



ABAC Adjudication Panel Determination No 167/23

Product: Hard Fizz
Company: Fizzy Mates Pty Limited
Media: Digital – Company Website
Date of decision: 26 November 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Louisa Jorm
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 12 October 2023 in relation to website marketing for Hard Fizz (“the product”) by Fizzy Mates Pty Limited (“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 12 October 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 just beyond the target time frame due to several determinations requiring completion at the same time.

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 Placement

10. The complaint relates marketing copy on the Hard Fizz Website:

Image 1: Screenshot from: [About FIZZ – Hard Fizz Sparkling Hard Seltzer \(getfizzy.co\)](#)

Promote great times and better health with
old mates and new.

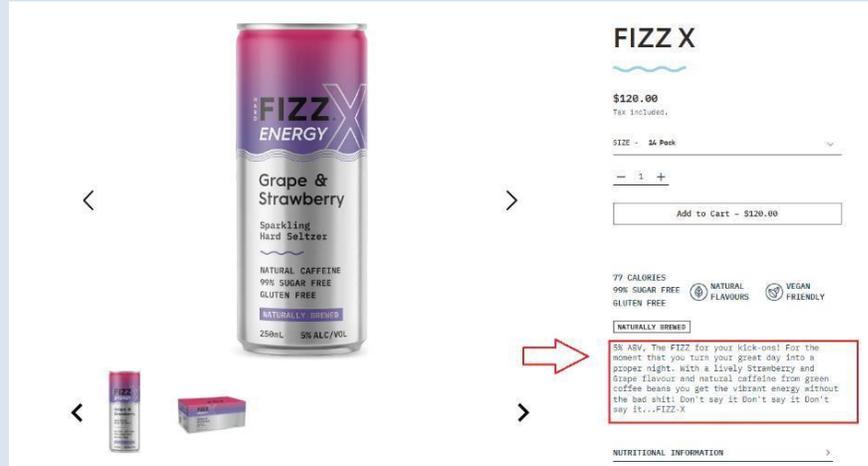
Image 2: Screenshot from: [About FIZZ – Hard Fizz Sparkling Hard Seltzer \(getfizzy.co\)](#)

We're a team on the Gold Coast
focussed on making 'banging' drinks
that are better for you.
We are a brand with a 'cracking'
flavour range, a great look and an
open attitude.

HARD

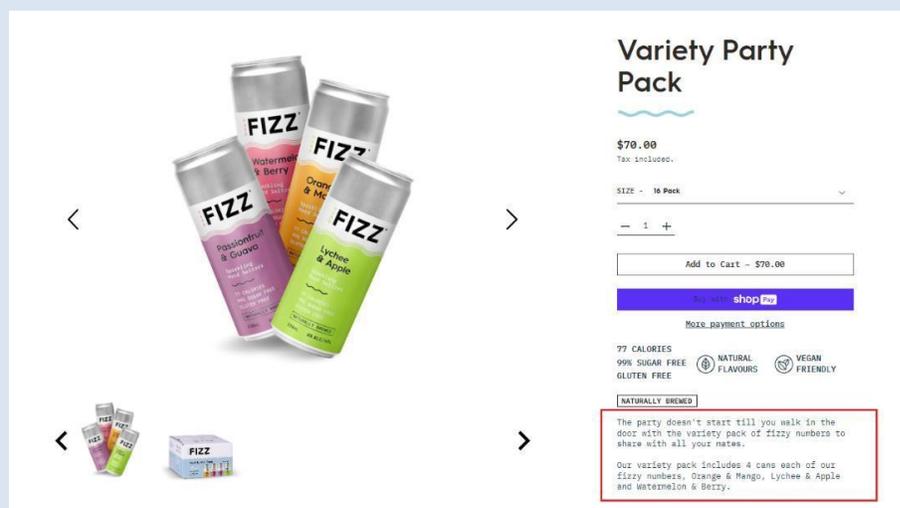


Image 3: Screenshot from: [FIZZ X – Hard Fizz Sparkling Hard Seltzer \(getfizzy.co\)](#)



5% ABV, The FIZZ for your kick-ons!
For the moment that you turn your
great day into a proper night. With
a lively Strawberry and Grape
flavour and natural caffeine from
green coffee beans you get the
vibrant energy without the bad shit!
Don't say it Don't say it Don't say it
it...FIZZ-X

Image 4: Screenshot from: [Variety Party Pack Hard Seltzer | 16-Pack Carton Sparkling Seltzer | Fizz – Hard Fizz Sparkling Hard Seltzer \(getfizzy.co\)](#)



The party doesn't start till you walk in the door with the variety pack of fizzy numbers to share with all your mates.

