



ABAC Adjudication Panel Determination Nos: 172, 173, 174 & 176/20

Product: Hard Fizz
Company: Fizzy Mates Pty Limited
Media: Digital - Instagram
Date of decision: 7 December 2020
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Richard Mattick

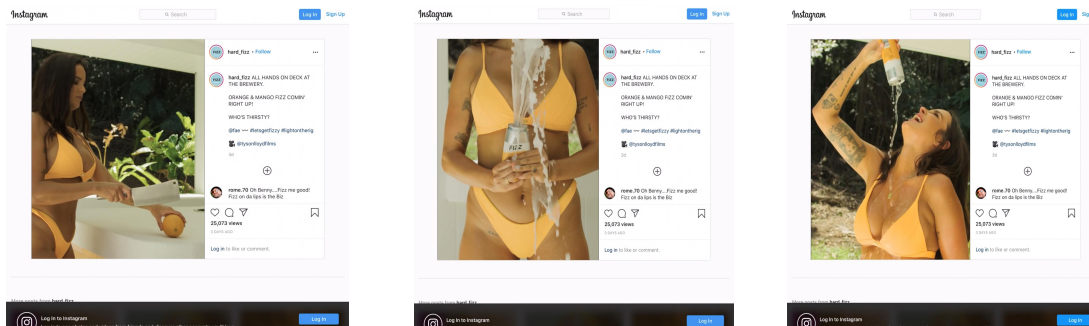
Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns Instagram marketing for Hard Fizz by Fizzy Mates Pty Limited (“the Company”) and arises from four complaints received on 20 November 2020 and 23 November 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.

