

<b>COMPLAINT NUMBER</b>	19/207
<b>COMPLAINANT</b>	C Kelly
<b>ADVERTISER</b>	National Brands
<b>ADVERTISEMENT</b>	Nitro, Facebook
<b>DATE OF MEETING</b>	9 July 2019
<b>OUTCOME</b>	Upheld in part Not Upheld in part Advertisements to be removed

### Description of Advertisements

The Complaint comprises of four Facebook posts on the National Brands Nitro page, [www.facebook.com/nitro](http://www.facebook.com/nitro)

- Advertisement 1 – O Week
- Advertisement 2 – Up for a Blinder
- Advertisement 3 – Sleep when You're Dead
- Advertisement 4 – Weekend Bonding

(A detailed description of each advertisement is provided in the Complaints Board Discussion section.)

### Summary of the Complaint

The Complainant was concerned the advertisements promote the alcoholic strength of the product and encourage immoderate drinking. The Complainant said an element of the advertising suggests alcohol can lead to sexual success. The Complainant was concerned the Facebook page and website were not limited to 18+ audiences.

### Issues Raised

- Social Responsibility
- Responsible and moderate alcohol consumption
- Alcohol advertising directed at adult audiences

### Summary of Advertiser's Response

The Advertiser clarified the age-gating restrictions in place on the Facebook page and its website. The Advertiser said the references to strength in the advertisements were about the product's energy formulation level. It said there were no instructions to drink to excess and the advertisements were hyperbolic.

### Summary of the Complaints Board Decision

The Complaints Board Upheld in part a complaint about four Facebook advertisements on the National Brands Nitro page.

Advertisements 1, 2 and 3 were Upheld under Principle 1, Principle 2, Guideline 2(a) and Guideline 2(b) of the Code for Advertising and Promotion of Alcohol.

Advertisement 4 was Upheld in relation to Principle 1, Principle 2, Guideline 1(c), Guideline 2(a) of the Code for Advertising and Promotion of Alcohol.

The Complaints Board ruled the four advertisements were Not Upheld in relation to Principle 3 of the Code for Advertising and Promotion of Alcohol.

### Relevant ASA Codes of Practice

The Chair directed the Complaints Board to consider the complaint with reference to the following code:

### CODE FOR ADVERTISING AND PROMOTION OF ALCOHOL

**Principle 1:** Alcohol advertising and promotions shall observe a high standard of social responsibility.

**Guideline 1(c):** Alcohol advertising and promotions shall not suggest that alcohol can lead to sexual, social, sporting or business success or popularity or is necessary to achieve social status with peers.

**Principle 2:** Alcohol advertising and promotions shall be consistent with the need for responsibility and moderation in alcohol consumption.

**Guideline 2(a):** Alcohol advertising and promotions shall not emphasise a product's alcoholic strength, except where the product is a light (or lite) alcohol product but can include factual information about the alcoholic strength.

**Guide 2(b):** Alcohol advertising and promotions shall not feature, imply, condone or encourage irresponsible or immoderate drinking. That applies to both the amount of drink and the way drinking is portrayed.

**Principle 3:** Alcohol advertising and promotions shall be directed at adult audiences. Alcohol advertising and promotions shall not be directed at minors nor have strong or evident appeal to minors in particular. This applies to both content and placement.

### Relevant precedent decision

In considering this complaint the Complaints Board referred to precedent Decision 17/107, which was Settled by the Chair of the Complaints Board.

The full version of this decision can be found on the ASA website:

<https://www.asa.co.nz/decisions/>

**Decision 17/107** concerned a Facebook advertisement for Harvest Cidery which offered scrumpy branded packing tape and encouraged followers to “get their mitts” on the giveaway. Upon receiving the complaint, the Advertiser removed the post as it could be seen to be encouraging excessive consumption of alcohol.

The Chair ruled the self-regulatory action was sufficient to settle the complaint.

### Complaints Board Discussion for Complaint 19/207

*Are the advertisements only accessible to an 18+ audience?*

The Complaints Board began by discussing the Advertiser's efforts to ensure its Facebook advertising is not available to minors (under 18 years of age). The Board noted the Advertiser had settings in place which restricts people under 18 from accessing the Facebook page. This restriction was also in place for any boosted posts. The Complaints Board also noted that the Nitro-energy.com website had an age verification gate.