Our variety pack includes 4 cans each of our fizzy numbers, Orange & Mango, Lychee & Apple and Watermelon & Berry.

Complaint

11. The complainant objects to the marketing as follows:

In relation to Images 1 and 2:

- The advertising from these messages diminishes the harmful effects of alcohol and suggests that their Hard Fizz products are differentiated from similar alcoholic beverages as indicated by:
 - The use of the wording “promote great times and better health”
 - The use of the wording “Focussed on making ‘banging’ drinks that are better for you”.
- We recognise that Hard Fizz also offers a non-alcoholic range, however this section of the webpage does not differentiate whether this messaging applies to one product and not another offered by the same company. A reasonable person would read this messaging and assume that the message relates to all of the products offered by Hard Fizz.

In relation to Image 3:

- The messaging “You get the vibrant energy without the bad shit” is a statement used to differentiate Fizz X from other alcoholic products by saying that their product has no negative side effects. It is unclear whether the messaging is in relation to the caffeine source or the alcohol in the products, however given that this is a statement for an alcoholic product a reasonable person would assume that this statement applies to the beverage as a whole. As such, this messaging is in breach of ABAC Code 3 (c)(iv).

In relation to Image 4:

- The messaging “The party doesn’t start till you walk in the door with the variety pack of fizzy numbers to share with your mates” implies that a good time does not occur until this particular alcohol product is present. The message also implies that the mood will instantly be lifted by bringing these products to a party. We believe this messaging is in breach of ABAC Code 3 (c)(i) and (iii).

The ABAC Code

12. A [new ABAC Responsible Alcohol Marketing Code](#) commenced on 1 August 2023. As the Company has advised that the website has been in existence for three years, the complaint will be considered under the [previous Code](#), in line with the [transitional arrangements](#) set out on ABAC’s website.
13. Part 3 (c) of the previous Code provides that a Marketing Communication must NOT:
 - (i) suggest that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment;
 - (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;
 - (iii) if an Alcohol Beverage is shown (visibly, audibly or by direct implication) as part of a celebration, imply or suggest that the Alcohol Beverage was a cause of or contributed to success or achievement; or
 - (iv) suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation.

The Company Response

14. The Company advised by email on 27 October 2023 that the website has been in existence for 3 years without issue, but otherwise did not respond to the complaint.

The Panel’s View

15. In 2020 Fizzy Mates Pty Ltd commenced operations on Queensland’s Gold Coast and joined the expanding alcoholic seltzers market. In March 2023 the Company moved into the non-alcoholic seltzer market with a product branded as ‘Fizz Functional’. Fizz Functional comes in three flavour types - Pink Lemonade, Berry Boost and Tropical Crush.

16. The branding of the packaging of Fizz Functional draws on core elements of Hard Fizz but the alcoholic and non-alcoholic ranges are distinguished through a number of differences, most notably the different brand names and different can shapes. While both ranges are packaged in 330ml size cans, Hard Fizz comes in a tall thin can whereas Fizz Functional is packaged in a shorter and wider can.
17. The Company has employed a strong digital marketing strategy for its products and the Panel has previously considered social media videos and posts from the Company in relation to Hard Fizz. On this occasion a complaint has arisen about entries on the Company's website and to some extent the issues relate to potential confusion in messaging between the Company's non-alcoholic seltzers and the alcoholic seltzer product ranges.
18. In short the complainant argues that several entries of the website would be understood as referring to Hard Fizz and make claims that the alcohol product offers positive health benefits or the product is the cause of social success or the success of an event.
19. In assessing if the website entries are consistent with the ABAC standards, the Panel is to adopt the standpoint of the probable understanding of the entries by a reasonable person. This means the benchmark is based on the attitudes, opinions, values and life experiences shared commonly in the community. If the messaging could be interpreted in several ways, it is the most probable interpretation which is to be preferred over a possible but less likely understanding.

