



## ABAC Adjudication Panel Determination No. 60-67/20

**Product:** Fireball Whisky  
**Company:** Southtrade International  
**Media:** Digital (Instagram)  
**Date of decision:** 9 June 2020  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Debra Richards  
Professor Richard Mattick

### Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns Instagram posts for Fireball Whisky by Southtrade International (“the Company”) and arises from complaints received 25 May 2020.
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 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 meeting 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 complaints raise concerns under the ABAC Code and accordingly are within the Panel’s jurisdiction.

### **The Complaint Timeline**

7. The complaints were received on 25 May 2020.
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**

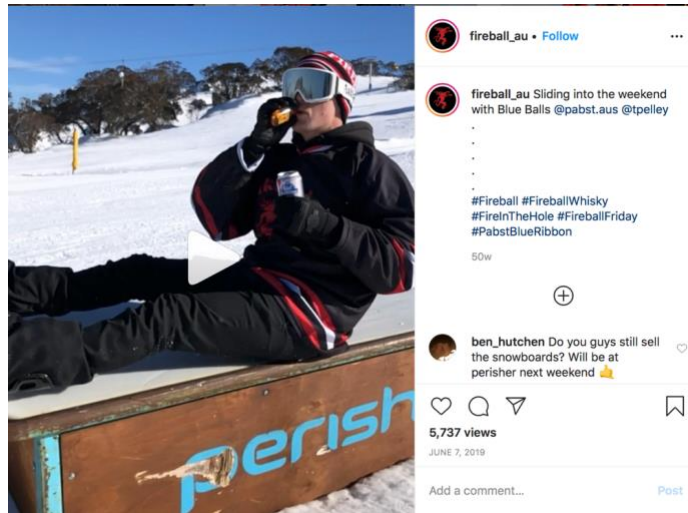
9. The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was obtained for this marketing communication.

## The Marketing Communications

10. The complaint identifies the following Instagram Posts on the fireball\_au Instagram account.

Post 1 (7 June 2019) - <https://www.instagram.com/p/ByZg4e7BCst/>

11. The post includes a video of a man snowboarding onto a platform and then sliding along the platform while taking a sip of beer and then a sip of Fireball whisky and then sliding off the platform and back onto his snowboard.



Post 2 (27 April 2019) - <https://www.instagram.com/p/BwwJpRNhy67/>



Post 3 (7 September 2018) - <https://www.instagram.com/p/BnamHlwhOAI/>

12. Video on loop of a man outside in snowboarding or skiing clothing drinking from a bottle of Fireball Whisky.



Post 4 (3 September 2018) - <https://www.instagram.com/p/BnQcLEBRPp/>

- This post includes a video showing people snowboarding and includes a scene where a man is outside in the snow drinking from a small bottle of Fireball Whisky.



Post 5 (20 August 2018) - <https://www.instagram.com/p/BmsIWsiHG10/>

- This post includes a video showing people snowboarding and includes two separate scenes where a person is outside in the snow drinking from a small bottle of Fireball Whisky.



Post 6 (26 July 2018) - <https://www.instagram.com/p/Blr48L8hmHs/>

15. This post includes a video showing two people in onesies snowboarding and includes a scene where they are inside but still in their snowboarding gear and one is drinking from a bottle of Fireball Whisky.



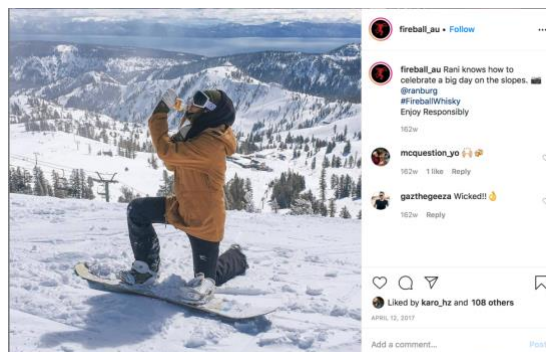
Post 7 (12 July 2018) - <https://www.instagram.com/p/BIHVnrwgyVC/>

16. This post includes a video showing a person who appears to be on a ski lift, showing they have a hip flask of Fireball whisky in their hand with the caption "Boom its Thirsty Thursday... always ride with a buddy!".