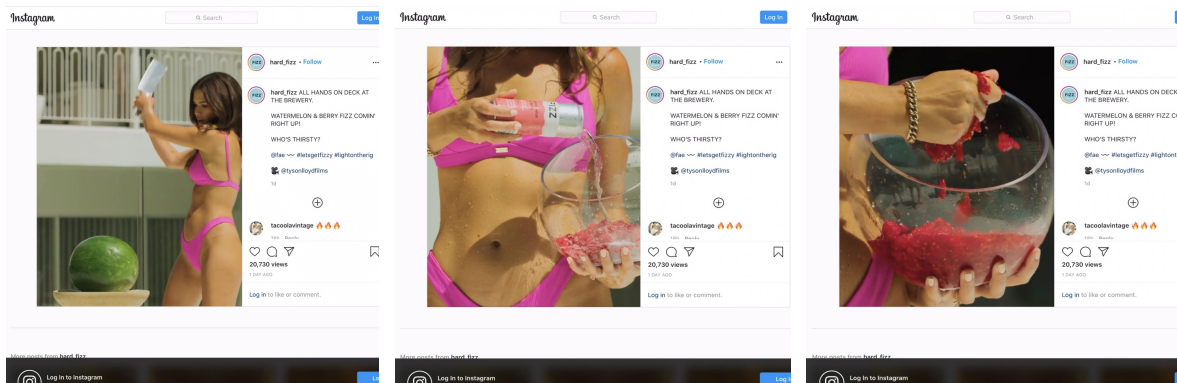
Orange & Mango Fizz

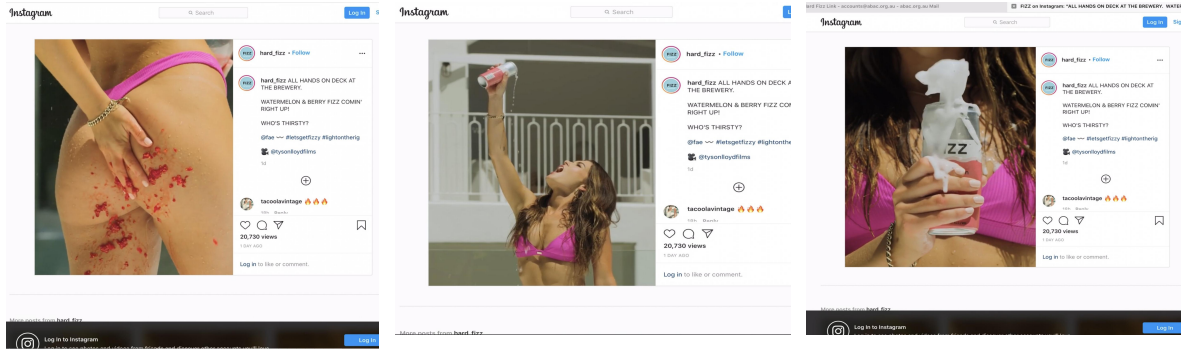
- This video opens with footage of a person wearing orange swimwear, who places an orange on a bench and then proceeds to cut it in half with a large knife. The person then shows the two halves of the orange to the camera, before squeezing the juice from the two halves of the orange onto their chest. The person then peels and opens a mango, following which they open a can of Hard Fizz, hold it aloft and pour it over themselves.
- The following screen shots are provided to assist with visualisation of the video:



Watermelon and Berry Fizz

- The video starts by showing a person wearing a bright pink swimsuit, approaching a whole watermelon with a large knife. They then grip the knife with two hands, raise it above their head and forcefully strike the watermelon several times. Using two hands, they pry the watermelon apart and scoop out some of the flesh. They are then shown pouring a can of Hard Fizz into a bowl containing watermelon and berries, before smashing some of the Hard Fizz, watermelon and berry mixture onto their bottom. The person then opens a can of Hard Fizz, and holds it above their head as they pour the contents over themselves. The final scene shows the person opening a can of fizzing Hard Fizz.
- The following screen shots are provided to assist with visualisation of the video:





The Complaint

17. The complainants object to the marketing as follows:

- No age-gating
- Sexualisation of females and the female body to appeal to the younger audience
- Promoting Alcohol brand by exploitation of female body
- Objectifying women to market to men
- It's soft porn, sexually suggestive, objectifies the female body
- A liquor promotion that uses indecent or offensive material is in poor taste and is against general community standards. Licensees (and permittees) should also be aware that indecent and offensive promotions may be a catalyst for crime or violence, including sexual violence
- Promoting a “wild” experience
- No drink wise logo
- Aggressive use of a knife
- Consumption of alcohol: in one of the videos the female is straight arming the drink. Promoting binge drinking, excessive drinking, promoting bad behaviour
- Slow motion videos emulating sex acts. Insinuating that drinking the product enhances sex appeal.

The ABAC Code

18. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (a)(i) show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines
 - (a)(ii) show (visibly, audibly or by direct implication) or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage.
 - (b)(i) have Strong or Evident appeal to Minors
 - (b)(iv) be directed at Minors through a breach of any of the Placement Rules
 - (c)(ii) show (visibly, audibly or by 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
 - (d) show (visibly, audibly or by implication) the consumption of an Alcohol Beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical alertness or physical co-ordination, such as the control of a motor vehicle, car, boat or machinery or swimming.
19. Definitions in Part 6 of the ABAC provide:

Placement Rules means:

- (i) A Marketing Communication must comply with codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy).
- (ii) A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.
- (iii) If a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, a Marketing Communication may only be

placed where the audience is reasonably expected to comprise at least 75% Adults (based on reliable, up-to-date audience composition data, if such data is available).

- (iv) A Marketing Communication must not be placed with programs or content primarily aimed at Minors.
- (v) A Marketing Communication must not be sent to a Minor via electronic direct mail (except where the mail is sent to a Minor due to a Minor providing an incorrect date of birth or age).

Available Age Restriction Controls means age restriction, targeting or affirmation technologies available to restrict a Marketing Communication to Adults, but this does not require a third party platform, website or account that is not primarily related to alcohol to be age restricted in its entirety before it can be used to place a Marketing Communication.

Strong or Evident Appeal to Minors means:

- (i) likely to appeal strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
- (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

A **Minor** means a person who is under 18 years of age and therefore not legally permitted to purchase an alcohol beverage in Australia.