The Complaints Board ruled that in light of the age restriction methods used by the Advertiser, the advertisements were not in breach of Principle 3 of the Code for Advertising and Promotion of Alcohol. The Complaints Board ruled the complaint was Not Upheld in relation to Principle 3.

The Complaints Board then considered other aspects raised by the Complainant about each of the four advertisements in turn:

#### **Advertisement 1 - O Week**

The Facebook post says "O-Week Rule#1"

The image shows 2 rolls of cello tape + a hand + a bottle of Nitro Vodka + ?

The text says "Who's got the answer to the puzzle?? Who's tried the challenge?? Nitro is the STRONGEST ENERGY RTD formulation so not for the weak or faint hearted.... Grab a NITRO 1.25 Litre party pack of 7% NITRO and get amongst it with ya mates...Be safe out there...we don't want any cello tape cuts/injuries"

The Complainant said the advertisement promotes the strength of alcohol and also promotes irresponsible drinking by encouraging the 'Scrumpy (or Nitro) Hands' drinking challenge.

The Advertiser said the post is not discussing alcohol strength but rather the energy formulation level which is high in caffeine and can be dangerous for those with a weak heart. The Advertiser said it did not understand the reference to 'Scrumpy Hands.' It said the Complainant was drawing their own personal conclusions to what is a simple open-ended puzzle. It said it is encouraging moderation by sharing a 1.5L bottle with mates.

#### *Consumer Takeout*

The Complaints Board agreed the likely consumer takeout was this advertisement was alluding to a drinking game where bottles of alcohol are taped to participants hands and must be finished before the bottles can be removed.

#### *Does the advertisement emphasise the product's alcoholic strength?*

The Complaints Board said the advertisement states the product's alcoholic content is 7%. The Complaints Board said that although the Advertiser said the "strongest energy RTD formulation" claim made in the advertisement refers to caffeine levels, there is no information provided to consumers about the caffeine content in the advertisement. Without this context the Board said the consumer focus was likely to be on the alcohol strength of the product and not the caffeine content. Therefore, the Complaints Board said the advertisement did emphasise the alcoholic strength in breach of Guideline 2(a) of the Code for Advertising and Promotion of Alcohol.

#### *Does the advertisement condone or encourage irresponsible or immoderate drinking?*

The Complaints Board said the advertisement was alluding to the drinking game in which bottles are taped to participants hands. The Board said the target audience of students participating in university Orientation Week would be well aware of this drinking game which requires an individual to consume the contents of the bottles before they can be removed. The Complaints Board said the advertisement was in breach of Guideline 2(b) of the Code for Advertising and Promotion of Alcohol which states advertisement should not feature, imply, condone or encourage irresponsible or immoderate drinking.

#### *Does the advertisement observe a high standard of social responsibility?*

The Complaints Board said the advertisement was in breach of Principle 1, Principle 2, Guideline 2(a) and Guideline 2(b) of the Code for Advertising and Promotion of Alcohol. The Board said the advertisement had not observed a high standard of social responsibility, taking into account context, medium, audience and product. The Complaints Board ruled unanimously to Uphold the complaint in relation to Advertisement 1.

### **Advertisement 2 Up for a Blinder**

The Post says “Who’s up for a Blinder long weekend. Grab a NITRO 1.25 Litre party pack (=5x250ml cans) 7% NITRO and get amongst it with ya mates...NITRO is the STRONGEST VODKA ENERGY RTD formulation so not for weak or faint hearted” The image shows a woman in lingerie with her hand on a window blind.

The Complainant said the advertisement promotes the strength of alcohol and also promotes irresponsible drinking by encouraging consumers to drink over the long weekend.

The Advertiser said the reference to strength is the high energy formulation level /caffeine levels. It said the image shows a woman pulling up a blind and has no commentary or instructions. It said the advertisement uses humour and hyperbole and suggests sharing the product with mates.

