



ABAC Adjudication Panel Determination No. 122/17

Product: BWS
Company: Endeavour Drinks Group
Media: Radio
Complainant: McCusker Centre for Action on Alcohol and Youth
Date of decision: 10 January 2018
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Jeanne Strachan
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns the placement of an advertisement for BWS by Endeavour Drinks Group (“the Company”) on radio station Nova 93.7FM during the Dave McClung show around 3.45pm on Friday 8 December 2017 and arises from a complaint received on 12 December 2017.
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”) – 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 – which places 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 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, the Advertising Standards Bureau (ASB) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the ASB, 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 the ASB 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 ASB 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 December 2017.
8. The Panel endeavour 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 determined within this timeframe.
9. The quasi-regulatory system for alcohol beverage marketing features independent examination of the content of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for the advertisement.

The Placement

10. An advertisement for BWS was heard by the complainant at around 3.45pm on radio station Nova 93.7FM during the Dave McClung show.

The Marketing Communication

11. The advertisement was delivered by radio hosts Fitzzy & Wippa:

Host: Can you hear that Wipp, is that the sound of sleigh bells jingling?

Host: Ring, ding, dingaling. I think it is Fitzzy and I think the festive season is well and truly upon us and with BWS' 100 days of summer lets see whats happening tonight.

Caller: Its the last night before I start my diet Wipp, and I know I've probably left it a bit late, but I'm having one more night with the girls

Host: Yeh, look you've left your run a little late mate but I love your enthusiasm.

Host: Get into it

Host: Too right

Host: And there's plenty more of that to come with BWS' 100 days of summer and they've got cracking Christmas specials for this festive season.

The Complaint

12. The complainant is concerned that the advertisement:
 - a) Was broadcast at a time when children and young people would have been finishing school and many would have been picked up and been exposed to the alcohol ad while travelling in a car or when listening to the radio on their phones. The complainant provided statistics on the percentage of students that travel to and from school by car.
 - b) It uses the voices of Nova FM presenters, Fitzzy and Wippa who would be familiar to the audience;
 - c) The use of Christmas phrases like "sleigh bells jingling" would attract the attention of children and young people.
 - d) The phrase "Get into it" is an inducement to drink.

The ABAC Code

13. 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;

- (b)(i) have strong or Evident Appeal to Minors; or
- (b)(iv) be directed at Minors through a breach of any of the Placement Rules.

14. Part 6 of the ABAC Code includes definitions including:

Placement Rules (in part) 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 Alcohol Guidelines)
- (ii) If a media platform on which a Marketing Communication appears has age restriction controls available, the Marketer must utilise those age restriction controls to exclude Minors from the audience
- (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

The Company's Response

15. The Company responded to the complaint by letter dated 20 December 2017. The principal points made by the Company were:

- a) EDG aim is to be Australia's most responsible retailer of alcoholic beverages. In 2013 we formalised our status as a signatory to the Alcohol Beverages Advertising Code (ABAC) Scheme. Prior to becoming a signatory, EDG demonstrated a long-standing commitment to supporting and adhering to ABAC and Advertising Standards Bureau principles. EDG maintains strict internal and external processes in addition to those required by the ABAC Scheme, which are highly relevant in this context. EDG has also instigated a range of industry-leading initiatives to ensure that children are not served alcohol, including:
 - ID25 (ask for ID from anyone who looks under 25)
 - Don't Buy It For Them (stopping secondary supply to minors)