Post 8 (12 April 2017) - [https://www.instagram.com/p/BSx\\_jdoAyPX/](https://www.instagram.com/p/BSx_jdoAyPX/)

17. A snowboarder on a ski slope still attached to their snowboard drinking from a bottle of Fireball Whisky.



## **The Complaint**

18. The complainant objects to the marketing as it shows consumption of alcohol before or during the high risk behaviour of snowboarding.

## **The ABAC Code**

19. Part 3 of the ABAC Code provides that:
  - (d) A Marketing Communication must NOT show (visibly, audibly or by direct implication) the consumption of an Alcohol Beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical co-ordination, such as the control of a motor vehicle, boat or machinery or swimming.

## **The Company's Response**

20. The Company responded to the complaints by letter dated 1 June 2020. The principal points made by the Company were:
  - a) We are disappointed to hear that there was a complaint about our social content. We certainly would not want to be seen as advocating people to consume alcohol whilst playing sport or engaging in activities that require a high degree of alertness and physical co-ordination, namely Snowboarding.
  - b) This content is over 12 months old, so we were surprised that it is being raised now and it is unlikely to be seen by anyone unless they specifically went searching for it? After reviewing the complaint, we have decided to take this content down in case anyone else misconstrues the message.
  - c) SouthTrade International does not encourage irresponsible alcohol consumption and is committed to ensuring our marketing material does not promote or encourage any such behaviour.

## **The Panel's View**

21. Fireball Whiskey originated in Canada in 1984 and has gained popularity, firstly in North America and then globally. The product is imported and distributed in Australia by the Company. This determination concerns a series of posts on the Australian Fireball Instagram account over which the Company has control.
22. The posts date from April 2017 to June 2019 and are based on scenes either photographed or videoed at Australian snow fields. The scenes on the whole feature or reference the sport of snowboarding. The complaint raises the concern that the posts depict the consumption of the product before or during the 'high risk behaviour' of snowboarding. The relevant ABAC standard raised by the complaint is Part 3(d) which provides that an alcohol marketing communication (which includes Instagram posts) must not show the consumption of alcohol before or during any activity that for safety reasons requires a high degree of alertness or physical co-ordination.
23. The Company accepts that snowboarding is an activity which requires a high degree of alertness or physical co-ordination to be carried out safely. The Company also



fully accepts the importance of responsible marketing and advised that the posts have now be removed 'in case anyone misconstrues the message'. It was noted that the posts were quite old and would not now be readily found on the Instagram account.

24. Social media is a highly dynamic medium and accounts on platforms such as Instagram can be readily updated with new posts. This does mean that older posts, while still present on an account, will be located only after scrolling through more recent postings. It will depend on how frequently the account holder posts new material as to how far from the landing page older posts will be found. In this case, the most recent of the posts in question is 12 months old and the oldest material dates to April 2017. It is probable that a current viewer of the Instagram account will not see the material, but the marketing material remains and can be accessed as was done by the complainant.
25. Snowboarding is a sport requiring a high degree of alertness and physical co-ordination. It will not be a breach of the standard to simply associate the product with the sport and not show any consumption of the product. Nor will it be a breach to show the performance of snowboarding and later show the consumption of the product if a reasonable person would probably understand that the snowboarding has been completed and will not be resumed. It will be a breach if the most likely interpretation of a post is that consumption is occurring prior to snowboarding or during a break in snowboarding but the activity will resume.
26. For brevity, the Panel believes the position to be with each post as follows:
  - post 1- breach as consumption is shown and it appears further snowboarding may well continue;
  - post 2- breach as consumption is shown and given the man is fully kitted up on the snow it is likely snowboarding could continue;
  - post 3- on balance breach, as consumption is shown and given the scene it is quite probable that snowboarding could continue;
  - post 4 - on balance breach, as consumption is depicted during various snowboarding scenes and the most probable interpretation is snowboarding has not concluded for the persons shown consuming alcohol;
  - post 5 -on balance breach, as consumption is depicted during various snowboarding scenes and the most probable interpretation is snowboarding has not concluded for the persons shown consuming alcohol;
  - post 6 - breach as consumption is shown and the overall scene makes it a reasonable interpretation that snowboarding will continue;
  - post 7- on balance breach, as although no actual consumption is shown a combination of the video of a snowboarder on a ski lift with a bottle of the product and the accompanying text with the video, directly implies that consumption will occur during a snowboarding activity;
  - post 8- breach as consumption is shown occurring apparently during a break in snowboarding with resumption of the activity a reasonably probable assumption.
27. The complaint is upheld