#### *Consumer Takeout?*

The Complaints Board said the likely consumer takeout is the play on the word “blinder” and the image of the blind with the implied message of having a “blinder” meaning being blind drunk over the three-day weekend.

#### *Does the advertisement emphasise the product’s alcoholic strength?*

The Complaints Board said the advertisement states the product’s alcoholic content is 7%. The Complaints Board said that although the Advertiser said the “strongest energy RTD formulation” claim made in the advertisement refers to caffeine levels, there is no information provided to consumers about the caffeine content. Without this context the Board said the consumer focus was likely to be on the alcoholic strength of the product and not the caffeine content. Therefore, the Complaints Board said the advertisement emphasised the alcoholic strength in breach of Guideline 2(a) of the Code for Advertising and Promotion of Alcohol.

#### *Does the advertisement condone or encourage irresponsible or immoderate drinking?*

The Complaints Board said the suggestion of having a blinder together with the image of a blind was likely to be interpreted to refer to being blind drunk or having an alcohol fuelled weekend. The Board said the emphasis on this meant the advertisement was in breach of Guideline 2(b) of the Code for Advertising and Promotion of Alcohol which states advertisement should not feature, imply, condone or encourage irresponsible or immoderate drinking.

#### *Does the advertisement observe a high standard of social responsibility?*

The Complaints Board said the advertisement was in breach of Principle 1, Principle 2, Guideline 2(a) and Guideline 2(b) of the Code for Advertising and Promotion of Alcohol. The Board said the advertisement had not observed a high standard of social responsibility, taking into account context, medium, audience and product.

The Complaints Board noted the Advertiser has removed the advertisement on a “without prejudice basis”. However, the Complaints Board ruled unanimously to Uphold the complaint in relation to Advertisement 2.

### **Advertisement 3 – Sleep when you’re dead**

The Post says “You can sleep when you’re dead! And shows a dark image of a hooded face The text says “Nitro is the STRONGEST ENERGY RTD formulation, so not for weak or faint hearted!... Grab a NITRO 1.25 Litre party pack (=5x250ml cans) 7% NITRO and get amongst it with ya mates”

The Complainant says the post refers to the strength of the product which targets young people who want affordable strong drink and is promoting consuming this to the detriment of your health.

The Advertiser says the reference to strength is the high energy formulation level/caffeine levels. The Advertiser disagrees with the Complainant's interpretation of the "Sleep when you're dead" tagline and says it means 'live life well' and provided Instagram images with the #sleep when your dead which show people partaking in a range of activities. It says the imagery used is simply a man wearing a hoodie.

*Consumer Takeout?*

The Complaints Board said the likely consumer takeout was that the stimulants in the product will allow users to stay up all night drinking. The image of the dark hooded face implied the grim reaper and death, which linked in with the tagline "sleep when you're dead".

*Does the advertisement emphasise the products alcoholic strength?*

The Complaints Board said the advertisement states the product's alcoholic content is 7%. The Complaints Board said that although the Advertiser said the "strongest energy RTD formulation" claim made in the advertisement refers to caffeine levels, there is no information provided to consumers about the caffeine content. Without this context the Board said the consumer focus was likely to be on the alcohol strength of the product and not the caffeine content. Therefore, the Complaints Board said the advertisement emphasised the alcoholic strength in breach of Guideline 2(a) of the Code for Advertising and Promotion of Alcohol.

*Does the advertisement condone or encourage irresponsible or immoderate drinking?*

The Complaints Board said the advertisement is encouraging consumers to stay up all night drinking which could lead to excessive consumption of alcohol. The Board said the advertisement was in breach of Guideline 2(b) of the Code for Advertising and Promotion of Alcohol which states advertisement should not feature, imply, condone or encourage irresponsible or immoderate drinking.

*Does the advertisement observe a high standard of social responsibility?*

The Complaints Board said the advertisement was in breach of Principle 1, Principle 2, Guideline 2(a) and Guideline 2(b) of the Code for Advertising and Promotion of Alcohol. The Board said the advertisement had not observed a high standard of social responsibility, taking into account context, medium, audience and product.

The Complaints Board ruled unanimously to Uphold the complaint in relation to Advertisement 3.

