



ABAC Adjudication Panel Determination No. 26/20

Product: BWS
Company: Endeavour Drinks Group
Media: Outdoor
Date of decision: 30 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 outdoor marketing by BWS (“the Company”) and arises from a complaint received 5 March 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

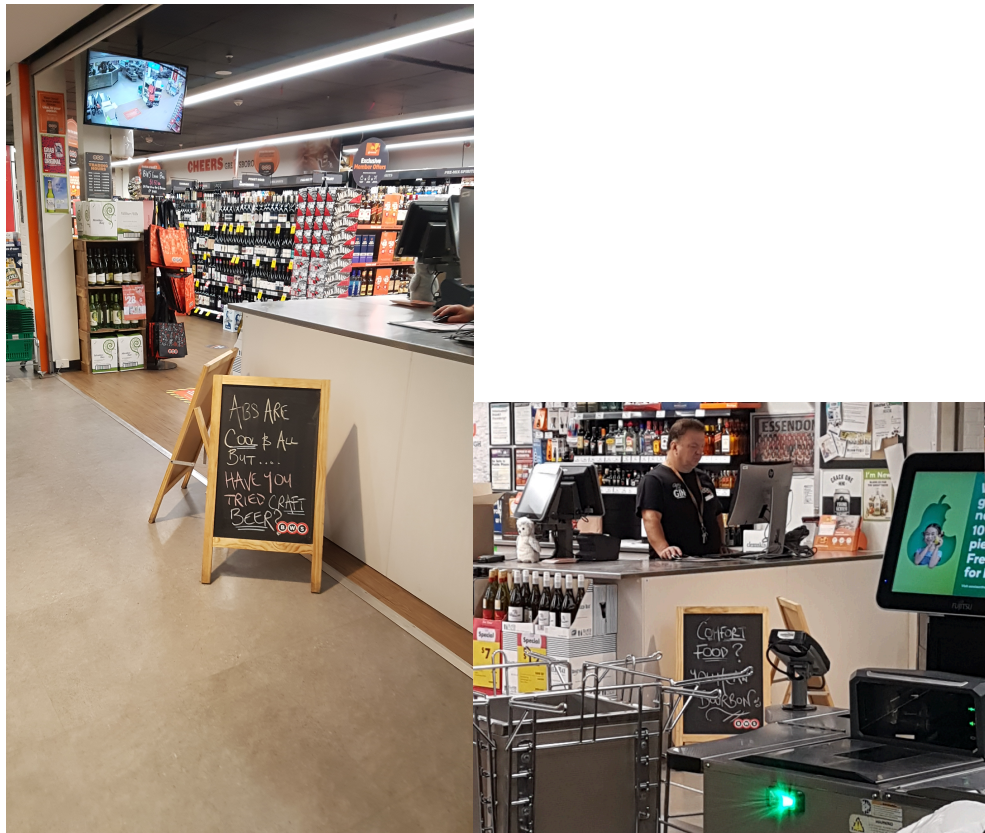
7. The complaint was received on 5 March 2020.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint 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 not obtained for this marketing communication.

The Marketing Communication

10. The complaint relates to marketing on a chalkboard outside a BWS store adjacent to a Woolworths supermarket with the messages:
- Abs Are Cool & All But... Have You Tried Craft Beer
 - Comfort Food? You Mean Bourbon



The Complaint

11. The complainant objects to the marketing as:
- it is promoting unhealthy messages around alcohol; and
 - placed outside the shop is very visible to children.

The ABAC Code

12. Part 2(b)(iv) of the ABAC Code provides that the Code does not apply to point of sale Marketing Communications initiated by Alcohol Beverage retailers (as these are regulated by liquor licensing legislation), provided that a producer or distributor of Alcohol Beverages has no control over the point of sale Marketing Communication.

13. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (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
 - (c)(iv) suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation
14. 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.
15. 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

16. The Company responded to the complaint by letter dated 23 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. 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".

b) In marketing alcoholic products, Endeavour Drinks is fully aware of the Code's requirement not to encourage irresponsible or offensive behaviour that is related to the consumption or presence of alcohol beverages and not to direct marketing at minors through a breach of any of the ABAC Placement Rules. It is our view that the Advertisement breaches neither Part 3(a)(ii) nor Part 3(b)(iv) of the Code.

c) Part 2(b)(iv) of the Code provides that:

" The Code does NOT apply to ... point of sale Marketing Communications initiated by Alcohol Beverage retailers (as these are regulated by liquor licensing legislation), provided that a producer or distributor of Alcohol Beverages has no control over the point of sale Marketing Communication..."

We believe this exception does not apply to the Advertisement on the basis that the Advertisement was not fixed to the point of sale and was clearly prominently visible to an audience beyond the people who chose to enter the BWS store (ABAC Adjudication Panel Determination No. 77/09). However, notwithstanding this, we do not believe that the Advertisement is in breach of the Code for the reasons outlined below.

d) The content of the Advertisement does not encourage irresponsible or offensive behaviour. The Advertisement is intended to be a light-hearted, attention-grabbing quip. Humour is intended to be generated from the use of non-sequiturs (i.e. the comedic use of two phrases that have no logical connection to one another). By way of example, the phrase "[b]ut have you tried craft beer?" is a non-sequitous response to the preceding phrase "[a]bs are cool". Similarly, the phrase "[y]ou mean bourbon" has no connection to the preceding phrase "[c]omfort food?", as bourbon is clearly not food. The Advertisement is intended to be humorous and not taken literally, and we believe a reasonable person would see it as such.

