



ABAC Adjudication Panel Determination No. 22/20

Product: BWS
Company: Endeavour Drinks
Media: Digital (Facebook & Website)
Date of decision: 25 March 2020
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns digital marketing for BWS by Endeavour Drinks (“the Company”) and arises from a complaint received 28 February 2020.
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 Code”) – 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 and Policies – which place 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

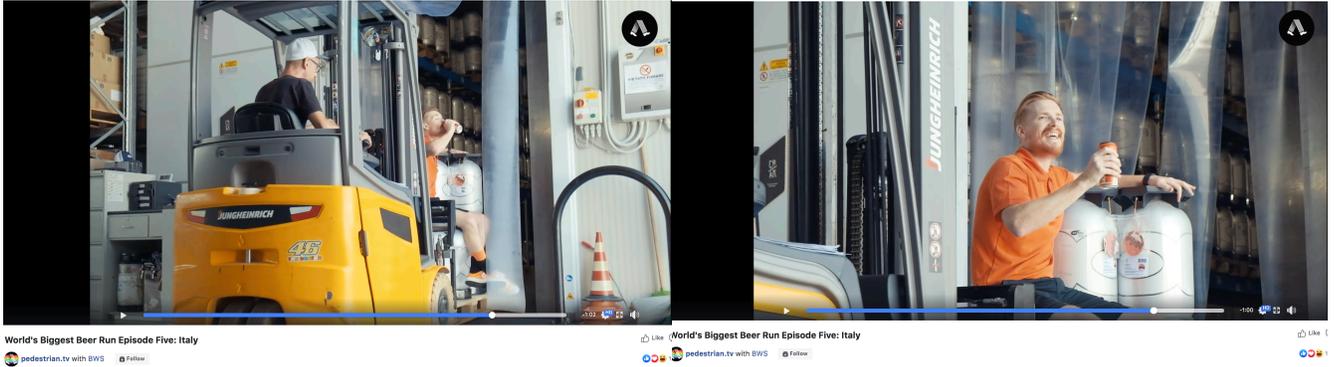
7. The complaint was received on 28 February 2020.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint was 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 this marketing communication (17708).

The Marketing Communication

10. The complaint relates to the “World’s Biggest Beer Run” episode 5 video which can be accessed via the BWS Facebook page, Youtube channel and website and the Pedestrian.TV Facebook page and website promoting a competition to win a 6 pack of rare beers obtained on “The World’s Biggest Beer Run”. In one scene the video depicts a BWS beer expert sitting on a moving forklift in a brewery in Italy.



The Complaint

11. The complainant objects to the marketing as:
- there is no request to enter age details; and
 - the scene where the BWS man is on the forklift looks dangerous.

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
 - (d) A Marketing Communication must NOT show (visibly, audibly or by direct implication) the consumption of an Alcohol Beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical co-ordination, such as the control of a motor vehicle, boat or machinery or swimming.
13. Part 4 of the ABAC Code includes definitions including:
- A breach of this Code that is reasonably unforeseeable by or outside the reasonable control of the Marketer or their agency will be classified as a no fault breach.
14. Part 6 of the ABAC Code provides:
- 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) A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.
- (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.
- (v) A Marketing Communication must not be sent to a Minor via electronic direct mail (except where the mail is sent to a Minor due to a Minor providing an incorrect date of birth or age).

The Company's Response

15. The Company responded to the complaint by letter dated 10 March 2020. The principal points made by the Company were:
- a) Endeavour Drinks' 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, Endeavour Drinks demonstrated a long-standing commitment to supporting and adhering to ABAC and Advertising Standards Bureau principles. Endeavour Drinks maintains strict internal and external processes in addition to those required by the ABAC Scheme, which are relevant in this context.
 - b) As part of our community charter, 'Our Community, Our Commitment', Endeavour Drinks 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:
 - ID25 (ask for ID from anyone who looks under 25);
 - Don't Buy It For Them (stopping secondary supply to minors);
 - our Intoxication Policy (refusal of service to anyone who may be intoxicated); and
 - 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, Endeavour Drinks is fully aware of the Code's requirement not to direct marketing at minors through a breach of any of the Placement Rules and not to show the consumption of alcohol before or during an activity that, for safety reasons, requires a high degree of alertness or physical coordination. It is our view that the Ad neither breaches Section 3(b)(iv) nor Section 3(d) of the Code.