**Advertisement 4 Weekend Bonding**

The post is titled 'Weekend Bonding' with the letters 'age' written over the original 'ing' to make the word bondage. A woman in a cropped top and open shorts with outstretched arms tied with ropes to vodka bottles. The text says "Nothing like a bit of pre-valentines 'bonding' to get you in the spirit. Grab a NITRO 1.25 Litre party pack (=5x250ml cans of VODKA, with both TAURINE & GUARANA with your hump mate and get amongst it...NITRO is the STRONGEST VODKA ENERGY RTD formulation so not for the weak or faint hearted!

The Complainant says the image of the half-naked woman implies drinking Nitro could lead to sexual success and emphasises the strength of the product

The Advertiser repeated the justification for the reference to the strength of the product. The Advertiser says the advertisement is hyperbolic. It said the half-naked claim is exaggerated and the woman is pulling ropes while participating in cross-fit training. It says bondage is not linked to sexual success and the text says "bonding".

*Consumer takeout?*

The Complaints Board said the likely consumer takeout of the advertisement is it suggests a connection between the product and a sexual fantasy by drinking with a sexual partner or “hump mate”.

*Does the advertisement emphasise the products alcoholic strength?*

The Complaints Board said the advertisement states the product’s alcoholic content is 7%.

The Complaints Board said that although the Advertiser said the “strongest energy RTD formulation” claim made in the advertisement refers to caffeine levels, there is no information provided to consumers about the caffeine content. Without this context the Board said the consumer focus was likely to be on the alcoholic strength of the product and not the caffeine content. The Complaints Board also noted that this advertisement refers to “strongest” in the statement “Nitro is the strongest vodka energy RTD formulation”

The Complaints Board said the advertisement emphasised the alcoholic strength in breach of Guideline 2(a) of the Code for Advertising and Promotion of Alcohol.

*Does the advertisement suggest that alcohol can lead to sexual success?*

The Complaints Board did not consider the likely consumer takeout was that the woman was portraying an extreme sport or cross fit activity as suggested by the Advertiser. The Board said there was an undeniable sexual element to the advertisement which was reinforced by the word ‘bondage’ replacing the word ‘bonding’ and the reference to “hump mate”. The Complaints Board said this connection did suggest that alcohol can lead to sexual success or popularity and was in breach of Guideline 1(c) of the Code for Advertising and Promotion of Alcohol.

*Does the advertisement observe a high standard of social responsibility?*

The Complaints Board said the advertisement was in breach of Principle 1, Principle 2, Guideline 1(c), Guideline 2(a) of the Code for Advertising and Promotion of Alcohol Code. The Board said the advertisement had not observed a high standard of social responsibility, taking into account context, medium, audience and product.

The Complaints Board noted the Advertiser has removed the advertisement on a “without prejudice” basis. However, the Complaints Board ruled unanimously to Uphold the complaint in relation to Advertisement 4.

**Summary**

The Complaints Board ruled Advertisements 1, 2 and 3 were Upheld in relation to Principle 1, Principle 2, Guideline 2(a) and Guideline 2(b) of the Code for Advertising and Promotion of Alcohol.

The Complaints Board ruled Advertisement 4 was Upheld in relation to Principle 1, Principle 2, Guideline 1(c), Guideline 2(a) of the Code for Advertising and Promotion of Alcohol.

The Complaints Board ruled the four advertisements were Not Upheld in relation to Principle 3 of the Code for Advertising and Promotion of Alcohol.

**Outcome**

The Complaints Board ruled the complaint was **Upheld in part, Not Upheld in part.**

Remaining advertisements to be removed.

**APPEAL INFORMATION**

According to the procedures of the Advertising Standards Complaints Board, all decisions are able to be appealed by any party to the complaint. Information on our Appeal process is on our website [www.asa.co.nz](http://www.asa.co.nz). Appeals must be made in writing via email or letter within 14 days of receipt of this decision.

## APPENDICES

1. Complaint
2. Response from Advertiser
3. Response from Media

### Appendix 1

#### COMPLAINT FROM C KELLY

O-week post-

This post promotes the strength of the alcohol by saying “Nitro is the strongest energy RTD formulation so not for the weak or faint hearted” this statement is consistent across majority of Nitro’s advertising on social media. This is in breach of Principle 2, a.

