

ABAC Adjudication Panel Determination No. 124/17

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)
Debra Richards
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 Hit 92.9FM during the Carrie & Tommy show at 3.30pm on Friday 8 December 2017 and arises from a complaint received on 13 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 13 December 2017.
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 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 is not generally sought for the placement of a marketing communication and was not sought in this case.

The Placement

10. An advertisement for BWS was heard by the complainant in Perth at 3.30pm on radio station Hit 92.9FM during the Carrie & Tommy show.

The Complaint

11. The complainant is concerned that the advertisement 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, and links to government reports which indicated:
 - 49% of 5-6 year olds and 42% of 9-10 year olds are driven to school every day; and
 - 40% of Western Australian secondary school students travel to or from school each day by car.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (b)(iv) be directed at Minors through a breach of any of the Placement Rules.
13. 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

14. 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". In marketing alcoholic products, EDG has been fully aware of the requirement not to encourage excessive consumption or risky drinking or appealing to people not of legal purchase age.

- b) The ABAC Rules and Procedures makes it clear that retailer brand and price advertising do not require to be pre-vetted. As such, BWS did not submit this particular advertisement for prevetting, however, the advertisement and its copy is still subject to stringent internal controls over the advertisement and its messaging to ensure compliance with internal policies and ABAC.

- c) Up until the 1st November 2017 the ABAC did not adjudicate on the placement of advertising.

- d) The Commercial Radio Code of Practice states:

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

2.1.3. presents as desirable:

- (a) the misuse of alcoholic liquor;

As the advertisement in question promotes the price for a single bottle of Jacobs Creek along with the message 'Drink Responsibly' it is our

position that in no way could this advertisement present the misuse of alcoholic liquor as desirable.

- e) The Carrie and Tommy show is hosted by The Project's Carrie Bradshaw and comedian Tommy Little from 3 to 4 pm, Monday to Friday. Up-to-date audience data provided to us by MetroRadio indicates that this time slot has an average audience of 87% that are aged 18 or over. These figures comply with the ABAC requirement to maintain an audience comprised of at least 75% mature adults.
- f) Focussing then on the content, there are no words or audio used in the promotion or the reasonable persons 'internal visualisation' of the conversation, that could possibly lead the listener into thinking the advertisement has strong and evident appeal to a Minor.
- g) Taking the advertisement as a whole, a 'reasonable person' would view the advertisements as simple retail price advertising. There is nothing in the advertisement that a reasonable person would view as likely to have a strong or evident appeal to children.
- h) 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.*
- i) With this interpretation in mind, it is the EDG position that the placement of our Jacob's Creek advertisement is not in breach of the placement rule. 92.9FM has an appeal across all age groups and is not primarily aimed at minors. The Carrie and Tommy show discuss a multitude of topics including LGBTQI equality, Brain Cancer Research, Terrorism and the placement of this advertisement is not counter intuitive to the general content of the program.
- j) Like any other retailer, using a special price is a very common promotional tool. BWS has had a long history of offering great specials on beer, wine and spirits.
- k) There is quite simply no evident appeal to Minors in the advertisement nor has it been placed in a timeslot that is in breach of the placement rule. Accordingly, the complaint should be dismissed and the Panel should determine that there has been no breach of the Code.

The Panel's View

15. 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.
16. The complaint argues that the broadcast of the advertisement is a breach of the Placement Rules. It is not asserted that the content of the advertisement is inconsistent with an ABAC standard. The relevant Placement Rules are numbers (iii) and (iv).
17. 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, far more children are driven to and from school as opposed to walking or riding a bike.
18. 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.
19. 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.
20. The data for Perth radio at 3.30pm on Friday 8 December 2017 indicates:
 - Hit 92.9 FM has the second highest overall audience in the 10-17 age group (behind Nova);
 - The station is a more moderate performer in the afternoon time slot (12 noon – 4pm) coming fourth behind Mix 94.5 and Nova in second spot;
 - At 3.30pm the adult audience of the station is 87%.
21. 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%.
22. Placement Rule (iv) provides that an alcohol advertisement must not be placed with a program that is primarily aimed at minors. This means the Hit 92.9 FM afternoon program needs to be assessed and a conclusion drawn as to its primary appeal.

23. Hit 92.9 FM is part of the Southern Cross Austereo's Hit Network and is marketed as Perth's station for 'hits and old school'. The Carrie and Tommy program airs from 3pm to 4.30pm weekdays and is presented by Carrie Bickmore and Tommy Little. Ms Bickmore is best known as a co presenter of the TV show 'The Project'. Mr Little is a comedian and a long time radio presenter.
24. While the program would have appeal across age groups including under 18 year olds, the themes, music selections and format of the show could not be said to be primarily aimed at minors.
25. Accordingly, the advertisement has not been broadcast in a manner inconsistent with the Placement Rules and the complaint is dismissed.