



ABAC Adjudication Panel Determination No 73/22

Product: Uber Eats Alcohol Delivery
Companies: Uber Eats/Liquorland/Vintage Cellars/BWS
Media: Printed Voucher
Date of decision: 17 October 2022
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”) arises from a complaint received on 8 September 2022, and concerns a printed voucher physically handed to an 11-year-old minor at a train station. The voucher was advertising 30% off a customer’s first order of alcohol through Uber Eats and included the logos of Liquorland, Vintage Cellars and BWS.
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 meet 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 8 September 2022.
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 an independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for placement of the marketing communication.

The Marketing Placement

10. The complaint relates to the physical handing of a voucher for discounted alcohol delivered by Uber Eats.

The Complaint

11. The complainant objects to the marketing as follows:
 - *A card advertising 30% off your first alcohol order card was given to my 11-year-old son in school uniform on his way home from school. He tried to refuse saying it was inappropriate but the person giving out the cards kept pressing it on him until he gave up.*
 - *This sort of advertising should not be aimed at minors.*



The ABAC Code

12. Part 2 of the ABAC Code provides that the Code applies to all Marketing Communications in Australia generated by or within the reasonable control of a Marketer...
13. 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.
14. Part 4 of the ABAC Code provides that 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 that:

Available Age Restriction Controls means age restriction, targeting or affirmation technologies available to restrict a Marketing Communication to Adults, but this does not require a third party platform, website or account that is not primarily related to alcohol that is not related to alcohol to be age restricted in its entirety before it can be used to place a Marketing Communication.

Marketer means a producer, distributor or retailer of Alcohol Beverages.

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 Placement Policy).
- (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 Companies Responses

16. Endeavour Group responded in relation to its BWS brand's involvement with the marketing by letter emailed on 28 September. The principal points made by Endeavour Group were:

- BWS thanks the ABAC Adjudication Panel (the Panel) for the opportunity to respond to the Complaint which has been made pursuant to the ABAC Responsible Alcohol Marketing Code and Complaints Management System (ABAC).
- At the outset, BWS would like to note that since being made aware of the Complaint, BWS has met with Uber Eats to discuss the circumstances surrounding the Complaint. As part of that discussion, BWS was instructed that to execute the Advertisement, Uber Eats subcontracted a portion of its services to Oppizi Pty Ltd (Subcontracted Services). The Subcontracted Services included the distribution of the flyers by brand ambassadors who were recruited and managed by Oppizi Pty Ltd.
- BWS understands that various measures were put in place to ensure that the flyers were not distributed to minors. BWS considers those measures to have been reasonable in the circumstances.
- On this basis and for the reasons outlined below, BWS submits that the Complaint was outside the reasonable control of BWS and we therefore request that the Panel dismiss the Complaint.

Alcohol Advertising Pre-vetting Service Approval

- BWS did not seek Alcohol Advertising Pre-Vetting Service Approval for the Advertisement.
- Notwithstanding this, BWS submits the following:
 - BWS, as part of Endeavour Group, is committed to maintaining our position as an industry leader in the responsible service of alcohol. This is highlighted by the fact that Endeavour Group formalised its status as a signatory to the Alcohol Beverages Advertising Code Scheme in 2013 and it prepares all advertising within its reasonable control in accordance with the ABAC Responsible Alcohol Marketing Code (the Code). As a signatory to ABAC, Endeavour Group commits to the objectives of the Code to ensure that alcohol

advertising does not encourage irresponsible or unsafe consumption, or consumption by persons under 18 years of age, and does not target young people.

- The importance of ensuring all necessary marketing communications (involving BWS's brand name or logo) are reviewed from a Code compliance perspective (and pre-vetted where appropriate), has been reinforced with the marketing team, even in circumstances where that material is controlled by a third party.
- Furthermore, BWS maintains strict internal and external processes in addition to those required by the Code. As part of our community charter 'Our Community, Our Commitment', Endeavour Group has in place a range of industry-leading initiatives to ensure that minors are not served alcohol and to encourage the responsible consumption of alcohol. These include:
 - (i) ID25; we ask for ID if a shopper looks under the age of 25;
 - (ii) Our Refusal of Service Policy (Secondary Supply, Intoxication and School Uniform); and
 - (iii) Staff training that exceeds legal requirements, including our 'Leading in Responsibility' training module, team talkers, regular refresher and reminder courses.
- The processes outlined in above provide Endeavour Group with a compliance framework to ensure that it serves customers in accordance with its obligations under the various applicable laws.

