



ABAC Adjudication Panel Determination Nos 210 & 212/24

Products: Fizzer Seltzer and Moon Dog Beach Club
Company: Moon Dog Brewing Pty Ltd
Media: Social Media
Date of decision: 28 January 2025
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from two complaints received on 19 December 2024 about social media marketing by Moon Dog Brewing Pty Ltd (“the Company”). The first complaint concerns the promotion of Fizzer Seltzer in Peach Iced Tea, Orange, Creamy Soda and Berry Tingle flavours. The second relates to the promotion of Moon Dog Beach Club.
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, marketing placement. 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 essential 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;
 - Specific broadcast codes, notably the Commercial Television Industry Code of Practice – which restricts when advertisements for alcohol beverages may be broadcast;
 - The Outdoor Media Association Code of Ethics and Policies restricts the location of alcohol advertisements on outdoor sites such as billboards.
3. The codes address the placement and 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. Ad Standards provides a common entry point for alcohol marketing complaints for ease of public access. Upon receiving a complaint, Ad Standards supplies a copy to the Chief Adjudicator of the ABAC.
5. The Chief Adjudicator and Ad Standards independently assess the complaint and stream it into the complaint process that matches the nature of the issues raised in the complaint. Occasionally, 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 are within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaints were received on 19 December 2024.

- The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, and this determination was made within the target timeframe.

Pre-vetting Advice

- A component of the ABAC Scheme is an advice service by which an alcohol marketer can obtain an independent opinion of a proposed alcohol marketing communication against the ABAC standards before public release. Pre-vetting advice is separate from the complaint process and does not bind the Panel but represents best practice on behalf of alcohol marketers. Pre-vetting advice was not obtained for the marketing item.

The Marketing

- The complaint relates to two social media posts.

The first complaint relates to various iterations of a post promoting Fizzer Seltzer and its four flavours. The following is a representation of the multiple posts:



Image 1: Hard Creaming Soda



Image 2: Hard Berry Tingle



Image 3: Hard Peach Iced Tea



Image 4: Hard Orange

The second complaint concerns a short video showing a clear bucket on the beach containing liquid and four straws. A hand holds a toy shark, which emits a red substance from its mouth.



Complaints

11. The complainant objects to the marketing as follows:

Complaint 210/24 – Fizzer Seltzer

- *Images 1 to 4 show an example of a series of identical ads made by Fizzer Seltzer which promote the 'Hard Creaming Soda', 'Hard Berry Tingle', 'Hard Peach Iced Tea' and 'Hard Orange' products at participating bars and pubs. The advertisements feature bright and colourful images of the drink in a glass with ice, the name of the product, and the note that it is 'new on tap'.*
- *We submit that the advertisements would resonate strongly with minors due to the following:*
 - *Bright, colourful advertising and use of 'pop' styled font.*
 - *Product names include non-alcoholic drinks that appeal to minors, i.e. Creaming Soda and Berry Tingle.*
 - *While noted at the end of the post copy, the dominant image does not refer to these products being alcoholic.*
- *While we acknowledge that the product names all start with the term 'hard', we would argue that for a minor, this term is not sufficient. To refer to ABAC's previous determination relating to Hard Solo (119/23 & Others), the panel noted that community research found that using the term 'hard' for a product such as these did not necessarily indicate to the community members that these products were alcoholic. In the case of Fizzer Seltzer, using the term 'hard' in front of product names such as 'creaming soda' is insufficient to indicate these products are alcoholic.*

Complaint 210/24 – Fizzer Seltzer

- *We believe the advertisement breaches Standard 3 (b)(i) of the ABAC Responsible Marketing Code.*
- *It depicts a beach scene with a bucket filled with blue liquid and four straws. The video shows a hand holding a toy rubber shark, which releases a shot of red liquid into the bucket filled with blue liquid. As Moon Dog Brewing is a company that manufactures and sells an alcohol product, one would reasonably assume that the liquids in question are alcoholic, with the red liquid being a 'shot' of alcohol.*
- *We submit that the advertisements would resonate strongly with minors because:*