- e) Furthermore, the Advertisement does not contain any direct call to action for consumers to engage in any kind of behaviour whatsoever. Therefore, it cannot be said that the Advertisement encourages behaviour that is either irresponsible or offensive.
- f) We note that it could be argued that the Advertisement is in breach of Part 3(c)(iv) of the Code, which provides: “A Marketing Communication must NOT ... suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation...” Inherent in the non-sequitous quip “[c]omfort food? You mean bourbon” there is an indirect implication that the consumption of bourbon provides comfort, which it could be argued constitutes a ‘therapeutic benefit’ of the kind contemplated by Part 3(c)(iv) of the Code above. However, as previously stated, we believe that the overt humorous intent of the Advertisement is abundantly clear, and that a reasonable person would not interpret the Advertisement as a literal suggestion that the consumption of bourbon either offers a therapeutic benefit or is a necessary aid to relaxation.
- g) Whilst also not expressly mentioned in your letter we further note that it could be argued that the Advertisement is in breach of Part 3(c)(ii) of the Code, which provides: “A Marketing Communication must NOT ... show (visibly, audibly or by direct implication) the consumption or presence of an Alcohol Beverage as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success...”
- h) Inherent in the non-sequitous quip “[a]bs are cool... But have you tried craft beer?” there is an indirect implication that craft beer is cool, which could be construed as a suggestion that consumption of craft beer will contribute to ‘social success’ as contemplated by Part 3(c)(ii) of the Code above. However, for the reasons outlined above, we do not believe that a reasonable person would interpret the Advertisement as a literal suggestion that the consumption of craft beer contributes to social success.
- i) Placement Rule (iii) does not apply to the Advertisement, as the medium of chalkboard does not qualify as any of ‘digital, television, radio, cinema or print media platform’. Notwithstanding the rule does not apply, in any event we believe that it is highly unlikely that the Advertisement’s potential audience would comprise less than 75% adults on the basis that, as at the 2016 ABS census, 78.4% of the population of Greater Melbourne are adults (and shopping centres, particularly supermarkets, are likely to have an above-average demographic of adults). Furthermore, notwithstanding the Advertisement is in close proximity to a supermarket and it is plausible that some children may be exposed to the Advertisement in passing, the Advertisement is not co-located with programs or content primarily aimed at minors. For these reasons, we do not believe that the Advertisement is in breach of Part 3(b)(iv) of the Code.
- j) Finally, we draw your attention to ABAC Adjudication Panel Determination No. 95/15, which concerned a marketing communication on a blackboard on an external wall adjacent to a Liquorland store. The complaint concerned the message “Beer – because no good story ever started with eating a salad”. In this case, the Panel found that the marketing communication was not in

breach of the Code, as it could not credibly be said that the message encouraged irresponsible or offensive behaviour. The Panel likewise did not believe a 'reasonable person' would find the message concerning in the way it was presented, but rather would find it slightly amusing. Accordingly, the complaint was dismissed. We also note that, as with the Liquorland blackboard, the Advertisement was not part of a business-wide marketing campaign, but rather reflected a one-off activity (intended to be temporary) by a staff member at the BWS store in question.

- k) We believe that the complaint should be dismissed on the basis that the Advertisement is not in breach of the Code. In any event, the Advertisement is extremely light-hearted in nature and intended purely as a humorous, attention grabbing quip. However, Endeavour Drinks takes the feedback of the community seriously and we understand that the Advertisement may have been a cause of concern for the complainant. For this reason, the BWS store in question has been requested to remove the Advertisement, notwithstanding it was not in breach of the Code.

The Panel's View

17. BWS is a part of the Woolworths group and is a major chain of alcohol retailers. Often BWS stores are located within shopping centres and adjacent to Woolworths supermarkets. This determination results from a complaint concerning chalk board messages displayed at the BWS store in the Greensborough Plaza shopping centre in Victoria.
18. The messages are respectively:
 - Abs are cool and all... Have you tried craft beer
 - Comfort food? You mean bourbon
19. The complainant believes the messages promote unhealthy uses of alcohol and are placed in a location which is highly visible to minors. This is contrasted to messages within a store which will have a more limited direct audience. The Company believes the messages are light-hearted and are not inconsistent with ABAC requirements.
20. The ABAC does contain Placement Rules which aim to limit the exposure of minors to alcohol marketing communications. The rules impose greater restrictions where the technical capacity of the communication medium permits the targeting of audiences such as marketing over digital platforms. The rules contain no specific provisions regarding the placement of advertising within a shopping centre. It is clear the chalk boards are not in breach of the Placement Rules. Nor would the actual messages have a strong or evident appeal to minors.
21. In relation to the messages, the applicable ABAC standards provide that an alcohol marketing communication must not encourage irresponsible or offensive behaviour that is related to the consumption or presence of alcohol. Further an ad must not suggest that alcohol is a necessary aid to relaxation. The assessment of whether these standards have been breached is based upon the probable understanding of the marketing communication by a reasonable person.
22. It is evident that the messages are intended to be light-hearted and do not proffer serious claims about alcohol. The message stating 'Abs are cool.. have you

tried craft beer' is likely to be understood as saying something akin to - 'fitness is good but craft beer is more fun'. The Panel does not consider this message to be contrary to any ABAC standards.

23. The second chalk board read - Comfort Food? You mean Bourbon. This message would likely be understood to mean that the spirit bourbon is a response to emotional stress. Probably most people would take the message as light-hearted and certainly not seriously advocating that alcohol be used as a 'comfort food'. That said, the humour relies on an assumed shared understanding that alcohol is commonly used as a response to stress. This message is contrary to Part 3 (c) (iv) of the Code as it suggests alcohol is an aid to relaxation.
24. Accordingly, the complaint is upheld in part in relation to the 'Comfort food? You mean bourbon' message and dismissed in relation to the other message.