Nature of the relationship between BWS and Uber Eats

- BWS is an Uber Eats merchant partner which, among other things, allows BWS to sell and deliver its products via the Uber Eats platform. This relationship is governed by a merchant agreement (the Agreement) between BWS, Uber porter B.V. (Uber) and Portier Pacific Pty Ltd ABN 28 622 365 459 (Portier Pacific) (together, the parties).
- Pursuant to the Agreement:

- Uber Eats is permitted to promote BWS goods in various ways, including via print advertisements (Promotional Activities), such as the Advertisement;
- BWS grants a licence to Uber Eats to use its trademarks in Promotional Activities carried on under the terms of the Agreement; and
- Promotional Activities are only permitted with BWS's prior written consent.

Control of the marketing

- BWS approved the use of its brand name and logo on the relevant flyers, however, it goes without saying that at no point did BWS approve for the flyers to be provided to a minor or persons who self-evidently appear to be minors.
- In certain circumstances, BWS is entitled to revoke the Uber Eats licence to use its brand name and logo. This includes in circumstances where it reasonably considers the quality of the services or performance of its obligations under the Agreement falls below an acceptable standard. Until notification of the Complaint, BWS was not aware that its brand name and logo was being used in a way inconsistent with the Agreement and as such, did not invoke its right to request the removal of its brand name and logo.
- BWS was aware that the flyers would be distributed to members of the public across high traffic areas in certain geographical locations.
- BWS was not aware of the specific locations that the flyers would be distributed. Since receiving the Complaint, BWS has been instructed by Uber Eats that the locations for distribution of the flyers were determined by a third party, Oppizi Pty Ltd, as part of the Subcontracted Services.
- Under the Agreement, the parties are required to perform their respective obligations in a manner consistent with all applicable laws, including guidelines of regulatory and quasi-regulatory bodies, such as the Code. In addition, Uber Eats' own community guidelines provide that alcohol is only to be delivered to those who are the legal age to buy alcohol (18). This is reflected by the disclaimer depicted on the flyers, namely: "Must be 18 . ID required. See app for license details". With these factors in mind, BWS had a

reasonable expectation that the relevant flyers would not be distributed by or on behalf of Uber Eats to minors in a manner which would be inconsistent with the Agreement, Uber Eats' own Community Guidelines and the terms of the flyer itself.

- BWS understands that various measures were put in place by Uber Eats with its subcontractor to prevent the provision of the flyers to minors. BWS reiterates that it considers those measures to have been reasonable in the circumstances. We also understand that following the Complaint, Uber Eats has discussed the matter with its subcontractor and appropriate remedial steps have been taken.
- For the reasons outlined above, BWS believes that the Complaint is outside its reasonable control and requests that the Panel dismiss the Complaint against BWS on that basis.

17. Coles Liquor responded in relation to its Liquorland and Vintage Cellars brands' involvement with the marketing by letter emailed on 30 September 2022. The principal points made by Coles were:

- We refer to your letter to Coles Liquor in respect of the above complaint (the complaint). We thank ABAC for affording Coles Liquor the opportunity to respond to the complaint.

Background

- Coles Liquor has been a signatory to the Alcohol Beverages Advertising Code since 2013. We take our alcohol advertising obligations very seriously and are committed to industry best practice – including compliance with the ABAC Responsible Alcohol Marketing Code's (the ABAC Code) spirit and intent.
- Coles Liquor has demonstrated a long-standing commitment to the responsible service, supply, advertising, and promotion of alcohol. We maintain robust internal compliance processes in relation to liquor advertising and have a strong culture of compliance training embedded throughout the business to ensure our teams have the necessary skills to successfully navigate this heavily regulated environment.
- Coles Liquor is also a key contributor to DrinkWise, an independent, not-for-profit organisation whose primary focus is to help bring about a healthier and safer drinking culture in Australia.

