



ABAC Adjudication Panel Determination No. 118/18

Product: BWS
Company: Endeavour Drinks Group
Media: Outdoor
Date of decision: 24 October 2018
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns the placement of outdoor advertising for BWS on a bus stop by Endeavour Drinks Group (“the Company”) and arises from a complaint received 29 September 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:
 - 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;

- 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 other codes as well as meeting the standards contained in the ABAC.
 4. 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.
 5. 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.
 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 29 September 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 completed in this timeframe.

Pre-vetting Clearance

9. 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 (16495).

The Marketing Communication

10. The complaint relates to the following poster that was placed on a bus shelter in Manning, Western Australia, on Manning Rd near the corner of Goss Avenue.



The Complaint

11. The complainant objects to the marketing as:
- it is placed where a lot of university students aged 17-24 travel by bus, vehicle or bicycle from the freeway to Curtin University (which has 25,000 visitors per weekday and 7,000 parking bays) and Liquor Licensing authorities deem this group vulnerable to binge drinking; and
 - it suggests that students have a beer fridge and promotes both not moving muscles and getting alcohol delivered fast with the same mentality as the saying "Hard work never killed anyone, but why take the chance".

The ABAC Code

12. 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;

- (a)(ii) show (visibly, audibly or by direct implication) or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage;
- (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:

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

The Company's Response

14. The Company responded to the complaint by letter dated 15 October 2018. The principal points made by the Company were:

- a) This response addresses advertising, marketing and retail activities under the control of Endeavour Drinks Group (**EDG**), which includes BWS. EDG's ambition is to be Australia's most responsible retailer of alcoholic beverages and as part of that commitment is a signatory to the 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.
- b) As part of our community charter, 'Our Community, Our Commitment', EDG has in place a range of industry-leading initiatives to ensure that minors are

not served alcohol and to encourage responsible drinking practices. These include:

- i. ID25 (ask for ID from anyone who looks under 25);
 - ii. Don't Buy It For Them (stopping secondary supply to minors);
 - iii. our Intoxication Policy (refusal of service to anyone who may be intoxicated); and
 - iv. 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".
- c) In marketing alcoholic products, EDG has been fully aware of the requirement not to show or encourage irresponsible behaviour related to the consumption or presence of alcohol, and not to direct marketing at minors in breach of the Placement Rules. It is our view that the Ad does not encourage irresponsible behaviour related to the consumption or presence of alcohol, and is not directed at minors in breach of the Placement Rules.
- d) We believe the Ad does not encourage irresponsible behaviour related to the consumption or presence of alcohol in breach Part 3(a)(ii) of the Code.
- i. The Ad uses tongue-in-cheek humour to convey the message that delivery of goods, and specifically express delivery, is convenient. The phrase "Don't move a muscle" combined with the accompanying asterisk and corresponding disclaimer (in small text) "Excluding hand muscles used to place order" is a clear play on the well-known use of fine-print disclaimers in advertising which most members of the community would be aware of. A reasonable person would understand the Ad was simply using this humour to convey a message about convenience. A reasonable person would not conclude that BWS was encouraging sedentary behaviour or not moving any muscles, or any genuine 'rescue' taking place.
 - ii. The Ad as a whole focuses on ordering and delivery, not the consumption of alcohol. Express delivery, in itself, does not encourage excessive consumption of alcohol or irresponsible behaviour related to alcohol. Express delivery and home delivery are driven by convenience and service. The distinction between alcohol purchase and consumption has been considered by the Panel in a previous decision (Determination No. 9 & 14/16), in which the Panel observed that: "...*There is a clear distinction between the purchase of an alcohol product and the pattern of its subsequent consumption. Alcohol by its nature is a product with a relatively long shelf life in that it can be stored*

for months or in the case of wine and spirits, for years, prior to its use. It does not follow that simply because alcohol products are home delivered that a person will then engage in binge drinking, any more than a person purchasing a product in store at a bottle shop will engage in subsequent excessive or rapid consumption of the product purchased.”

- iii. The responsible service of alcohol is a very important part of EDG’s operations, including for the BWS on Demand service. EDG’s responsible service initiatives outlined earlier, including ID25 and our Intoxication Policy, apply to our delivery services to ensure that alcohol is not delivered to someone who is under 18 years of age or someone who is intoxicated.
 - iv. We should also note that the Ad carries our “Our Commitment, Our Community” ID25 logo, which emphasises our commitment to the responsible service and marketing of alcohol.
- e) The Ad was displayed on an Adshel bus stop panel on Manning Road, Manning (WA) near the corner of Goss Avenue (**Ad Location**). We believe that the Ad Location does not breach Part 3(b)(iv) of the Code in that it is not directed at Minors through a breach of the Placement Rules. Given the Ad is an out of home (**OOH**) advertisement, the most relevant guidance on placement is given by the Outdoor Media Association (**OMA**), in particular the OMA’s Placement Policy. The OMA’s Code of Ethics, Alcohol Advertising Policy and Placement Policy require that alcohol advertisements are not displayed within a 150-metre sightline of a primary or secondary school, and are only displayed if approved by the AAPS. We have been advised by Adshel (the organisation which controls the particular OOH bus stop panel), that the Ad Location is not within a 150-metre sightline of any primary or secondary school and this check was conducted before the Ad was displayed. Further, we understand that Adshel consulted the OMA’s MOVE enquiry service prior to the placement of the panel at the Ad Location and that OMA is of the view that the Ad Location does not breach its Placement Policy. The Ad was also approved by the AAPS prior to display. For completeness, Curtin University is not a primary or secondary school and in any case, the Ad Location is not within 150-metres sightline of Curtin University (we estimate the distance at over 1.5km).
- f) In addition to the above, to address the concerns raised in the complaint more generally:
- i. Manning Road is a major thoroughfare road in Perth, linking Albany Highway in Cannington to Kwinana Freeway in Como, and it forms the entirety of WA’s State Route 26. It is reasonable to expect that the