- Staff training that exceeds legal requirements, including "Don't Guess, Just Ask", team talkers, regular refresher and reminder courses, and implementation of the award winning training program "Safe".
- b) In marketing alcoholic products, EDG has been fully aware of the requirement not to encourage excessive consumption or risky drinking.
- c) The advertisement takes the form of a conversational exchange between radio presenters "Fitzy" and "Wippa" setting the scene of it being the festive season, before moving to discussion on a range of promotional specials on offer at BWS, followed by a conversation with an "adult woman" that canvasses catching up with her friends before she starts her diet.
- d) Dealing firstly with concerns that the marketing communication encourages excessive consumption of alcohol. The BWS advertisement is simply alerting the audience to a wider price-promotional campaign running at BWS across summer called the 100 Days of Summer. This is a seasonal price-promotion campaign in which various beer, wine and spirits attract savings and discounts across a 100-day period coinciding with the summer months. The advertisements do not at any point make a suggestion for the alcohol to be consumed or in a rapid or excessive manner. It simply states that there are a range of special "Christmas" prices on BWS products during the "100 Days of Summer" promotional campaign. Fitzy and Wippa are asking what people are up to and play a short clip from a female who advises she is on her last day catching up with her friends ("the girls") before starting a diet. The term "get into it" according to the MacMillan dictionary is an informal statement meaning to 'start enjoying something' or to 'become enthusiastic'. It is the EDGs submission that this statement made by the radio host "Wippa" was an indication for the woman to enjoy her catch up with "the girls" and could not be taken as an inducement to drink in any interpretation. At no point does the conversation even mention alcohol or its consumption. The pre and post references to BWS are simply alerting the listener to a range of special prices that will be available at BWS over their 100 Days of Summer campaign.
- e) Finally in dealing with concerns it would have appeal to minors, the statements "ring, ding, dingling" and "is that sleigh bells jingling?" are made to set the scene around this being the Christmas festive period which is clear by the subsequent statement "I reckon the festive season is well and truly upon us". The festive season has appeal to all age demographics and could not be argued to be more enticing to children over that of the general population. Christmas carols have been an integral part of the Christmas tradition since the early 18th century with all ages taking delight in them. These statements are not sung, but are simply spoken by mature aged male commentators. There is no accompaniment of youthful or playful music or sounds which further distances them from a child's appeal. The remainder of the advertisement is about pricing specials and a woman starting her diet - neither of which would have strong or evident appeal to children.

- f) In summarising the content, it is clear there are no words or background sounds in the audio or the reasonable persons 'internal visualisation' of the conversation, that could possibly lead the listener into thinking the advertisement has either an inducement to excessive consumption; an encouragement to consume; or a strong and evident appeal to a Minor.
- g) Moving on to the advertisements placement, and the first requirement which is to comply with relevant existing placement codes. The Commercial Radio Code of Practice states:

2.1. A Licensee must not broadcast a Program which in all of the circumstances

2.1.13 presents as desirable:

(a) the misuse of alcoholic liquor

- h) As outlined above, the advertisement does not encourage excessive consumption and our previous arguments stand.
- i) Looking at the specific ABAC requirements that specify a 75% adult audience, we have been provided with data from MetroRadio on both the radio personalities and the show in which the ad is aired. The audience data we quote has been provided by them. The radio personalities are both morning show hosts of an Australian breakfast radio show on Nova 96.9 in Sydney, New South Wales which is sometimes syndicated to other stations around Australia. They are aged 41 and 38 and their show covers a range of topics for both general and mature audiences. They are definitely not children's radio program hosts. Their show ("the Fitzy and Wippa show") has an age demographic split of 78% over the age of 18. The pre-recorded advertisement was aired during the Dave McClung show which has an 84% adult (over 18) average audience.
- j) In the recent 118/17 decision, the Panel made the following interpretation of the placement rule:
- *An objective as opposed to subjective test is to be applied i.e. how would a reasonable person understand the primary appeal of the program;*
 - *Each program will need to be assessed individually on its own content;*
 - *A program that has appeal across age groups, including but not limited to minors will not generally be 'primarily aimed' at minors.*
- k) With this interpretation in mind, it is the EDGs position that the placement of *100 Days of Summer* advertisement is not in breach of the placement rule complying with both the Commercial Radio Code and the ABAC placement provisions. Nova 93.7FM and the Dave McClung show has an appeal across all age groups and is not primarily aimed at minors. On the

balance of probability a reasonable person would understand the primary appeal for this radio segment to be for persons over the age of 18.

- l) Accordingly, the complaint should be dismissed on both content and placement grounds, and the Panel should determine that there has been no breach of the Code.