- *The rubber toy shark used to pour the ‘shot’ of red liquid in the drink is a popular type of children’s bath or water toy.*
- *The bright colours of red and blue would appeal to minors as these drinks traditionally represent sweet, cordial-based drinks.*
- *The setting and props used include sand, bucket and beach toys, which mimic family beachside settings. The use of these props to promote an alcoholic product may blur the lines between family-oriented environments and the promotion of alcohol, potentially appealing to underage audiences or creating an inappropriate association between alcohol and family activities.*

The ABAC Code

12. Part 3 (b) of the Code provides that an Alcohol Marketing Communication must NOT:

- (i) have Strong or Evident Appeal to Minors, in particular;
 - (A) specifically target Minors;
 - (B) have a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
 - (C) use imagery, designs, motifs, language, activities, interactive games, animations or cartoon characters that are likely to appeal strongly to Minors;
 - (D) create confusion with confectionery, soft drinks or other similar products, such that the marketing communication is likely to appeal strongly to Minors or
 - (E) use brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

The Company Response

13. The Company responded to the complaint by email on 13 January 2025. Its primary comments were:

- **212/24:** The Instagram post promotes a licensed venue, not an Alcohol product, and is not an Alcohol Marketing Communication subject to the Code.
- **210/24:** The Meta posts, which are the subject of the complaint, sufficiently identify the products in question as alcoholic and are not directed to, nor do they have strong or evident appeal to, minors. The complaint (evidently

submitted by a commercial competitor) relies on prior ABAC determinations about “Hard Solo” to submit that the use of “hard” in the name of the products that are the subject of the relevant marketing communications is insufficient to identify them as alcoholic. That, with respect, is an oversimplification and fails to engage with the reasons why Hard Solo (an alcoholic version of a beloved soft drink brand) was found to contravene the Code. Generic terms such as “creaming soda”, “iced tea”, “orange”, and “berry tingle” are not of the same character and the use of the descriptor “hard”, along with the “Drink responsibly. 18+” wording accompanying each post, is in this context sufficient to identify the products as alcoholic. Notwithstanding this, the relevant marketing communications have been removed.

The Panel’s View

14. Moon Dog is a Victorian-based craft brewer. The Company produces craft beers, alcoholic ciders and a range of alcoholic seltzers. It also operates several restaurants and function venues. This determination arises from two complaints about marketing for the release of new alcoholic seltzers and the promotion of the Company’s most recent venue, the Moon Dog Beach Club.
15. The first complaint concerns the promotion of the Company’s alcoholic seltzer brand, Fizzer Seltzer. The staple range of Fizzer Seltzer is four flavours sold in 330 ml cans. The complainant’s complaint concerns marketing for a new range of flavours available on tap at several hotels but not in cans.
16. The marketing is an ad served on social media platforms for the flavours Peach Iced Tea, Orange, Creamy Soda, and Berry Tingle. The ad features images of each product and contains:
 - a background colour similar to the colour of the beverage (i.e. red for Creamy Soda and blue for Berry Tingle);
 - an image of a hand holding a tall glass containing the product, which in each case is brightly coloured;
 - the name of the product;
 - above the name of the product, the word “hard”, in smaller more cursive style font than used for the product name;
 - at the top of the glass, and in a relatively small font, the words “new on tap”; and
 - the accompanying text explains that the products have ‘hit the pub’ and the message ‘Drink Responsibly. 18+’