- d) The Ad is placed on BWS' website, Facebook page and YouTube page and on Pedestrian.TV's website and Facebook page. Pedestrian.TV is a digital media agency that was engaged by BWS in relation to the Ad.
- e) Section 3(b)(iv) of the Code states that 'A Marketing Communication must NOT be directed at Minors through a breach of any of the Placement Rules'. The complaint suggests that the Ad breaches Placement Rule 2 of Section 6 of the Code (Placement Rule 2), which states that 'A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.'
- f) The BWS Facebook page that contains the Ad had, and still currently has, age restrictions in place. The age restrictions can be seen in operation when attempting to access BWS' Facebook page, which requires Facebook users to login to confirm that they are over the age of 18 before accessing the page. Contrast this with a Facebook page that does not have age restrictions in place, such as Woolworths', which can be accessed without logging on to Facebook.
- g) The Ad on BWS' YouTube page did have, and still currently has, age restrictions in place. The Ad from BWS' YouTube page has simply been embedded into BWS' website. It has come to our attention that age restrictions are automatically removed when a YouTube video is embedded into another website. We are currently in the process of removing the embedded Ad from BWS' website.
- h) We accept that Placement Rule 2 was breached in relation to the Ad's placement on BWS' website. However, we note that the automatic removal of age restrictions that occurs when a YouTube video is embedded into another website is not stated in YouTube's support pages. We therefore submit that this breach should be classified as no-fault because it is not reasonably foreseeable that a design flaw exists in embedded YouTube videos such that age restrictions are automatically removed.
- i) The Ad on Pedestrian.TV's website and Facebook page appear not to have any age restrictions in place. However, Section 6 of the Code makes it clear that Available Age Restriction Controls do 'not require a third party platform, website or account that is not primarily related to alcohol to be age restricted in its entirety before it can be used to place a Marketing Communication.'
- j) Pedestrian.TV is not primarily related to alcohol. It appears to predominantly be a news website for young adults. As such, the Available Age Restriction Controls would not require Pedestrian.TV's entire website or Facebook page to be age restricted. Further, we are of the understanding that it is not possible to age restrict an individual webpage within a website. Therefore, there are no Available Age Restriction Controls to be utilised for the Ad placed on Pedestrian.TV's website. With respect to Placement Rule 3 of the Code, I am advised that data from Nielsen indicates the audience of Pedestrian.TV's website was made up of 93% adults for the 2019 year. As such, we believe that no Placement Rule was breached in relation to the Ad placed on Pedestrian.TV's website.

