



## **ABAC Adjudication Panel Determination No. 52/18**

**Product:** Coopers Session Ale  
**Company:** Coopers Brewery  
**Media:** Outdoor  
**Complainant:** Confidential  
**Date of decision:** 11 May 2018  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Debra Richards  
Professor Louisa Jorm

### **Introduction**

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns a digital outdoor advertisement for Coopers Session Ale by Coopers Brewery (“the Company”) and arises from a complaint received 11 April 2018.
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.
2. 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.
  3. 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.
  4. 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.
  5. The complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

### **The Complaint Timeline**

3. The complaint was received on 11 April 2018.
4. 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 completed in this timeframe.

### **Pre-vetting Clearance**

5. The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed alcohol beverage marketing communications

against the ABAC prior to publication or broadcast. Pre-vetting approval was obtained for the content of this marketing communication (16101).

## The Marketing Communication

6. The complaint relates to the following advertisement that was located on a digital outdoor site attached to the Murray Hotel, cnr of Murray St and Thomas Road, West Perth.



## The Complaint

7. The complainant objects to the marketing as:
- The billboard is in clear view of a high school (Perth Modern School) and the Perth Children's Hospital, being across the road from both sites and would be clearly viewed by children;
  - Creates confusion with a tropical flavoured soft drink due to the imagery and wording of the ad; and
  - Uses colours and imagery that would appeal to young people.

## The ABAC Code

8. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:

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

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

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

**Placement Rules** means:

- (ii) 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).
- (iii) 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
- (iv) 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)
- (v) A Marketing Communication must not be placed with programs or content primarily aimed at Minors

**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.

## **The Company's Response**

10. The Company responded to the complaint by letter dated 26 April 2018. The principal points made by the Company were:
  - a) The objective of the advertisement is to promote Coopers Session Ale. The advertisement features a play on the word 'tropical' and the nature of the beverage being 'ale'. The creative concept of the advertisement is to link the tropical tasting notes of the beer to the artwork, hence the tagline "*It's a bit TropicALE*".
  - b) We do not consider that the advertisement has "*Strong or Evident Appeal to Minors*" as alleged in the complaint. In our view, a reasonable person to whom the advertisement is likely to be communicated would understand that the advertisement is for an alcoholic beverage, and not a tropical flavoured soft drink, for the following reasons:
    - i. The Coopers brand is familiar as the largest Australian owned brewery, known for its brew ales, stout, lagers, light and low carb beers. The Coopers product packaging depicted within the creative references 'can fermentation', 'brewery', 'brewed' and 'ale' clarifying the alcoholic nature of the product. The Coopers beer can is the dominant feature of the advertisement.
    - ii. The word 'ale' is also emphasised in the tag-line, "TropicALE" through the use of blue highlighting matching the can, which further distinguishes the product as a beer and not a soft drink.
  - c) We also disagree that the advertisement would appeal to young people due to the imagery and colours used, as alleged. In this regard we note that Session Ale is a style of ale primarily characterised by its drinkability, refreshment and the balance between its character and a lower alcohol content. Coopers Session Ale is a refreshing summer style beer with tropical fruit notes and an aromatic hop character. The colourful nature of the advertisement with its tropical/summery theme is suggestive of a man's Hawaiian shirt, with detailed illustrations depicting tropical/summery icons including dragon fruit, pineapples, frangipani, hibiscus, palm fronds and ukulele. It is not a simplistic drawing intended to appeal to minors.
  - d) The advertisement, created by KWP! On behalf of Coopers Brewery, combines these elements to produce a creative concept that links the taste of the beer with the artwork, to indicate to the viewer that the advertisement is for an alcoholic beverage. A reasonable viewer would understand this, and

that the play on words in the tag-line “TropicALE” is referring to a beer product.