composition of traffic via Manning Road (via all modes of commute) to be very diverse.

- ii. We estimate that Curtin University is over 1.5km from the Ad Location and given the thoroughfare nature of Manning Road, we do not believe that the majority of traffic would comprise of Curtin University attendees. In any case, we believe that the significant majority of Curtin University attendees would be over 18 years of age.
- iii. Finally, we should also point out that we have been advised by Adshel that the Ad was removed from the Ad Location on or about 30 September 2018.

The Panel's View

15. BWS is a major Australian alcohol retailer. This determination concerns a bus shelter shed advertisement for the Company's home delivery service. The bus shed is located on Manning Road which is an important arterial road in Perth. According to Google Maps the bus shed is situated approximately 2.5 km by nearest road route to Curtin University.
16. The complainant raises two concerns about the advertisement namely:
 - its location means that it will be visible to a large number of Curtin University students using Manning Road by private or public transport including students aged under 18 years old and this group is vulnerable to binge drinking; and
 - the message that you don't have to 'move a muscle' to have alcohol supplied to a home beer fridge is irresponsible.
17. Underlying the complainant's concern is likely a view that given the harm the misuse of alcohol can cause, to have the product easily accessed through home delivery services is undesirable, particularly if the service is used by younger adults. While home delivery of products is not new the growth in the 'gig' economy and accessing goods such as meals via services like uber eats does demonstrate a shift in how goods and services are accessed in the community and no doubt this also impacts on how people purchase alcohol.
18. The use of alcohol and how the product should be best regulated is ultimately a matter for government. Within the current multifaceted regulatory framework, the role of the ABAC scheme is to create a set of standards which go to the content of alcohol marketing irrespective of how that marketing occurs and rules about the placement of marketing items which aim to direct the marketing towards adult audiences and away from minors. The scheme does not purport to regulate how or where alcohol may be accessed. Controls on accessing alcohol are contained in State liquor licensing regimes and not the ABAC.

19. What this means in relation to the current complaint is that the ABAC does not go to the desirability or otherwise of home delivery by alcohol retailers as a means of an adult consumer accessing alcohol. While Part 3 (a) (ii) of the Code provides that alcohol marketing must not encourage irresponsible or offensive behaviour that is related to the consumption or presence of alcohol, this provision cannot fairly be said to prohibit the advertising of home delivery services.
20. Equally the Panel does not believe the ad is encouraging excessive consumption or binge drinking. The ad states a proposition that home delivery is a convenient means to purchase alcohol. It does not suggest or imply a subsequent pattern of alcohol consumption. It is far too long a bow to interpret a message that alcohol can be conveniently purchased to mean that the purchaser, because of this convenience, will then engage in excessive consumption.
21. Further, the ad doesn't suggest how much alcohol should be purchased and even if a person purchased more than they might have if they had to go to a store and transport the product home themselves, this does not mean the purchased alcohol will be consumed in a reckless manner. Alcohol by its nature has a relatively long shelf life and a purchased carton of beer or case of wine for instance can be consumed over months or even years by a single person or by multiple persons.
22. The ABAC does contain a series of rules regarding the placement of alcohol advertising. These rules impose differing obligations on alcohol marketers largely dependent on the technical capacity of the particular medium to target marketing towards (and away from) age groups. Hence digital platforms such as Facebook or Youtube have a physical capacity which can endeavour to exclude under 18 year olds from viewing alcohol marketing. The ABAC placement rules require that available capacities be used for this purpose. Clearly outdoor advertising on billboards or bus shelter sheds cannot be shielded from under 18 year olds. The rules here attempt a more modest objective and that is to avoid placing outdoor alcohol ads near to schools where a disproportionate part of the likely audience of the ad will be under 18 years old.
23. The complainant argues that the bus shed in this case will be visible to a large number of university students and this will include students who will be aged under 18. In reality the number of under 18 year olds in Australian universities is a significant minority of the overall university population given only undergrads coming straight from high school will fall into that age group and then typically only for part of their first year of studies. In any event the applicable placement rule does not restrict advertising in the vicinity of universities. The rule in relation to schools places a 150 metre line of sight prohibition on outdoor sites and there is no school within that radius from the Manning Road bus shed where the ad appeared.
24. As the ad does not breach any of the relevant ABAC provisions, accordingly the complaint is dismissed.