- It also promotes irresponsible and immoderate drinking, as it is tapping in to the trend of scrumpy hands, although in this case it is Nitro hands: Taping a 1.25L highly caffeinated, 7% alcohol, high-sugar RTD to each hand is clearly promoting excessive and inappropriate drinking to young people during O-week. O-week is already well-known for immoderate drinking and it is irresponsible to promote a product such as this, which is particularly dangerous in this manner. I believe this is breaching principle 2, b.

Up for a blinder post

- The theme of Nitro seems to be promoting the strength of the product by stating “Nitro is the strongest vodka energy RTD formulation so not for the weak or faint hearted!” This is in breach of principle 2, a.

- In this post, the first line of text is “Who’s up for a Blinder long weekend?” and in the image “UP FOR A BLINDER?” This is encouraging young people to drink alcohol over the long weekend (the post was for Queens Birthday assumingly) and is encouraging excessive, inappropriate drinking. I believe this is in breach of principle 2, b.

You can sleep when you’re dead post

- The first line of the caption for this post is promoting the strength of the product, and it is written in capitals. By writing this as the first line you are more likely to capture the attention of those who scroll through Facebook, and I believe that promoting the strength of the drink is more likely to target youth who want to drink whatever is affordable and is also ‘strong’ enough to get them ‘drunk’ . I believe that promoting the strength of this RTD is unnecessary, irresponsible, and is more likely to cause harm to youth who want to feel socially accepted. The fear of judgement or missing out for young people can put a lot of pressure on them to join in and copy others behaviour or drink choices. This is clearly breaching principle 2, a.

- The unmissable image and text of this post is written in capitals “YOU CAN SLEEP WHEN YOU’RE DEAD” which implies that you should consume this product to the maximum capacity, even if it impacts on your ability to sleep; that it is socially ok to do so, even if it is at the cost of one’s health. This message strongly encourages irresponsible and inappropriate drinking to young people. The comments under most posts are a clear example of young people wanting to do ‘crazy’ things whilst consuming Nitro, in order to get recognition from others and from the people behind the Nitro Facebook page. I believe this breaches principle

2, b.

Weekend bonding post

- This post features a half-naked woman and implying that the consumption of Nitro could lead to sexual success. The post features the words "WEEKEND BONDING" but the ending of the bonding is crossed out to say BONDAGE. The caption for the post has the word bonding in inverted commas, highlighting that they really are implying what is written in the post itself. Promoting alcoholic beverages with sexual acts is not ok for a young audience, and alcohol should never be associated with sexual success in any way. This post to me is breaching principle 1, c.

- The post image has a warning of the strength of the product (WARNING R18, 7% ALC/VOL, HIGH ENERGY FORMULATION), it is also listed yet again in the caption "NITRO IS THE STRONGEST VODKA ENERGY RTD formulation so not for the weak or faint hearted" I believe that this is breaching principle 2, a.

Overall, I just want to point out the main concerns, which are centred around:

- Principle 1, in particular point c.

- Principle 2, point a and b.

My reasons for these concerns are due to the repetition of scantily-clad women featured in their posts, the sexual nature of many of the posts, the encouragement of drinking irresponsibly and inappropriately through their captions, images, and Facebook comments, as well as supporting and encouraging their 'fans' to post their antics whilst consuming Nitro - which are often rewarded through apparel such as caps or even payment for promotion of their products. Also, the emphasis and consistency of pushing the strength of their product on almost every single post.

Lastly, I do want to point out that the website is lacking an age-gate or age verification before entry, and I do believe that the Facebook page should also have one to protect minors from exposure to such explicit and inappropriate content.

1 Refer to Sale and Supply Act

2 Sandra C. Jones et al, Why (not) alcohol energy drinks? A qualitative study with Australian university students in Drug and Alcohol Review, 2012: DOI: 10.1111/j.1465-3362.2011.00319.x

3 Martin Wall et al, Purchases by heavier drinking young people concentrated in lower priced beverages: Implications for policy in Drug and Alcohol Review, 2017: DOI: 10.1111/dar.12495

Law Commission, Alcohol in Our Lives: Curbing the Harm, 2010.