- e) We also note that tropical settings and colours are a common theme used in many alcohol advertisements, particularly beers. The tropical theme does not pose any stronger or more evident appeal to children than beaches, rivers, forests or other outdoor settings might. Placing the Coopers product in a tropical setting is intended to reflect the season and consumer trend in consumption of Session Ale over the summer period, which a reasonable viewer would understand.
- f) In support of our position, we refer to ABAC Adjudication Panel Determination No. 61/17, in which the Panel notes the following:
  - i. in paragraph 16: *“the advertisement makes no claim that the product has any therapeutic benefit. It is also asserted that the product’s name is well known as an alcohol beverage and the reference to vodka within the advertisement establishes that the advertisement is not referring to a soft drink”*. We note, in this case that the word ‘ale’ establishes that the advertisement is not referring to a soft drink.
  - ii. in paragraph 18: *“The Panel does not believe the advertisement would be confused as promoting a soft drink. The advertisement does place the product as a vodka beverage. Further, there are no other aspects of the advertisement which can fairly be concluded as creating a strong or evident appeal to under 18 year olds”*.
- g) In response to your second query, we do not believe that the advertisement breaches section 3(b)(iv) of the Code by directing marketing at minors in breach of one of the Placement Rules. We note that the definition of Placement Rules in Part 6, includes, relevantly that *“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”*. The relevant parts of the Outdoor Media Association Alcohol Guidelines (**OMA Guidelines**) require that *“alcohol advertising is not placed on fixed signs that are located within a 150 metre sight line of a primary or secondary school. This generally relates to any access gates to the school”*. The OMA Guidelines do provide an exception as follows: *“There are some locations near schools where this policy does not apply, for example where the school is in the vicinity of a club, pub or bottle shop or any other venue that sells alcohol products. The policy does not apply to transit advertising on buses and taxis. We draw assistance from the Guidance Note to the Code in respect of section 3(b)(iv), which relevantly states that the OMA Guidelines exclude “licenced venues”*



such as a club, pub or bottle shop or any other venue that sells alcohol products in the vicinity of a school.

- h) The advertisement in question forms part of a digital sequence through a billboard attached to the Murray Hotel at the corner of 718 Murray Street and Thomas Road, West Perth. The Murray Hotel, on which the billboard is located, is licenced to sell liquor (Licensee: The Murray Hotel Pty Ltd, Hotel Licence No. 6010102377). The Mayfair Lane Pub is also within 100m of the advertisement.
- i) Further to the exclusion for licensed premises, we do not accept that the advertisement breaches the placement rules on account of the line of sight. In this regard, we note that the OMA Guidelines only apply to the advertisement to the extent it is *“located within a 150 metre sight line of a primary or secondary school”*. While the location of the advertisement is approximately 82.13 metres from the Perth Modern School, due to the dense foliage and buildings obscuring the line of sight, considered from the *“access gates to the school”* and the fact that the advertisement is angled away from the school we do not consider that it is within the *“sight line”* of the school and therefore, in our submission, the advertisement does not breach the Code or OMA Guidelines. The images below document these facts:



**Figure 1: School located behind the trees opposite the Shell service station**



**Figure 2: Line of sight from Perth Modern School (The Murray Hotel is the charcoal grey building located behind the Shell Service Station)**