- As a preliminary matter, we note that Coles Liquor is mindful of the importance of responsible advertising of alcohol products. To this end, it is never Coles Liquor's intention to publish advertisements that could contravene the ABAC Code.
- Coles Liquor confirms it will accept the decision made by the ABAC Adjudication Panel in relation to this complaint.

The complaint

- Ad description:
 - Print – An Uber Eats flyer containing the words, “30% off your first alcohol order. Leave the driving to us”. Featuring the logos, from left to right, of Uber Eats, Liquorland, Vintage Cellars and BWS. Subtext at the bottom of the pamphlet notes, “Must be 18+. ID required. See app for license details” (the flyer).
- Reason for concern, as described by the complainant:
 - “The card was given to my eleven-year-old son in school uniform on his way home from school. He tried to refuse saying it was inappropriate but the person giving out the cards kept pressing it on him until he gave up. This sort of advertising should not be aimed at minors”.

Alcohol Advertising Pre-vetting Service Approval

- As the flyer was managed by Uber Eats, Coles Liquor did not obtain Alcohol Advertising Pre-vetting Service Approval prior to Uber Eats distributing the flyer.

Nature of the relationship between Coles Liquor and Uber Eats

- Coles Liquor advises that Liquorland and Vintage Cellars are both brands within Coles Liquor. Coles Liquor confirms that it has a commercial relationship with Uber Eats via a Merchant Agreement (the Agreement). Under the Agreement, Uber Eats is responsible for compliance with the ABAC Code where compliance is outside Coles Liquor's reasonable control.
- The Agreement governing the relationship between Coles Liquor and Uber Eats does not specifically refer to the advertisement featured on the flyer.

Coles Liquor confirms it had reviewed and approved the flyer prior to distribution, but did not review or approve the distribution methodology. As such, the distribution of the flyers was outside of Coles Liquor's reasonable control.

Control of the marketing

- Coles Liquor confirms that it was aware that the Liquorland and Vintage Cellars brands and logos were to be included on marketing materials produced and used by Uber Eats, such as the flyer.
- Coles Liquor confirms it had reviewed and approved the inclusion of Liquorland and Vintage Cellars on the flyer prior to distribution.
- Coles Liquor confirms it has an entitlement under the Agreement to require Uber Eats to cease to use Coles Liquor brand names and logos in certain circumstances.
- Coles Liquor advises that it was not aware that the flyer would be distributed to members of the public specifically in the vicinity of Epping Railway Station, as described in the complaint. However, Coles Liquor confirms it was aware that the flyers would be distributed to members of the public generally, without clarification as to specific distribution locations. Under the Agreement, Uber Eats takes responsibility for adherence to the ABAC Code where it is outside of the reasonable control of Coles Liquor.
- The Agreement requires adherence to the ABAC Code. Under the Agreement, Uber Eats are responsible for adherence to the ABAC Code in this instance, as Coles Liquor had no reasonable control of the distribution methodology or the agreement with the third-party distributor.

Responsibility toward Minors

- Coles Liquor respectfully notes that in its view the flyer itself does not contravene the ABAC code. In respect to Coles Liquor's responsibility towards minors in accordance with the ABAC Code, Coles Liquor submits that the flyer does not have a strong or evident appeal to minors; does not depict a person who is, or appears to be, a minor; nor was the flyer directed towards minors in respect to distribution, or was placed in programs or content primarily aimed at minors.