4 Richard O. de Visser et al, "Drinking is our modern way of bonding": Young people's beliefs about interventions to encourage moderate drinking" in Psychology & Health, 2013: <http://dx.doi.org/10.1080/08870446.2013.828293>

## **Appendix 2**

### **RESPONSE FROM ADVERTISER, NATIONAL BRANDS**

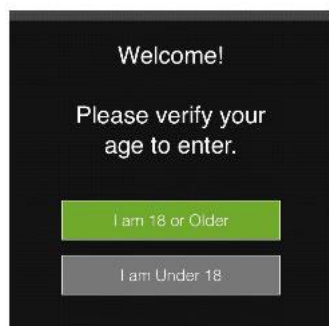
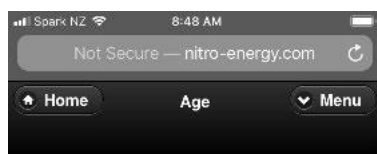
Please see below responses to complainant C Kelly and your letter dated 7 June 2019.



Q. We would be grateful if you could also provide information as to how you ensure your Facebook advertising is only accessible to adults.

A. The Facebook setting are set to “Page is only shown to people over 18 years of age” which restricts people under 18 accessing the Facebook page. We also set the age of any boosted post to 18+ years. This standard operating practice for all alcohol brands.

Our website Nitro-Energy.com has age verification – refer screen shot.



**O-Week post** - Regarding the queries you have over principle 2.A, the ASA code says, “Alcohol advertising and promotions shall not emphasize a product’s alcoholic strength”. The advertising is not discussing alcohol strength, it is referring to the products “ENERGY” formulation level which is high strength. NITRO contains guarana/caffeine - and the Food Code encourages warnings that tell consumers not to consume large amounts of caffeine, particularly if they have a weak or faint heart – which is what we have done.

Regarding the queries you have over principle 2.B. We are not sure what the complaint is talking about regarding ‘scrumpy hands. The picture is tape, 1 hand, 1 bottle of Nitro. We believe the complainant may be drawing their own personal conclusions to what is a simple open-ended question/puzzle. The only clear message on the post is to ‘drink responsibly’ where in the text it says, ‘grab a 1.25L bottle and share it with your mates’. This is encouraging drinking in moderation.

**Blinder post** – Regarding the queries you have over principle 2.A, the ASA code says, “Alcohol advertising and promotions shall not emphasize a product’s alcoholic strength”. The advertising is not discussing alcohol strength, it is referring to the products “ENERGY” formulation level which is high strength. NITRO contains guarana/caffeine - and the Food Code encourages warnings that tell consumers not to consume large amounts of caffeine, particularly if they have a weak or faint heart – which is what we have done.

2B – the lady is clearly pulling up a blind. There is no commentary instructing anyone to do anything.

The advertisement was targeted at an adult audience, employed the use of obvious hyperbole and humour and does not cause widespread or serious offence. The only clear message on the post is to ‘drink responsibly’ where in the text it says, ‘grab a 1.25L bottle and share it with your mates’. This is encouraging drinking in moderation.

This post is from June 2018... there has not been any complaint regarding this post in the past year.



The claimant is saying that bondage is 'sexual success' which they are entitled to their personal opinion... however we refute this and would suggest that bondage is not linked success at all.

The claimant is imagining and drawing their own personal false opinions. The text clearly states 'bonding' The ad is Hyperbole.

2.B The only clear message is to 'drink responsibly' where it says, 'grab a 1.25L bottle and share it with your mates'. This is encouraging drinking in moderation.

This post is from Feb 2018... the claimant may be a little over zealous or is potentially a competitor to spend so much time scrawling though the Nitro Facebook page.

**To avoid wasting ASA's time we have on a without prejudice basis, removed the post from Facebook.**

### **Appendix 3 RESPONSE FROM MEDIA, FACEBOOK**

We have investigated this matter and can advise that this piece of content did not violate our policies at the time of investigation.

If you have any further questions or links to specific content that you are concerned about, please let us know.