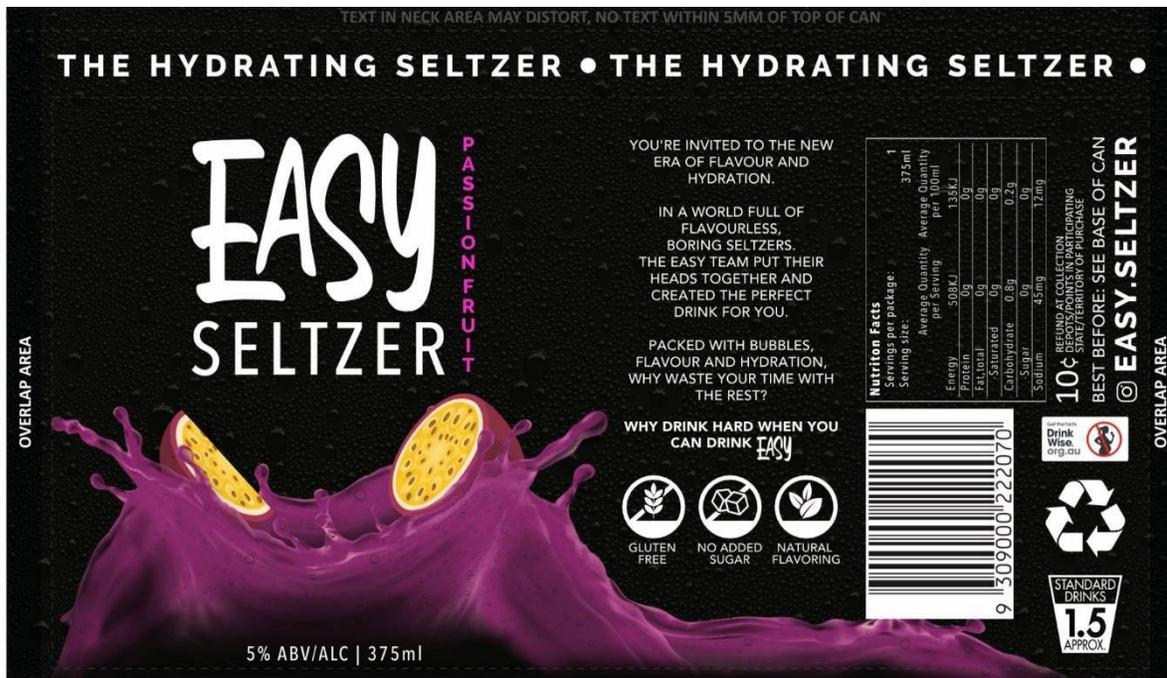
- The complaint was received on 11 April 2023.
- Generally, the Panel endeavours to make a decision within 30 business days of the receipt of a complaint but this timeline is not applicable due to the two part process involved in determinations concerning product names and packaging.

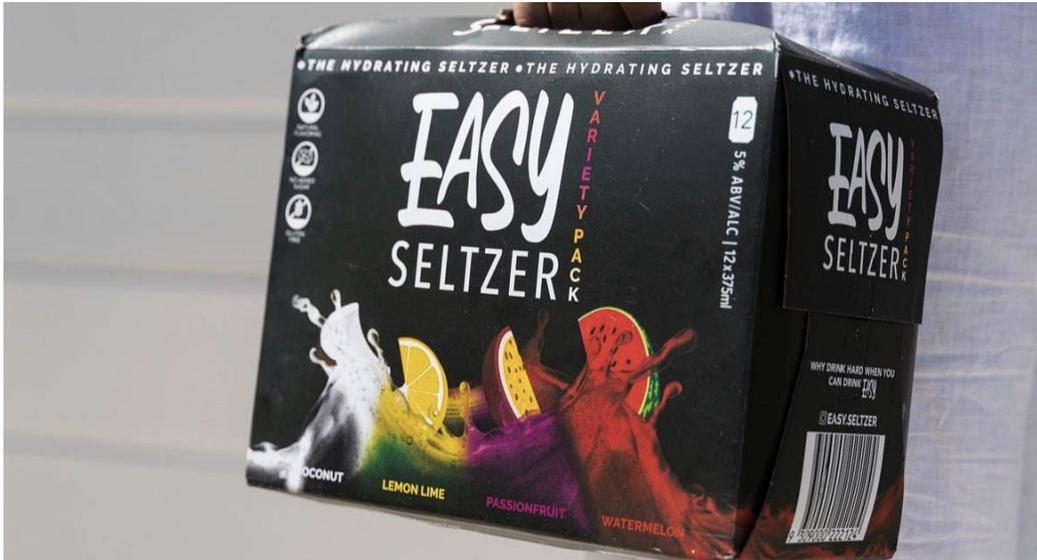
Pre-vetting Clearance

- 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 Communications

- The complaint relates to the packaging of Easy Seltzer products, being both the can labels and the cardboard multi-product wrap. The product comes in four different flavours, Watermelon, Coconut, Lemon Lime and Passionfruit, with the Company advising that the can labels of each product flavour are identical with regards to the matters mentioned in the complaint.





The Complaint

11. The complainant objects to the packaging as follows:

- *The product called "Easy seltzer" claims to be a "hydrating" alcoholic product. "Hydrating seltzer" appears on the actual can as a part of the label.*
- *The drink claims to be a 5% ABV and promotes "hydration" on the actual can. I believe that making health claims of an alcoholic beverage is prohibited and thus in breach with the FSANZ standards.*
- *It is also claiming to be "Gluten free". I believe the product has not been accredited/certified by the Coeliac Australia.*

The ABAC Code

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

(c)(iv) suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation.