Action taken

- Coles Liquor is unable to confirm or deny the allegations contained in the complaint relating to the distribution of the flyer to an eleven-year-old boy, in a school uniform, at Epping railway station on 7 September 2022. However, in light of the information provided above, Coles Liquor submits that in its view the alleged distribution of the flyer was outside of the reasonable control of Coles Liquor.
 - Following receipt of the complaint, Coles Liquor understands that the third-party brand ambassador who was working at Epping railway station on 7 September 2022 will no longer partake in future Uber Eats campaigns. Additionally, Coles Liquor will continue to work with Uber Eats to ensure ongoing compliance with the ABAC Code.
18. Uber Eats responded to the complaint by letter emailed on 7 October 2022. The principal points made by Uber Eats were:

Background

- We have reviewed the copy of the complaint provided in the letter from ABAC. This complaint appears to be in relation to a campaign that commenced on 1 July 2022 which involved the distribution of flyers by brand ambassadors to the general public (Promotion).
- To execute this campaign, we engaged Oppizi Pty Ltd to provide services to us, which included:
 - Determining the times and locations for distribution of flyers;
 - Printing the flyers; and
 - Distributing the flyers with brand ambassadors.
- Brand ambassadors were recruited and managed by Oppizi Pty Ltd.
- Oppizi Pty Ltd has a number of measures in place to help ensure that flyers for the promotion of alcohol are only distributed to individuals that are at least 18 years old. We understand these measures include:
 - The sharing of pitch materials with brand ambassadors, which includes instructions to only distribute alcohol flyers to individuals that are at least 18 years old, to not distribute the flyers to anyone in

school uniform, and to request ID if they are in doubt of an individual's age;

- Briefing sessions with brand ambassadors where the pitch materials are discussed;
 - Questions which must be answered by all brand ambassadors prior to distributing flyers, to ensure they understand the pitch; and
 - A mystery shopping program which monitors brand ambassadors for their compliance with the pitch instructions.
- We take seriously our obligation to the community to market our services in a responsible manner. We are very conscious of ensuring any marketing involving alcohol is not targeted at minors in any way. We have worked with Oppizi Pty Ltd to make sure appropriate measures were in place to attempt to prevent this type of incident from happening.
 - While we are unable to confirm this complaint's allegations that a flyer was given to an 11 year old by a brand ambassador, Oppizi Pty Ltd has informed us that after the complaint, they have taken precautionary measures by removing the brand ambassador working at Epping station on 7 September 2022, and will ensure the ambassador will not partake in future Uber Eats campaigns.
 - We will accept the decision made by the Panel in relation to this complaint.

Alcohol Advertising Pre-vetting Service Approval

- The marketing communication referred to in the complaint did not receive Alcohol Advertising Pre-vetting Service Approval.

Application of the Code

- Uber Eats does not hold a liquor licence in Australia and is not a producer, distributor or retailer of alcohol items. Rather, Uber Eats supports liquor licence holders who want to sell and deliver their products by providing a platform that can connect them with customers.
- Under our Marketplace model:
 - Merchants engage Uber Eats to provide lead generation and other related services.

- Customers use the Uber Eats platform to request the purchase of food, alcohol and other items from licensed merchants, and to request the purchase of delivery services from Uber Eats.
- Uber Eats engages delivery persons to provide delivery services as requested by the customer.

Reasonable Control

- Uber Eats has entered into merchant agreements with each of Coles Liquor (covering Liquorland and Vintage Cellars) and Endeavour Group Limited (covering BWS) under which the marketplace model outlined in paragraph 2 above is documented. Under the merchant agreements Coles Liquor and Endeavour Group grant a licence to Uber Eats to use their marks in marketing or promotional activities carried on under the terms of agreements. The merchant agreements also include general provisions regarding the running of promotions.
- The merchant agreements do not specifically refer to the terms of the Promotion. However, Coles Liquor and Endeavour Group did separately approve the flyer for the Promotion.
- Each of Coles Liquor and Endeavour Group approved the flyer for the Promotion.
- Under our merchant agreements, Coles Liquor and Endeavour Group have the right to revoke our licence to use their brand names and logo in certain circumstances. If a request is made outside of these circumstances, Uber Eats would review the request and work with Coles Liquor or Endeavour Group to resolve any issue.
- Both Coles Liquor and Endeavour Group were aware that a promotion for the purchase of alcohol beverages would be included on a flyer distributed to the members of the public.