17. The complainant contends the ad resonates strongly with minors due to the bright colours, creamy soda and berry tingle product names, and the lack of sufficient identification of the products as alcoholic beverages. Part 3 (b)(i) of the Code states that an ad must not appeal strongly to minors. The standard might be breached if the marketing:
- specifically targets minors;
 - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult;
 - uses imagery, designs, motifs, language, activities, interactive games, animations or cartoon characters that are likely to appeal strongly to minors and
 - creates confusion with confectionery, soft drinks or other similar products, such that the marketing communication is likely to appeal strongly to minors.
18. The Company argues the ads are consistent with the ABAC standard, submitting:
- the products are identified as alcoholic, and the ads are not directed to nor have strong or evident appeal to minors; and
 - the descriptor “hard”, along with the “Drink responsibly. 18+” wording accompanying each post, is in the context sufficient to identify the products as alcoholic.
19. It should be noted that the ABAC Scheme does not regulate physical beverages but is confined to the marketing of alcohol products. This means characteristics such as colour, viscosity, and taste are not within the remit of the Panel as such. The colour of a beverage will be relevant in as much as it is an element of the visual impact of a marketing communication, as will descriptions of the taste of a product.
20. Further, there is no freestanding ABAC standard that requires that an item of marketing unambiguously identify a beverage as alcoholic. Rather, the failure to do so may create confusion with confectionery or soft drinks and contribute to the appeal of the marketing to minors.
21. The complainant referenced Determination 119/23 & Others concerning the packaging of the product Hard Solo as a basis for pointing out that the descriptor ‘Hard’ would not necessarily be recognised as identifying a product as an alcohol beverage. The Hard Solo decision was very detailed and involved many factors. The Panel found that the packaging, in that case, would

have been understood as being for an alcohol beverage, but it was found that the packaging had a strong appeal to minors.

22. The point about the descriptor 'Hard' was taken from community research conducted in 2021 about a range of descriptors used on alcohol products and whether it was generally understood that the term was referring to an alcohol beverage. 'Hard Seltzer' was a descriptor tested, with 52% of respondents believing the term related to alcohol, 9 % thinking it was a soft drink term and 39% unsure. Hard Seltzer had the highest level of community recognition of all the descriptors tested, and it might be surmised that recognition has further increased in the last 4 years, given the greater use of the term.
23. That said, the fact that a marketing communication establishes a product as an alcohol beverage does not mean the marketing cannot strongly appeal to minors. Imagery, colouring, messaging, and other factors can all make a marketing item strongly appealing to minors.
24. The Panel has often considered the Part 3 (b) standard. While each marketing communication must always be assessed individually, some characteristics within marketing material that may make it strongly appealing to minors include:
 - the use of bright, playful, and contrasting colours;
 - aspirational themes that appeal to minors wishing to feel older or fit into an older group;
 - the illusion of a smooth transition from non-alcoholic to alcoholic beverages;
 - creation of a relatable environment by use of images and surroundings commonly frequented by minors;
 - depiction of activities or products typically undertaken or used by minors;
 - language and methods of expression used more by minors than adults;
 - inclusion of popular personalities of evident appeal to minors at the time of the marketing (personalities popular to the youth of previous generations will generally not have strong current appeal to minors);
 - style of humour relating to the stage of life of a minor (as opposed to humour more probably appealing to adults), and
 - use of a music genre and artists featuring in youth culture.
25. It should be noted that only some of these characteristics are likely to be present in a specific marketing communication, and the presence of one or

more of the characteristics does not necessarily mean that the marketing item will have a strong or evident appeal to minors.

26. The assessment of the consistency of a marketing communication with a Code standard is from the standpoint of the overall probable understanding of the marketing by a reasonable person. This means the benchmark is the values, opinions, and life experiences common to most members of the community.
27. On balance, the Panel believes that the ads breach the Part 3 (b) standard. In reaching this conclusion, the Panel noted:
 - a combination of the descriptor 'Hard' and the accompanying text message of 'Drink responsibly. 18+' and that the product is on tap in pubs means a reasonable person would probably understand the products are alcoholic;
 - the descriptors "Creamy Soda" and "Orange", in particular, are commonly applied to non-alcoholic beverages consumed by minors and would be recognisable and relatable to minors;
 - the products are shown in a glass similar to the type used for non-alcoholic drinks;
 - the use of bright colours and playful font, which would be eye-catching and appealing to minors;
 - while no one factor is decisive, taken as a whole, the ads are relatable to minors, raising the inference of a smooth transition from consumption of a non-alcoholic drink to alcohol use and would probably be understood as strongly appealing to minors.
28. It is noted that while the Company did not believe the ads breached the ABAC standard, it nonetheless withdrew them upon considering the complaint. This speaks well of the Company's willingness to reflect on feedback and its commitment to responsible alcohol marketing.