The Company's Response

13. The Company responded to the complaint by email on 9 May 2023. The principal comments made by the Company were:

- I write to you regarding the ABAC Complaint 65/23 against our product "Easy Seltzer".
- Firstly, I will let you know that our product was formulated by a team of scientists at Doehler (<https://www.doehler.com/en/>). We have accredited batch sheets that have been produced to the highest standard possible. Furthermore to this point, these batch sheets have been provided to our brewer to follow. We are able to provide these if they are needed.
- I will also attach a flat lay of the can. They are all identical. We are under the assumption that the term "The Hydrating Seltzer" is not a health claim. Although, it can be noted that our product does in fact include a large majority of water, and includes an electrolyte blend.
- Doehler has also certified that this product is gluten free. Does this have to be certified by Coeliac Australia? If so please enlighten me. A quick google search reveals this:

" All alcohol is gluten free with the exception of normal, barley-based beer. This means anything from bourbon to tequila, sparkling wines, spirits, port, sherry and even cider, is suitable for someone following a gluten free diet (in moderation of course). Listing ingredients on alcoholic products is not mandatory. For those missing beer, gluten free options are available in Australia. Check our list of endorsed products for gluten free beer options" (coeliac.org.au).

- Finally, our ethanol is cane based.
14. The Company responded to the provisional determination by email on 16 June 2023, advising that it would not be seeking a rehearing.
 15. As the Company has accepted the provisional determination, under the rules and procedures applying to the Panel the determination now becomes final.

The Panel's View

Introduction

16. The Easy Seltzer products are new to market, having been released in January 2023. Four flavours are currently included in the range – Watermelon, Coconut, Lemon Lime and Passionfruit. This determination deals with the can labels for each of the four flavours, as well as the cardboard wrap used for packs of multiple cans.
17. On 20 May 2023 the Panel issued a provisional determination finding that the Easy Seltzer packaging breached the ABAC standard in Part 3 (c)(iv) of the Code by suggesting that its consumption of an Alcohol Beverage offers a therapeutic benefit.
18. Each of the can labels contain the words 'The Hydrating Seltzer' on the front, and on the back read that 'You are invited to the new era of flavour and hydration' and the product is 'packed with...hydration'. The cardboard wrap for the variety pack also shows the words 'The Hydrating Seltzer'. Both the back of the cans and the cardboard wrap show a picture of a single wheat stalk with a line through it and the words 'Gluten Free'.
19. The complainant argues that the packaging is not appropriate for an alcohol product due to advertising that it is:
 - 'hydrating', which is making a health claim; and
 - 'gluten free', when the product has not been accredited and/or certified by the Coeliac Australia.

20. The complainant's concerns raise Part 3 (c)(iv) of the Code which provides that an alcohol marketing communication (which includes product packaging) must not suggest that the consumption of an alcohol beverage offers any therapeutic benefit or is an aid to relaxation.
21. In response to the concerns, the Company argued that:
- the term 'The Hydrating Seltzer' is not a health claim. The product does include a large majority of water, and includes an electrolyte blend; and
 - a team of scientists has certified that the product is gluten free, and the Company is not aware of the need to obtain certification from Coeliac Australia before providing this information on its packaging.

22. **'Alcohol' and 'Hydration'**

23. The Panel is not a research body and does not purport to be abreast of the latest medical understandings on the impacts of alcohol consumption. That said it is an accepted physiological fact that alcohol acts as a diuretic and causes the body to remove fluids through the passing of urine. The effects of alcohol consumption in relation to diuretic effects will be influenced by a range of factors related to the individual consuming alcohol (e.g., body weight) as well as the alcohol product itself and whether food and water are consumed in conjunction with the alcohol.
24. The ABAC Scheme does not have the purpose of 'fact checking' marketing claims by alcohol companies. The requirement that marketing does not make misleading or deceptive claims rests in the provisions of Federal consumer law and the fair-trading laws of the States and sits in the ambit of the ACCC and State Fair Trading regulators.
25. The Panel's role is to assess the consistency of alcohol marketing communications with ABAC standards from the standpoint of the probable understanding of the marketing item by a reasonable person. This means the life experiences, values and attitudes found by most people in the community is the benchmark.
26. Alcohol marketers are entitled to choose their brand posture and highlight that alcohol beverages are produced or distilled in a particular fashion and contain (or exclude) various elements. What a marketer cannot do under the Part 3 (c)(iv) standard is then suggest that either the way the product is made or its constituent parts, results in the consumption of the product giving a consumer positive health or relaxation benefits.

27. The Company argues the statement - 'The Hydrating Seltzer' is not a health claim, 'although the product does contain a large majority of water and includes an electrolyte blend'. The Panel does not accept however the description of hydration on the packaging would probably be understood by a reasonable person as simply a factual reference. Rather the packaging would be understood as a positive assertion that the product does offer the positive benefit of hydration. In reaching this conclusion the Panel noted:
- a reasonable person understands that alcohol consumption can lead to de-hydration;
 - the reference 'The Hydrating Seltzer' would be probably understood that the product offers hydration
 - this understanding is reinforced by the other references to hydration on the can;
 - taken as a whole, the packaging would be understood as making a positive claim that the products offer the benefit of hydration
28. The Panel does not believe the packaging makes any positive health claim about being gluten free. To state the product does not contain gluten is simply a factual reference.

Conclusion

29. Accordingly, the Panel makes a final determination that the packaging of the Easy Seltzer products (both the can labels and the cardboard wrap) breaches Part 3 (c)(iv) of the Code by suggesting that the consumption of an alcohol beverage offers a therapeutic benefit.