Distribution of the flyers

- The locations for distribution of flyers were determined by Oppizi Pty Ltd, as part of the service they provided to Uber.
- It is our understanding that Oppizi Pty Ltd briefed the brand ambassadors participating in this flyer campaign on the age requirements for receiving

these flyers. We believe that Oppizi carried this out through the following means:

- Brand ambassadors are provided with a copy of a pitch, which is available at all times on the Oppizi app;
 - The pitch must be reviewed and understood by the brand ambassadors before they are able to commence the distribution of flyers; and
 - Brand ambassadors are required to confirm that they have understood the pitch by completing questions relating to the information provided.
- A copy of the pitch provided by Oppizi Pty Ltd to its brand ambassadors has been attached to this letter. The pitch includes the following instructions:

“THE ALCOHOL FLYERS ARE ONLY AVAILABLE FOR PEOPLE WHO ARE 18 & OVER.

DO NOT HAND OUT THE FLYERS TO KIDS IN SCHOOL UNIFORMS & IN THE CASE OF ANY DOUBT OF THE AGE OF THE POTENTIAL CUSTOMER REQUESTING A FLYER, PLEASE REQUEST FOR A PROOF OF AGE BY REQUESTING FOR A VALID ID DOCUMENT.

IF AN ID DOCUMENT CAN NOT BE PROVIDED, NO FLYERS SHOULD BE GIVEN OUT. BREACHING THIS RULE WILL RESULT IN THE TERMINATION OF YOUR CONTRACT”

- A copy of questions that must be completed by brand ambassadors has also been attached. These questions are administered by Oppizi Pty Ltd and include the following question:
 - Question: “The alcohol flyer can only be given out to the following audience:”
 - Possible Answers:
 - “Anyone”
 - “Over 18 years of age”

- “Under 18 years of age”
- Oppizi Pty Ltd have also informed us that they regularly use mystery shoppers as another measure to help ensure compliance. Shoppers are sent to the locations where distribution of flyers is occurring to observe whether the brand ambassadors are targeting the correct audience and are distributing the flyers correctly. If their observations give rise to any concerns, the activities will be halted and any brand ambassador found to be not following the correct procedures will be removed.

Concluding comments

- At Uber Eats, safety is a top priority. We are committed to ensuring that alcohol is marketed and delivered in a responsible manner, in a way that is compliant with relevant regulations. We have invested in our technology to help ensure that alcohol is only delivered to those who are 18+. In addition to requiring Users to confirm that they are 18+ before they place an order containing alcohol items, Delivery People are provided with education materials on alcohol delivery and are prompted by the app to scan the recipient’s ID (for age verification) and confirm the recipient’s sobriety for every alcohol delivery. We also engage a mystery shopping provider to conduct mystery shops on a weekly basis to continually test and monitor our processes. We have a formal partnership with Drinkwise and we regularly participate in industry groups to enable us to continually improve our work in this area and to make meaningful contributions to the industry.

The Panel’s View

Introduction

19. This is an unusual case. It is so self-evident that an 11 year old wearing a school uniform should not be handed marketing material for alcohol products that it has, thankfully, not been behaviour previously brought before the Panel. The conclusion is equally self-evident, namely that the complainant’s concern is fully justified. What is not so self-evident is whether a breach of the ABAC obligations has occurred.
20. The uncertainty arises for several reasons, namely:
 - The flyer was created by Uber Eats and is a promotion of the home delivery service rather than direct marketing by the alcohol retailers as such;

- The alcohol retailers were not involved in the distribution of the flyers; and
 - The ABAC obligations don't envisage the behaviour (i.e. handing alcohol marketing flyers to minors) occurring and hence the interpretation of the obligations to cover the behavior is somewhat strained.
21. The issue arises from the 11 year old son of the complainant being approached by a person who was distributing flyers for the home food and drink delivery service Uber Eats. According to the complainant, the boy was not interested in taking the flyer, but the person was insistent, and the boy accepted the flyer and brought it home.
 22. The flyer was promoting the home delivery of alcohol products from the retailers, Liquorland, Vintage Cellars and BWS. The flyer featured a photograph of a paper bag bearing the name 'Uber Eats' and containing bottles of alcohol. Also shown were some cans of an unidentified product but presumably of alcohol. Underneath the photograph was printed '30% off your first alcohol order. Leave the driving to us.' The brand names/logos of the alcohol retailers were shown at the bottom of the flyer.
 23. Understandably the complainant was concerned that their son, who was wearing a school uniform and who was obviously a minor, was given marketing material for alcohol. It is common ground from the companies involved in the flyer - Uber Eats and the two owners of the alcohol retailers - that the flyer should not have been given to the boy. Given this, the question is how did the problem arise and whether the alcohol retailers have breached their obligations under the ABAC Scheme.

