



## ABAC Adjudication Panel Determination No. 80/18

**Product:** The Bavarian  
**Company:** Rockpool Dining Group  
**Media:** Outdoor  
**Complainant:** Confidential  
**Date of decision:** 31 August 2018  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Debra Richards  
Professor Louisa Jorm

### Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns an advertisement for The Bavarian by Rockpool Dining Group (“the Company”) that was placed on a bus operating in Sydney’s western suburbs and arises from a complaint received on 6 August 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.
3. 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 the 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 6 August 2018.
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 obtained for the content of the marketing communication.

## The Marketing Communication

10. The advertisement was for beer varieties available at the Company's venues in Western Sydney that was placed on a bus servicing a school run (service 3034).



## The Complaint

11. The complainant is concerned that the advertisement that covered the whole of a bus used for school service 3034 breaches:
  - a) part 3(b)(i) of the ABAC Code on the basis:
    - it is specifically targeted at minors by its placement on a bus used for a school service used exclusively for minors that collects and distributes children to at least three schools and one early learning centre exposing children to the marketing while waiting for, boarding and alighting from the bus, and also while travelling to school in cars or at bus stops during peak school travel period; and

- It uses brand identification, including logos on ... merchandise for use primarily by minors as it is a school bus for use exclusively by minors.

- b) Part 3(b)(iv) of the ABAC Code as a breach of point (iii) of the placement rules as the marketing communication is not placed where the audience is reasonably expected to comprise at least 75% adults, because it is a school bus for use exclusively by minors.

## The ABAC Code

12. 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.

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

### **Placement Rules** 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

### **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.

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

## **The Company's Response**

14. The Company responded to the complaint by letter dated 21 August 2018. The principal points made by the Company were:
- a) Thank you for taking the time to give your feedback, we take all complaints very seriously and this concern you have raised is no different.
  - b) Upon receiving this complaint, we immediately contacted Moove Media, the company which we made the booking through for this bus advertising. When booking this media, we were not made aware by Moove Media that there were any school bus routes departing the Northmead depot, therefore we were also equally disappointed and concerned to see our advertising on a bus which was dropping children off at school.
  - c) We were advised that on occasion a school service route is run out of Northmead depot. Upon receiving this complaint, the advertiser removed these buses from the Northmead depot immediately.
  - d) We deeply apologise for any offense this may have caused to any members of the public and local community. The Bavarian is a family friendly venue and a local favourite for many communities around New South Wales, Victoria and Queensland. Our popular 'Kids Eat Free Sundays' see many local families gather at our venue each week to enjoy our friendly and warm family atmosphere.
  - e) Moove Media provided the following response:
    - a. Firstly, I can confirm it is not a dedicated school bus- it is primarily a route bus. Saying this however, route buses from the Northmead depot do occasionally run a school service route, we can't confirm route buses at this depot will not be utilised for a school route on occasion.
    - b. What we have done is prioritised for this artwork to be removed immediately from the buses at Northmead depot and we are exchanging this to a bus at our Dural depot as it has similar Hills coverage and no school routes. Moove Media will cover the cost of the artwork removal as

well as reprint and install costs. This process is prioritised but will take around a week for reprint and install.

- c. You do have two Superbuses currently active from Northmead- both will have to be removed. One bus expires on 5<sup>th</sup> August and the timeframe once print and install is given is minimal so to compensate we can give additional run on for the redone bus. This will then stretch from the 30<sup>th</sup> of September – we can give 4 weeks additional run on (to compensate the second bus and timeframe for redone creative on another bus) and you will still have 4 weeks run on after this subject to bus availability as stated on the booking form.

### **The Panel's View**

15. The Company is the operator of a series of restaurants branded as “The Bavarian” which are themed upon a Bavarian beer hall. The restaurants are located across Australia including the Western Sydney suburbs of Rouse Hill and Castle Hill. The Company promotes its venues via marketing in various mediums including the placement of advertisements on public buses.
16. The complaint concerns an advertisement that was placed on a bus operating in Western Sydney. The advertisement takes up both sides and the rear of the bus and promotes seventeen varieties of beer available at The Bavarian restaurants. The complainant has identified that a bus with the advertisement has been servicing a school route and contends that this is highly irresponsible. In particular, it is argued the advertisement breaches the ABAC provision which states that alcohol marketing must not have strong or evident appeal to minors.
17. In response to the complaint the Company has stated that it was unintended that a bus with the advertisement would service a school route. It is explained that the advertising has now been removed from the school route. To this extent the complainant's point that it is inappropriate for an alcohol ad to be on a bus serving a school route has been accepted.
18. In relation to the ABAC the complaint is specifically referenced to Part 3(b)(i) of the Code which provides that an alcohol marketing communication must not have strong or evident appeal to minors. This Code provision has several components which go to both the content of the marketing and the placement of the marketing.
19. The content standard is further amplified in the definition section of the Code which provides some examples of when a marketing item might be considered as having strong or evident appeal to minors. One of these examples is when a marketing communication uses brand identification, including logos, on clothing, toys or other merchandise for use primarily by minors. The complainant argues that the advertising on a bus servicing a school run was the use of brand identification on “merchandise” for use primarily by minors.
20. The Panel does not believe that the content of the advertisement can be said to have strong or evident appeal to minors. In reaching this conclusion the Panel has noted:

- The Code provision cited by the complainant cannot be said to apply to a school bus as a bus is not merchandise within the meaning of this Code section.
  - The term merchandise is to be understood alongside the terms clothing and toys and is intended to capture marketing items such as a giveaway or activities like placing branding on a child's scooter or a frisbee.
  - More broadly, the advertisement features photographs of glasses of beer depicted in a style not likely to be particularly appealing to minors.
21. The second component of Part 3(b) raised by the complaint is the direction of marketing towards minors through a breach of the placement rules. The placement rules concern the use of particular media to promote alcohol and has the policy aim of directing marketing towards predominantly adult audiences. The complainant contends that the placement of the advertisement on the bus breaches placement rule (iii).
  22. The rules apply different requirements to different media, largely shaped by the technical capacity of the media to be manipulated so as to be directed towards specific audience segments. As a result the more stringent rules apply to digital platforms e.g. Facebook and YouTube and less stringent rules apply to broadcast media. This is because it is not practically possible for instance for endeavour to restrict the potential audience of say a billboard located on a highway in the same way which it is possible to place technological barriers on who might access a website.
  23. Placement rule (iii) provides if digital, television, radio, cinema or print media platforms do not have age restriction controls available then a marketing communication may only be placed where the audience is reasonably expected to comprise 75% adults. This rule does not apply to outdoor advertising.
  24. The requirement applying to outdoor advertising is found in placement rule (i). This rule incorporates into the ABAC the restrictions contained in the Outdoor Media Association Code of Ethics. This Code does restrict a fixed outdoor placement of an alcohol ad e.g. a billboard to areas beyond 150m of a school but doesn't attempt to restrict the use of alcohol advertising on motor vehicles.
  25. The end point of this is that it is not a breach of the ABAC to place an advertisement on a public bus. While it can be accepted that it is not desirable to have an alcohol advertisement on a bus servicing a dedicated school route, this is not a breach of the placement rules.
  26. The placement rules are a relatively recent addition to the ABAC Scheme having come into operation in November 2017. The Scheme's Management Committee has foreshadowed a review of the rules after their first twelve months of operation and it would be useful to test if the rules can be adjusted to deal with the circumstances of advertising on dedicated school buses.
  27. Accordingly, the complaint is dismissed.