The Panel's View

Introduction

16. This is one of three complaints lodged by Ms Pierce of the McCusker Centre for Action on Alcohol and Youth concerning alcohol advertisements broadcast on commercial radio in Perth. Greater detail about the background to ABAC and its application to radio is provided in Determination 123/17, and this determination deals directly with the issues in the complaint and does not provide the contextual background found in the sister Determination.
17. The complainant argues that the broadcast of the advertisement is a breach of the Content Standards and Placement Rules. The relevant content standards are Part 3(a)(i) and (b)(i) and the relevant Placement Rules are numbers (iii) and (iv).

Placement

18. Essentially the complainant contends that it is inappropriate to broadcast alcohol advertisements on radio in the period immediately after the end of the school day. This is because a large number of school children are driven home from school in the family car and hence will be exposed to the advertising. Government reports accompany the complaint which show that compared to earlier times, more children are driven to and from school as opposed to walking or riding a bike.
19. Placement Rule (iii) in essence imposes a 75% adult audience benchmark for the programming with which an alcohol advertisement can be aired. If a program can reasonably be expected to have more than 25% of its audience as minors, then the Rule has been breached.
20. In assessing if the Rule has been complied with, the Panel is to assess available data on the audience composition of the relevant program and draw an objective and essentially factual conclusion. In the case of commercial radio, the best available data are the radio ratings based upon surveys conducted of listeners by a research company contracted by Commercial Radio Australia.
21. The data for Perth radio at 3.45pm on Friday 8 December 2017 indicates:
 - Across all the time periods Nova was the most popular radio station for persons in the age group 10 to 17.
 - In the afternoon time slot referred to in the complaint the adult audience of the station is 84%.

22. The available data indicates that Placement Rule (iii) has not been breached and that the adult audience of the program was in excess of 75%.
23. Placement Rule (iv) provides that an alcohol advertisement must not be placed with a program that is primarily aimed at minors. This means the Nova 93.7 FM afternoon program needs to be assessed and a conclusion drawn as to its primary appeal.
24. The Nova 93.7FM afternoon program is broadcast from 1-4pm and is presented by Dave McClung. Mr McClung has worked in radio in several states and has hosted a number of different time slots.
25. The format of the afternoon time slot is based on popular music. The nature of the program would have appeal across age groups and could not be said to be primarily aimed at minors.
26. Accordingly, the advertisement has not been broadcast in a manner inconsistent with the Placement Rules.

Content standards

27. It is argued that the advertisement is particularly concerning as it features the voices of well known Nova presenters Fitzzy and Wippa and the phrase 'sleigh bells jingling' which would attract the attention of children. Further it is contended that the phrase 'get into it' is an inducement to drink.
28. Section (b) of the Code provides an alcohol marketing communication must not have strong or evident appeal to children. The issue is whether the advertisement and its references to Christmas could be said to breach this standard.
29. In assessing if a standard has been breached the Panel is to have regard to the probable understanding of the marketing communication by a reasonable person. The reference to a reasonable person means that the benchmark is the opinions, beliefs and values common in a majority of the community. A person who holds a different view is not 'unreasonable' but possibly their interpretation would not align with the majority of the community.
30. The Panel does not believe a reference to sleigh bells as used in the context of the advertisement would be strongly or evidently appealing to under 18 year olds. The conversation between the presenters and the 'caller' is adult in nature and does not contain language, expressions, music or other features likely to strongly appeal to children or adolescents. Further the voices of the presenters would be recognisable to regular Nova listeners but this does not seem evidently appealing to minors.
31. Finally, the Panel does not believe the expression 'get into it' can be fairly taken as an encouragement to excessive alcohol consumption or irresponsible alcohol related behaviour. It would be taken by a reasonable listener to be a reference to the caller having a night out with the girls. While it may well be reasonably implied that alcohol use will occur during the night out, there is no

suggestion that this use will be immoderate or consumption levels excessive or the pattern of use inappropriate.

32. Accordingly, the complaint is dismissed in relation to the Placement Rules and Code standards (a) and (b).