Uber Eats and the ABAC

24. The ABAC is one part of the national regulatory regime which collectively aims to have alcohol marketed in a responsible manner. The ABAC applies to alcohol marketing communications in Australia generated by or within the reasonable control of a producer, distributor or retailer of alcohol beverages.
25. It is clear that Coles Liquor and Endeavour Group, the owners of the alcohol retailers mentioned on the flyer, are captured by the ABAC Scheme. On the other hand, Uber Eats is not an alcohol company but rather a delivery service of various foods and drinks. Uber Eats describes its relationship with Coles Liquor and Endeavour Group as one whereby:

- Uber Eats supports liquor licence holders who want to sell and deliver their products by providing a platform that can connect them with customers;
 - Merchants engage Uber Eats to provide lead generation and other related services;
 - Customers use the Uber Eats platform to request the purchase of food, alcohol and other items from licensed merchants, and to request the purchase of delivery services from Uber Eats; and
 - Uber Eats engages delivery persons to provide delivery services as requested by the customer.
26. This means that Uber Eats is not captured directly by the ABAC obligations, however Coles Liquor and Endeavour Group are. That said, the two alcohol companies have agreements with Uber Eats which give them reasonable control over how their brand name is to be used in marketing created by Uber Eats. Accordingly, this brings the flyer into the scope of the ABAC Scheme, even though Uber Eats is not bound by the ABAC Scheme.

The Flyer - its content, method of distribution and ABAC Placement Rules

27. The obligations in the ABAC in relation to minors are essentially twofold. Firstly, alcohol marketing in its messaging and content is not to be strongly appealing to minors (Content Standards). Secondly, alcohol marketing material, to the extent possible, is to be directed towards adults and away from minors (Placement Rules).
28. The concern expressed by the complainant was not about the content of the flyer as such, but that any alcohol marketing irrespective of its content was handed directly to their son. This means the issue is not the ABAC content standards but the ABAC Placement Rules and the interplay of the rules with the distribution of the flyers.
29. The ABAC Placement Rules seek to have alcohol marketing directed toward adults and to the extent possible away from minors. The rules consist of five separate, but interrelated obligations imposed on alcohol marketers:
- Rule 1 - the placement of marketing must comply with codes published by the Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy);

- Rule 2 - available age restriction controls are used by the marketer to exclude minors from viewing alcohol marketing;
- Rule 3 - if a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding minors, then alcohol marketing may only be placed where the audience is reasonably expected to comprise 75% adults;
- Rule 4 - irrespective of the expected audience, alcohol marketing must not be placed with programs or content primarily aimed at minors; and
- Rule 5 – a marketing communication must not be sent to a Minor via electronic direct mail.

30. Working through the Placement Rules, and applying them to the specific circumstances of this complaint, it is clear that:

- The Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy do not apply and therefore Placement Rule 1 has not been breached;
- Placement Rule 3 applies to overall audience reach numbers and does not seem applicable in this case;
- The marketing was not placed with programs or content primarily aimed at minors, therefore Placement Rule 4 has not been breached; and
- The marketing was not sent via electronic direct mail, therefore Placement Rule 5 has not been breached

31. Placement Rule 2 is about the channels over which alcohol marketing is conveyed and mostly commonly comes into play when digital marketing is being used on social media platforms or broadcast via digital TV and streaming platforms.

32. Placement Rule 2 requires the use of Available Age Restriction Controls, the Code definition of which refers to “*age restriction, targeting or affirmation technologies available...*” In past determinations, the Panel has considered Placement Rule 2 in the context of the application of technologies available to enable age restriction, targeting or affirmation on platforms such as Facebook and Instagram.