- k) We accept that, on the understanding that individual Facebook posts can be age restricted, the Ad placed on Pedestrian.TV's Facebook page breaches Placement Rule 2. We are currently in the process of addressing this breach.
- l) In relation to the content of the video, it contains a scene (at 4:52) that depicts a person seated on a pallet (the Passenger) being carried on a forklift which is being operated by another person (the Operator). The duration of the scene is less than four seconds of the approximately six minute long Ad. For completeness, we note that the relevant Facebook page referred to in the complaint is Pedestrian.TV's, not BWS'. Section 3(d) of the Code states that 'A Marketing Communication must NOT show (visibly, audibly or by direct implication) the consumption of an Alcohol Beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical coordination [a Potentially Unsafe Activity] , such as the control of a motor vehicle, boat or machinery or swimming.'
- m) The complaint suggests that a person being seated on a pallet being carried on a forklift is a Potentially Unsafe Activity. Such an activity does not fall under any of the example categories of Potentially Unsafe Activities listed in Section 3(d) of the Code. We note that this does not necessarily mean that the activity is not a Potentially Unsafe Activity. Whether the Passenger is engaging in a Potentially Unsafe Activity is assessed based 'on the inherent nature of the activity and the manner in which it is portrayed in the marketing communication' (ABAC Adjudication Panel Determination No. 127/15, para 24).
- n) We do not believe that the Ad shows the Passenger engaging in a Potentially Unsafe Activity for the following reasons:
 - i. the forklift is shown being operated at a very slow speed and over a very short distance (of what appears to be no more than three metres);
 - ii. the Operator is not shown operating the forklift in an irresponsible, reckless, dangerous, careless or unsafe manner, and the load being carried by the forklift does not appear to be unstable;
 - iii. the prongs of the forklift are shown raised only a short distance above the floor, with the Passenger's feet appearing to not be more than approximately half a metre above the floor; and
 - iv. the Passenger is shown stably seated on the pallet and does not appear to have their balance and coordination impaired.
- o) For the sake of completeness, we note that operating a forklift would be deemed to be a Potentially Unsafe Activity as it falls under the category of 'control of a machinery'. However, the Ad does not depict, and makes no suggestion that, the Operator was drinking alcohol before or during the operation of the forklift that would trigger a breach of Section 3(d) of the Code. For the reasons outlined above, we believe that the Ad does not breach Section 3(d) of the Code.

- p) Notwithstanding the requirements of the Code, Endeavour Drinks takes the safety of its team members very seriously, and this extends to going above and beyond what is required of us. Although the Ad is clearly intended to be humorous (and to some extent a parody) and the two main characters are paid actors, the acts depicted in the scene are not reflective of behaviour that we would accept on our sites or that of our suppliers. We will therefore be reviewing our internal marketing processes with this in mind.
- q) For the reasons outlined above, we believe that the complaint should be dismissed in relation to the Ad's content and placement on BWS' Facebook page and Youtube page, and Pedestrian.TV's website. We expect that the complaint will be upheld with respect to the Ad's placement on BWS' website, and Pedestrian.TV's Facebook page, and we are currently in the process of taking down the ad from BWS' website and getting an age restriction applied to the Ad on Pedestrian.TV's Facebook page. However, we believe that the breach in relation to BWS' website should be classified as no-fault.

The Panel's View

16. BWS is a major Australian retailer of alcohol and a signatory to the ABAC Scheme. The Company operates and utilises various digital platforms and channels to disseminate its marketing communications. One innovative way which the Company has employed to engage its potential customers is through the commissioning of a video series entitled 'The World's Biggest Beer Run' which is accessible on a number of digital platforms. This determination concerns episode 5 in the video series and goes to both the content of the video and the interplay with the digital platforms as a means to view the episode.
17. The World's Biggest Beer Run follows two men, Tai and Malcolm, as they seek out distinctive beers from around the world. The episodes are light-hearted and engaging as the two friends travel in different countries to breweries making beers which had not previously been available on the Australian market. The videos display high production values and result from a collaboration between the Company and Pedestrian TV. Pedestrian TV is a media production and entertainment business owned by the Nine Media group and amongst a range of activities produces content for its own digital platforms. The target audience for much of the content of Pedestrian TV is 16 to 35 year olds.
18. Episode 5 of the World's Biggest Beer Run is set in Italy. The men visit the Crak brewery in Padua. The complainant raises two issues about the episode namely:
- a scene in the video which shows Malcolm sitting on the forks of a forklift and consuming a beer while the forklift slowly reverses which the complainant argues depicts alcohol use with a dangerous activity; and
 - it is accessible via digital platforms which do not require age verification to be used.
19. It is accepted by the Company that the video series is a marketing communication for ABAC purposes and hence the content of each episode needs to be consistent with ABAC standards for good marketing practice. Part 3 (d) of the Code provides that a marketing communication must not show the consumption of alcohol before

or during any activity that for safety purposes requires a high degree of alertness or physical coordination. The Company argues that the video does not breach the standard given the operator of the forklift had not been drinking and while Malcolm is drinking, his position on the forklift is perfectly safe.