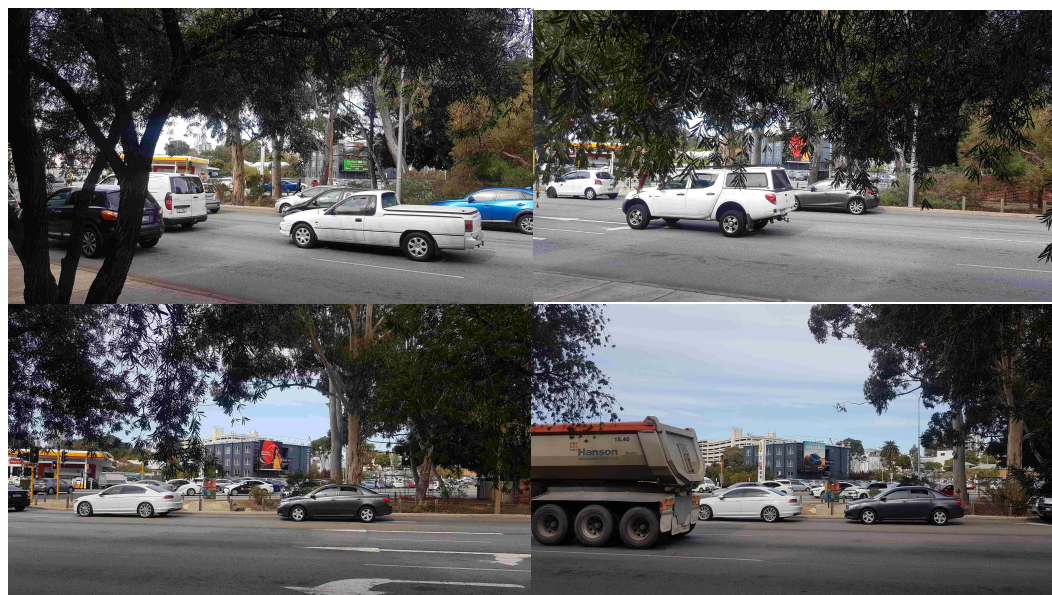


**Figure 3: Google satellite image of the line of sight between Perth Modern School and The Murray Hotel**

- j) Following receipt of the complaint, enquiries were also made with APN Outdoor Advertising, the operator of the digital outdoor billboard, which advised that in its view the site was acceptable for Coopers, noting the heavy vegetation and that the billboard does not face towards the school. They stated that: *“while the sign is within 150m of the school, it is not within the sight line of the school and therefore the policy does not apply”*.
- k) Based on the above, we respectfully submit that the complaint should be dismissed on the basis that:
  - i. the advertisement does not breach the Code, in particular section 3(b)(i) and 3(b)(iv) of the Code; and
  - ii. the advertisement does not breach the OMA Guidelines, in particular there has been no breach of the placement rules pertaining to primary and secondary schools.
- l) If, however, the Panel does not agree that no breach has occurred, in our respectful view such a breach should be classified as a “no fault breach” pursuant to Part 4 of the Code, noting that the placement was checked with the relevant outdoor media company and deemed compliant, so a breach was reasonably unforeseeable by and outside the reasonable control of the Marketer.



- m) We note that there has only been one complaint made in relation to the advertisement and the public response to the advertisement to date has been overwhelmingly positive. We also note we have used the Murray Hotel venue several times in the past for Coopers advertising without incident. We regret if any viewers were offended by the advertisement and would like to take this opportunity to assure the Panel and the viewers that this was never our intention and that we take our responsibilities in regard to responsible alcohol consumption seriously.
  - n) As a gesture of respect for the process, we have taken the advertisement out of rotation at the Murray Hotel site whilst the complaint is investigated.
  - o) We appreciate the opportunity to respond to the complaint and acknowledge our commitment to self-regulation of advertising in Australia. We sincerely hope that the Panel reviews the advertisement positively having regard to the points raised above.
11. The Outdoor Media Association supplied the following additional photographs and comments by their member on 7 May 2018:
- a) Photographs taken on the footpath outside of the school grounds on Roberts Rd. Noting that along Roberts Rd and outside of the school there were areas where you could review the creative wholly but it was not in the eyeline of the pedestrian, ie you are not looking directly at it while you are walking along the footpath. In addition cars do not stop on Roberts Rd in this vicinity for pick up and drop off.



- b) Photographs taken from the closest gates on both Thomas St and Roberts Rd. Noting that the billboard could not be viewed from either gate and cars do not stop along Thomas St or Roberts Rd in this vicinity for pick up and drop off





- c) Photographs taken from inside the school grounds along the fence closest to the billboard (with permission from the school). Noting the billboard was wholly obscured from most places inside the school grounds and partially obscured in a couple of locations.



- d) Cars were parked around the school in Subiaco Rd and Hamilton St with some cars parked on Roberts Rd closer to Hamilton St.

## The Panel's View

12. Murray Street in West Perth is a major arterial road and is the location for many stores, restaurants and hotels as well as important public facilities such as the Princess Margaret Hospital and the famous Perth Modern School. This determination concerns the use of a digital billboard placed upon the façade of the Murray Hotel in the near vicinity of the hospital and school to advertise the Company's Session Ale product.
13. The complainant has raised two separate but related concerns about the billboard advertisement for the product. The first concern is about the location of the billboard that is argued to be unsuitable because of its proximity to the hospital and school. The second concern is about the content of the advertising that it is argued confuses the product with a tropical flavoured soft drink. Both concerns relate to the appeal of the advertising to under 18 year olds.
14. The ABAC provides requirements for both the placement of alcohol marketing and standards for the content of marketing. Both the placement rules and the content standards will be considered.

### Is the placement of the billboard consistent with the ABAC placement rules?

15. The ABAC contains a series of interlocking rules that govern the placement of alcohol marketing in outdoor locations, broadcast electronic media, print media and digital platforms. Placement Rule 1 provides that a marketing communication must comply with codes regulating alcohol that have been published by Australian media industry bodies. For outdoor billboards, the applicable code is the Outdoor Media Association Alcohol Guidelines.
16. The Guidelines provide that *... alcohol advertising is not placed on fixed signs that are located within a 150 metre sight line of a primary or secondary school. This generally relates to any access gates to the school.* The Guidelines go on to provide a qualification to the 150 metre sight line restriction by stating *... this policy does not apply, for example where the school is in the vicinity of a club, pub or bottle shop or any other venue that sells alcohol products.*
17. The Company accepts that the billboard located on the façade of the Murray Hotel is within 150 metres of the Perth Modern School. It argues however that the Guideline and hence Placement Rule 1 has not be breached for two reasons, namely:
  - The physical placement of the digital billboard on the façade of the hotel brings the advertising within the qualification of the 150 metre requirement; and
  - Due to the presence of the dense foliage and the angle of the billboard to the school, the advertising was not within the 'sightline' of the school.
18. The Panel does not believe the 'sightline' argument can be accepted. The 150 metre sightline cannot be subject to variable factors such as the density of the foliage as this would mean a billboard may or may not be suitable for alcohol advertising depending on whether the foliage in the area was trim or overgrown.