33. Uber Eats provided information as to the arrangements for the distribution of the flyers. It was submitted:

- The actual distribution was handled by a subcontractor - Oppizi Pty Ltd;
 - The times and locations of the distribution were actioned by Oppizi;
 - The so called 'brand ambassadors' who hand out the flyers are given clear instructions that include that flyers promoting home delivery of alcohol are not to be given to anyone under 18 and specifically not given to a minor wearing a school uniform;
 - The ambassadors are required to answer questions confirming they understand their brief;
 - The actions of the ambassadors are monitored for compliance via a 'mystery shopping' program; and
 - An ambassador failing to meet the expected practices is removed.
34. While it is a strain to describe written instructions and briefings to 'brand ambassadors' as an 'age restriction technology', the policy intent of Rule 2 is that alcohol marketers should use the means reasonably available to them to exclude minors being served with alcohol marketing material. Given that the ABAC obligations are to be applied with 'spirit and intent', then the Panel believes the Rule can be understood as applying in this case.
35. So has the Rule been breached? Clearly the complainant's son was handed the flyer and this means there was a failure, but can this failure be placed against the two alcohol retailers not applying available 'age restriction controls'? As explained, the Rule was not designed for the handing out of flyers, but a common sense application would expect the alcohol marketer to do things like:
- ensure that there are clear expectations that flyers will not be handed to minors;
 - that these expectations are contained in contractual obligations with partners involved in the distribution of the flyers;
 - a proper and robust system to implement the obligation is created; and
 - the implementation is monitored and any failures are identified and rectified.
36. On the face of it, the two alcohol companies had requirements that Uber Eats operate consistently with the ABAC obligations and in turn Uber Eats and its sub-contractor had proper instructions, training and monitoring of the distribution to

stop the flyers being handed to minors. Clearly a failure occurred, but it is not possible to know if this was a 'one-off' problem with the actions of the sole 'brand ambassador' at the Epping railway station on the day in question or is indicative of a wider problem with the distribution of alcohol materials by Uber Eats.

Summary

37. The complainant's concern is both genuine and justified. Alcohol marketing material should not be handed to a minor and the fact that the complainant's son is only 11 and was wearing a school uniform makes the occurrence even more inexplicable.
38. While Uber Eats is not a business that is captured by ABAC obligations, both Coles Liquor and Endeavour Group, the owners of the alcohol retailers included on the flyer are signatories to the ABAC Scheme and bound to market consistently with the ABAC standards. It is readily accepted by all companies that the flyer should not have been given to the complainant's son.
39. The problem with the flyer was not its content. Rather, it was the distribution of the flyer which was inappropriate. This brought into play the ABAC Placement Rules. The Rules are not drafted to easily capture the circumstances of the case, but the Panel believes the distribution of flyers into the hands of members of the public can be regarded as falling within the intent of Rule 2.
40. Adapted to the expectations of the distribution of flyers at a railway station, the rule means that flyers are not to be offered to minors and alcohol companies need to have in place a system that would avoid minors being handed the flyers. This includes requiring partners contracted to distribute flyers to have appropriate measures in place.
41. In this case, it appears the two alcohol companies did require Uber Eats to market consistently with ABAC standards and the system Uber Eats employed with its sub-contractor did appear to be robust and if followed would not have alcohol marketing material given to minors. Clearly the system failed in this instance, but whether this was a one-off or something more cannot be determined on the available information.
42. Drawing this together, the Panel is unable to find that the two alcohol companies failed to meet their obligation to apply 'available age restriction controls'. While a breach has not been found, the Panel reiterates that the complainant's concern was valid and justified.

43. The ABAC Responsible Alcohol Marketing Code is currently undergoing review, and while it might seem obvious to a reasonable person that handing flyers promoting alcohol to a minor is not responsible alcohol marketing, the Panel recommends to ABAC's Management Committee that the Code be strengthened by including a specific requirement to this effect.
44. The complaint is dismissed.