20. The forklift scene in the video is no more than 5 seconds in a video which is almost 6 minutes long. The video as a whole depicts alcohol and alcohol use in a responsible manner e.g. alcohol consumption is moderate and contextualised with most references being about the characteristic of the beer and how it is brewed. The short scene with the forklift would be understood by a reasonable person as being staged for comic effect and would not be taken particularly seriously. While drinking and use of a forklift obviously are activities that should not be combined for safety reasons, the Panel does not believe in the full context of the video the short scene means the video is in breach of the ABAC standard.
21. The second issue raised by the complaint is the ease under 18 year olds have in accessing the video online. This brings into play the ABAC Placement Rules which have the policy aim of directing alcohol marketing towards adults and away from minors. The rules have differential requirements related to the technical capacity to restrict or target the audience of a marketing item.
22. For marketing transmitted via digital channels, Placement Rule 2 requires that marketers utilise available age restriction controls to exclude minors. This means using age restriction, targeting or affirmation technologies available to the marketer according to the technical capacity and protocols applying to the relevant digital platform. When the marketing is carried by a third party platform which is not primarily related to alcohol it is not expected that the entire platform be age restricted.
23. In essence, the rule requires the marketer to select age restriction/targeting options that the platform makes available to alcohol marketers to eliminate or at least minimise the under 18 year old potential audience. Each of the platforms such as Google, Facebook, Instagram etc have variations in how age restrictions operate and it can be difficult on occasions to get clear information from the platforms on this point. The Panel however expects that marketers will keep up to date on how the platforms operate and be able to demonstrate a full understanding of the options available to keep minors from accessing their online marketing and that the most effective available option to achieve this end has been used.
24. The Company advised that the World's Biggest Beer Run was accessible via several platforms namely:
 - the BWS website;
 - the BWS Facebook Page;
 - BWS YouTube channel;
 - Pedestrian TV website; and
 - Pedestrian TV Facebook Page.
25. The ABAC Placement Rule obliges that for each of these channels (and indeed any other digital platforms over which the series can be viewed) that the available age restrictions be utilised. The BWS channels need to be age restricted in their entirety

while the Pedestrian TV sites will need to be optimised to restrict access to the video series by under 18 year olds recognising that these sites as a whole will have non-alcohol related content which is suitable for minors and hence the entire site need not be aged restricted.

26. The Company reviewed the position post the complaint and conceded that in two instances access to the video was possible via platforms where the available age restriction controls had not been utilised. For the other platforms the Company contended access to the video was protected by age controls. The two instances where the controls were not used were
 - the embedding of the video onto the BWS website; and
 - accessing the video as a post on the Pedestrian TV Facebook page.
27. It does seem that age restriction controls were in place on other digital platforms over which the video might have been seen. The Company advanced that the YouTube version of the video was age restricted on YouTube itself but the age restriction was lost when the youTube version was placed onto another platform. It is argued because the loss of the age restriction was not expressly stated as occurring when a video is added to another site in YouTube's 'support pages', then the Company's failure to identify the issue should be regarded as a no-fault breach.
28. A no fault breach finding might be made if the breach is reasonably unforeseeable or outside the control of a marketer. In this case the Panel does not believe a no-fault ruling should be made. While the YouTube operational protocols may have been silent on the point, it is not unreasonable to have expected the Company to have checked if the age restriction controls had carried over to another site when the YouTube version was placed on a site beyond YouTube itself. This would be reasonable prudence.
29. Accordingly, the complaint is dismissed as to Part 3 (d) and upheld in relation to Placement Rule 2 regarding the video appearing as a post on the Facebook Page of Pedestrian TV and the YouTube version of the video on the Company's website.