Images 1 and 2

20. Images 1 and 2 are screenshots taken from the Company's website on its "About" webpage. The page includes the words (emphasis added):
 - Promote great times and **better health** with old mates and new.
 - We're a crew from the coast who enjoy our mornings as much as our nights.
 - You're chasing a fresh little number that's **easy on tomorrow...**
 - We're a team on the Gold Coast focussed on making 'banging' drinks that are **better for you.**
21. The complainant is concerned that by diminishing the harmful effects of alcohol the messaging breaches Part 3 (c)(iv) of the Code which requires that an alcohol marketing communication must not suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit.

22. In relation to the “About” web page, the complainant recognises that Hard Fizz also offer a non-alcoholic range, however, contends that:
- this section of the webpage does not differentiate whether this messaging applies to one product and not another offered by the same company; and
 - a reasonable person would read this messaging and assume that the message relates to all of the products offered by Hard Fizz.
23. The “About” web page neither refers to specific products nor includes product images, however it is headed “Hard Fizz”. The Panel believes that this, combined with the Company’s longer history in marketing alcoholic beverages, means that a reasonable person would likely understand that the web page messaging applies, if not solely to the Company’s alcoholic beverages, then at least to all of its products equally.
24. The Panel believes that text on the “About” webpage breaches the Part (c)(iv) after taking into consideration that:
- references to enjoying “our mornings as much as our nights” and “...a fresh little number that’s easy on tomorrow...” position the Company’s alcoholic products as providing health benefits by causing less of an alcohol induced hangover;
 - the marketing copy suggests that the same alcohol products are “better for you” and offer “better health” relative to other alcoholic products; and
 - a reasonable person would conclude that consumption of the Company’s alcoholic beverages offer therapeutic benefits and that they are relatively beneficial for a person’s health or wellbeing.

Image 3

25. Image 3 is a screenshot of the Company’s webpage for the online purchase of Fizz X (a grape and strawberry flavoured alcoholic beverage that also contains caffeine and is 5% ABV). It includes the following text (emphasis added):
- 5% ABV, The FIZZ for your kick-ons! For the moment that you turn your great day into a proper night. With a lively Strawberry and Grape flavour and natural caffeine from green coffee beans you get the vibrant energy **without the bad shit!**
26. Again, the complainant contends this entry suggests that the Fizz X product diminishes the harmful effects of alcohol and suggests it offers a health benefit. The Panel believes this entry is in breach of the ABAC standard. In reaching this view the Panel noted:

- there is no requirement that alcohol marketing state that alcohol consumption has harmful effects;
- what cannot be claimed is that alcohol use provides health benefits;
- the entry can be read in two ways and possibly might be understood as claiming that energy is derived from the natural caffeine of the green coffee beans and these beans do not have “the bad shit”; and
- that said, the most likely understanding is that the alcohol beverage provides the health benefit of energy and does not have adverse side effects of alcohol consumption.

Image 4

27. Image 4 is a screenshot of the Company’s webpage for the online purchase of its Variety Party Pack (consisting of four cans each of alcoholic seltzer in Orange & Mango, Passionfruit & Guava, Lychee & Apple and Watermelon & Berry flavours). It includes the following text:
- The party doesn't start till you walk in the door with the variety pack of fizzy numbers to share with all your mates.
28. The complainant is concerned that this messaging breaches the Part 3 (c) standards by implying that a good time does not occur until this particular alcohol product is present and that the mood will instantly be lifted by bringing these products to a party.
29. The Code requires that an alcohol marketing communication must not:
- suggest that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment (Part 3 (c)(i)); and
 - show 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 (Part 3 (c)(ii)).
30. The key concept in the Part 3 (c)(ii) standard is causation. It is permitted to place alcohol with successful people and an enjoyable occasion provided it is not suggested that alcohol was the cause of or contributed to the success of a person or the success of the event.
31. The Panel believes that the messaging links the introduction of alcohol to a party as leading to a significant change in its intensity and the enjoyment of those present, and suggests that the person contributing the drinks will earn social success by causing an improvement to the mood.

32. The Panel therefore finds that the marketing copy “The party doesn't start till you walk in the door with the variety pack of fizzy numbers to share with all your mates.” breaches Part 3 (c)(i) and (ii) standards.

33. The complaint is upheld.