



ABAC Adjudication Panel Determination No 109/22

Product: BWS
Company: Endeavour Group
Media: Website – Uber Eats
Date of decision: 4 January 2023
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 23 November 2022 and concerns the marketing of BWS products (“the products”) retailed by Endeavour Group (“the Company”) on the Uber Eats website.
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 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 23 November 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 the BWS listing on the Uber Eats website landing page.

The Marketing

10. The complaint relates to the listing of BWS products on the Uber Eats website landing page.

The screenshot shows the Uber Eats website interface. On the left, there are various filters and sorting options for restaurants, including 'Sort' (Picked for you (default), Most popular, Rating, Delivery time), 'From Uber Eats' (Deals, Highest rated), 'Price Range' (\$, \$\$, \$\$\$, \$\$\$), 'Max Delivery Fee' (\$1, \$3, \$5, \$5+), and 'Dietary' (Vegetarian, Vegan, Gluten-free, Halal, Allergy friendly). The main content area displays a grid of items under the heading 'Wine for any occasion'. Each item includes a small image, the name, price, and a brief description. Some items have additional details like delivery fees or ratings. Below this section, there are other food items from various restaurants like KFC, Noodle Box, and Red Rooster.

Item	Description	Rating
Bird In Hand Sauvignon Blanc 750ml	\$30	
In Top Company Pinot Grigio Cask 2L	\$12	
South Island Sauvignon Blanc 750ml	\$17	
South Island White Mist Sauvignon Blanc 750ml	\$23	
Jacob's Creek Cool Harvest Pinot Grigio...	\$17	
Dean & Monroe King Valley Prosecco 750ml	\$23	
KFC (Aspley)	\$8.95 Delivery Fee* - 15-30 min	4.5
Guzman y Gomez (Virginia)	\$4.99 Delivery Fee* - 15-30 min	4.7
Hungry Jacks (Boondall)	\$4.99 Delivery Fee* - 10-25 min	4.2
Noodle Box (Boondall)	Spend \$30 / Save \$8 NEW MENU	4.7
Red Rooster (Aspley)	DELIVER ONE DELIVERY FEE	4.5
Thai Natong	ENJOY LOCAL FLAVOURS	4.9

The Complaint

11. The complainant objects to the marketing as follows:

- *Surely it can't be legal for Uber Eats to just list alongside Allen's lollies and similar alcoholic beverages like those sold at BWS and similar? I have suffered from alcohol abuse before and it is really discouraging to find that just ordering food results in me being subject to having to resist alcohol advertising. I really would like a response as to how it is considered appropriate for McDonald's to be suggested alongside wine, beer and spirits in Australia where Alcohol is a significant contribution to societal harm.*
- *I went to order dinner for myself and my partner and was confronted not only by individual stores selling alcoholic beverages but the individual products themselves including "Wine for any occasion" (would that include recovering alcoholic?) alongside KFC, Guzmen y Gomez, Red Rooster and Noodle Box.*
- *I was very pleased that Uber Eats allowed me to exclude alcohol products from my order form, but that requires me to be "logged in" to my account which I am not always. Surely, we are not a society that allows a child to be exposed to such advertising simply because they navigated to the website that their parents use without first "logging in"?*

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:

- (b)(i) have Strong or Evident Appeal to Minors;
- (b)(iv) be directed at Minors through a breach of any of the Placement Rules.

13. Part 6 of the ABAC Code provides that:

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 BWS Response

14. **Endeavour Group** responded to the complaint by letter emailed on 13 December 2022. The principal points made by the Company 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).
- We respectfully submit that the Complaint should be dismissed for the following reasons:
 - the Content does not fall within the ambit of the ABAC Responsible Alcohol Marketing Code (the Code) on the basis that it is not a “Marketing Communication” as defined in Part 6 of the Code:

Marketing Communications means marketing communications in Australia generated by or within the reasonable control of a Marketer (apart from the exceptions listed in Section 2(b)), including but not limited to brand advertising (including trade advertising), competitions, digital communications (including in

mobile and social media), product names and packaging, advertorials, alcohol brand extensions to non-alcohol beverage products, point of sale materials, retailer advertising and Marketing Collateral

- As outlined in the Complaint, the Content includes images, names and prices of the relevant liquor products, which in and of itself cannot reasonably be considered to be any form of ‘marketing’.
- The definition of ‘to market’ is defined in the Oxford English Dictionary as follows:

To place or establish (a product) on the market; esp. To seek to increase sales of (a product) by means of distribution and promotion strategies¹.