The Company's Response

20. The Company responded to the complaint by email dated 27 November 2020. The principal points made by the Company were:

- In response to all complaints being related to the same 3 Instagram posts, we include a common statement to respond to all.
- The content in question was conceived, directed and acted by our owners of FIZZ. No paid models were used in the making of the content and it was captured in a controlled, private setting. Our

diverse ownership group play an integral role in much of our marketing and brand vision and it was not our intent to offend, nor to endorse excessive consumption or unsafe behaviour.

- 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 complaints refer 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 public. We will continue to diligently follow this process, taking into account this point of view.
- As it was not the intent of these posts in question to offend or promote unsafe behaviour, we have proactively removed the posts from public view as at 23rd November.
- We will continue to build the brand in the marketplace in a responsible manner and will be consulting industry along the way.

The Panel’s View

21. Since late 2019 there has been an explosion of alcoholic seltzers on the Australian market, with now over 30 different brands on sale. One brand is Hard Fizz produced on the Gold Coast as an initiative of Paul Fisher and Hayden Quinn. Hard Fizz comes in three flavours of lemon & ginger, orange & mango, and watermelon & berry. With so many brands competing in the alcoholic seltzer market it's not surprising that alcohol companies are employing eye catching marketing strategies to seek the attention of potential consumers.
22. The marketing of Hard Fizz has relied heavily on social media including Instagram and it is three video posts on Instagram promoting the three flavours of the range which has attracted the complaints. Each post features an attractive bikini wearing woman highlighting a product flavour by either pouring the drink over her body or rubbing squished fruit over herself. As marketing concepts go, the Company will not be accused of being subtle in relying on the old adage of “sex sells”.
23. The four complaints to the Instagram posts raise a common theme of the marketing being sexist and objectifying the women. While it would be difficult to disagree with this assessment, concerns of this nature fall within the ambit of the AANA Code of Ethics and not the ABAC. The Code of Ethics is administered by Ad Standards, however as the Company has removed the posts and undertaken not to reuse them, there will be no decision on the objectification point by Ad

Standards. The rules governing the ABAC Scheme provide that Panel decisions are still made on complaints even when a marketing item is removed prior to the decision. Hence this determination considers the relevant ABAC provisions, namely do the posts:

- show or encourage rapid or excessive alcohol consumption;
- encourage irresponsible or offensive behaviour related to alcohol use;
- have strong or evident appeal to minors;
- imply that the use of product is a cause or contributor to sexual or other success;
- show alcohol use before or during an activity that for safety reasons requires a high degree of alertness; and
- breach the ABAC Placement Rules by failing to utilise available age restriction controls.

24. As mentioned, the Company did remove the posts shortly after the complaints were received. In responding to the concerns expressed the Company advised:

- the posts did not use paid models but were “conceived, directed and acted by our owners” and there was no intention to offend or endorse excessive consumption or unsafe behaviour;
- the marketing was light-hearted and overwhelmingly the response was positive; and
- future content will meet community guidelines and the brand will be built in a responsible manner.

25. The Panel believes the following breaches of ABAC requirements did occur:

- Part 3 (a)(i) - through showing the entire content of the product being poured into the mouth of the woman and hence showing rapid consumption and implying excessive consumption;
- Part 3 (b)(iv) - failing to apply available age restriction controls to the Instagram posts; and
- Part 3 (c)(ii) - using the product as a prop to demonstrate sexually provocative behaviour and hence raising a reasonable implication that the consumption or presence of the product may contribute to sexual success.

26. While the posts did show the use of knives which clearly require care to be used safely, the posts positioned any alcohol consumption occurring after the use of the knives to slice or cut the fruit. Further, the posts cannot be said to be targeting minors or having an appeal to minors beyond the appeal of the posts to adults. And while the posts depict women in a manner reminiscent of calendars in 1970's motor mechanics garages, the "offensive behaviour" is not related to alcohol use as such e.g., drunken loutish behaviour.
27. The complaints are upheld.