Moon Dog Beach Club

29. The second complaint concerns an Instagram post promoting the Moon Dog Beach Club, a new venue opened by the Company on 20 December 2024. The venue is themed on a beach club with indoor and outdoor entertainment areas. The food menu is a mixture of burgers, seafood and pub classics such as chicken parma. The drinks menu includes the Company's alcohol product range, wines, cocktails and non-alcoholic drinks.
30. The post is a short video showing a clear bucket on sand containing a blue beverage and four straws. A hand is shown holding a toy shark, which emits a red liquid from its mouth into the beverage. The complainant argues the post

would be understood as being for an alcohol beverage and appeals strongly to minors given the props used, the 'beach' setting, and the colours.

31. The Company contended that the post promotes a licensed venue, not an alcohol product, and therefore is not an alcohol marketing communication subject to the Code.
32. The Company is under a misapprehension as to the scope of the ABAC Scheme. The Code applies to the marketing of alcohol retailers, potentially capturing marketing about a licensed premise instead of a branded alcohol beverage the retailer sells.
33. That said, the intersection of the ABAC standards with the marketing of a licensed restaurant or a mixed business like a hotel is a case-by-case assessment that is dependent on whether the marketing communication features or references an alcohol brand or portrays the use of alcohol.
34. For instance, an ad from a Hilton hotel that simply goes to the hotel's accommodation options will not be an alcohol marketing communication. If the hotel, however, advertises its bar and shows images of patrons using alcohol, then the depictions of alcohol use need to meet ABAC standards even if no identifiable alcohol product brand is depicted.
35. Further, the marketing and promotions conducted by a licensed premise will fall within the direct regulatory domain of the relevant State/Territory Liquor Licensing Authority. In Victoria, the regulator is Liquor Control Victoria and the responsible marketing requirements for licensees are detailed in the Responsible Alcohol Advertising and Promotion Guidelines. The Guidelines thematically align with the ABAC standards.
36. Because marketing by licensed premises falls within a shared regulatory space, a complaint about an item of marketing could potentially be considered by the applicable Liquor Licensing Authority and/or the ABAC Scheme. That's why the ABAC Rules and Procedures permit a complaint ostensibly within the remit of the Panel to be referred to another regulator if the issue is better dealt with by the other regulator.
37. In the current case, the nature of the beverage in the bucket is not clear at first glance as there is no reference to a type or style of alcohol or even if the beverage is alcoholic. The accompanying text to the video states, 'We've got plenty of fun planned for our drinks list! Here's a sneak peek.' As mentioned, the venue has both alcoholic and non-alcoholic drinks on its menu, so the message is also not definitive.
38. Other Instagram posts made by the Company and the venue's menu, which is included on the Moon Dog Beach Club website, establish that the post is referencing a drink in the 'Cocktail Bucket' section of the menu, specifically a

'Shark Attack Bucket' made with raspberry vodka, blue curacao, and lemonade.

39. The underlying issue raised by the complaint concerns the cocktail bucket and how it would be presented if ordered at the venue. This means the complaint could reasonably be referred to Liquor Control Victoria and assessment under Principle 7 of the Guidelines - 'The advertising or promotion of alcohol must not encourage underage drinking or otherwise be likely to appeal to minors'. The examples of unacceptable practice in the Guidelines largely reflect Part 3 (b)(i) of the ABAC.
40. That said, the Instagram post appears on the venue's account and that of the Moon Dog master account and is within the scope of the ABAC obligations. Hence, the Panel has assessed the post and believes it breaches the Code standard. In reaching this conclusion, the Panel noted:
 - the post fails to establish the beverage is alcoholic and could cause confusion with a soft drink;
 - the use of props, including sand, a bucket and a shark toy, which would be familiar and relatable to minors;
 - taken as a whole, a reasonable person would probably understand that the post strongly appeals to minors.
41. The complaints are upheld.