This interpretation is hardly practical and the guideline needs to be understood in a way that provides continuity and certainty. In any event, additional photographs show that the billboard is currently visible and within 150m sightline of several locations within the school grounds and from the footpath outside the school.

19. The second argument advanced by the Company is that the billboard is placed on the hotel building and sits within the qualification. The policy intent of the qualification would be to recognise that hotels and other alcohol outlets may be positioned near schools and it would be unreasonable to prohibit the hotel or retailer to advertise itself using signs on their premises. In some instances, a hotel may have been established before the school was built.
20. In the current case the billboard is owned by the outdoor advertising company APN and not by the Murray Hotel. The billboard is digital and that means that a number of different advertisements are displayed on the billboard in rotation. The alcohol advertisement is not promoting the Murray Hotel, nor is it linking the availability of the product at the hotel. The selection of the site as being suitable for the billboard would be related to the high traffic volumes on the roads and not the presence of the hotel.
21. In interpreting the ABAC the Panel takes a 'spirit and intent' approach and where a provision might be interpreted in more than one way, the interpretation that is consistent with the policy intent of the ABAC should be preferred. In this case, the Panel does not believe Placement Rule 1 and hence the OMA alcohol guideline should be taken to mean that alcohol advertising can be placed on a billboard within 150 metres of a school when that advertising has no connection to the Murray Hotel.
22. Accordingly the Panel believes the placement of the advertisement is a breach of Placement Rule 1.
23. The Company argues that should the Panel find a breach of Placement Rule 1, then this breach should be regarded as a no fault breach. It is contended that the Company checked the use of the location with 'the relevant outdoor media company and [the location] was deemed compliant, so a breach was reasonably unforeseeable by and outside the reasonable control of the marketer.'
24. The Panel may make a no fault finding if a breach occurs that is reasonably unforeseeable or outside the reasonable control of an alcohol company or their advertising agency. The impact of a no fault finding does not diminish the responsibility of the Company to act on the breach finding and either remove the marketing item or modify the item so that it complies with the ABAC requirement. The no fault finding merely recognises that the breach arose notwithstanding the prudent and reasonable endeavours of the Company to meet the Code requirements.
25. The Panel believes a no fault finding should be made in this case. This is the first occasion the Panel has made a ruling on the intent and meaning of the qualification to the 150 metre from a school restriction for outdoor advertising contained in the OMA Alcohol Guidelines. The position taken by the Company and the outdoor media firm that the site fell within the qualification was not unreasonable given the lack of a previous ruling on the point. The Company acted

in a manner that recognised the ABAC requirements and it believed it was acting in accordance with them.

### **Strong Appeal to Minors**

26. The Complainant is also concerned about the content of the advertising arguing it creates confusion with a tropical flavoured soft drink and the advertisement uses colours and imagery that would appeal to young people.
27. Section 3(b) of the Code provides that an alcohol marketing communication must not strongly or evidently appeal to minors. Such appeal might arise if imagery is used that creates confusion with a soft drink.
28. The Company argues that the advertising does not breach the provision as the product is clearly identified as a beer and the use of colours and fruit images would not be taken as having strong appeal to children.
29. In assessing if a code standard has been breached, the Panel is to have regard to the probable understanding of the marketing communication by a reasonable person taking its content as a whole. The reference to a 'reasonable person' is drawn from the common law system and means that the attitudes, opinions and values held in a majority of the community is the benchmark.
30. The Panel does not believe that the advertisement would be confused with a soft drink and does not have a strong appeal to minors. In reaching this conclusion, the Panel has noted:
  - The product is presented in a standard beer can and the Coopers brand name is reasonably well recognised as a beer product;
  - The play on the word 'Tropicale' give emphasis that the product is a beer;
  - The use of Hawaiian style fruit and images is colourful but in the overall context is not considered as having strong appeal to minors.
31. Accordingly the complaint is upheld in relation to Placement Rule 1 and is dismissed in relation to section 3(b).