(emphasis added)

- It is clear from this definition that there must be an element of ‘promotion’ or an intention to ‘increase sales’ in order to constitute marketing. In our view, with respect, there is nothing about the Content which would, when properly considered, constitute marketing. Rather, it is the depiction of products for sale in the ordinary course of trade by Uber Eats, alongside numerous other products from other vendors.
- We further submit the Content is also not within the definition of a Marketing Communication for the purposes of the Code, as the Content was not generated by, or within the reasonable control of BWS.
- However, if the Panel is minded to disagree with our interpretation above, we have set out below responses to ABAC’s specific questions.

Alcohol Advertising Pre-vetting Service Approval

- BWS did not seek Alcohol Advertising Pre-Vetting Service Approval for the Content because it did not create the Content.

¹ Oxford Dictionary

- 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 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.
 - 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:
 - ID25 - we ask for ID if a shopper looks under the age of 25;
 - Our Refusal of Service Policy (Secondary Supply, Intoxication and School Uniform); and
 - Staff training that exceeds legal requirements, including our 'Leading in Responsibility' training module, team talkers, regular refresher and reminder courses.
 - Endeavour is a signatory to the Retail Drinks Australia (RDA) Online Alcohol Sale and Delivery Code of Conduct - a voluntary Code that helps govern online sales and deliveries of alcohol in Australia;
 - The processes outlined above provide Endeavour Group with a compliance framework to ensure that it serves customers in accordance with its obligations under the various applicable laws.

The 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 grants BWS a licence to use its mobile and web applications and other technology interfaces during the Term (the Uber Tool). Access to the Uber Tool enables BWS to seek, receive and fulfill requests from customers who order from BWS using the Uber Eats application (the App) or website, and are located within the Uber Eats Active Area².
- The Uber Eats website is a third-party online food ordering and delivery platform that is not primarily related to alcohol. In addition, the Content was not generated by or within the reasonable control of BWS (as explained further below).
- Under the Agreement, BWS allows Uber Eats to display the BWS brand name and BWS products on the Uber Eats platform. The specific manner in which the BWS products are displayed when a customer selects a BWS store (i.e., on the BWS “store-front”) is determined by BWS, however placement on the website landing page is determined entirely by Uber Eats and BWS has no involvement in the way that Uber Eats executes its product listings on that page.
- 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 policies (including its [community guidelines](#)) provide that:
 - a person must be 18 years or older to be eligible for an Uber Eats user account;
 - anyone under the age of 18 is not allowed to order or receive alcohol deliveries; and

² The maximum geographic area in which BWS’s location and/or products are visible to customers in the App or website

- people under the age of 18 are not allowed to use an adult's Uber Eats account to request deliveries,
- (the **18+ Policy**).
- As noted above, BWS does not have control over the placement of its products on the landing page of the Uber Eats website, including the Content.
 - We understand from Uber Eats that the positioning of BWS products on the Uber Eats website is based on various factors, including a customer's location within the Uber Eats Active Area and purchasing history.
 - We understand that the ability to view alcohol products on the Uber Eats website does not change depending on whether the user is logged in.
 - However, a customer is unable to make an alcohol purchase unless they create a user account with Uber Eats (and therefore comply with the 18+ Policy). Further, we understand that Uber Eats conducts additional ID verification at the point of delivery for alcohol products in certain states.

Responsibility toward Minors

- Part 3(b)(i) of the Code prohibits a marketing communication from having strong or evident appeal to minors. To breach section 3(b)(i) one of the following tests must be met:
 - likely to appeal strongly to minors;
 - specifically targeted at minors;
 - having a particular attractiveness for a minors beyond the general attractiveness it has for an adult
 - using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to minors or that create confusion with confectionary or soft drinks;
 - using brand identification, including logos, on clothing, toys or other merchandise for use primarily by minors.
- In assessing the Content's compliance with the Code, it must be considered from the perspective of a 'reasonable person to whom the material is likely to

be communicated and taking its content as a whole' (Part 5 Code). In light of the 18+ Policy, BWS considers it reasonable to conclude that any person viewing the Content is most likely to be an adult (Viewer).

- On balance, BWS does not believe that a Viewer would consider the Content to have a strong or evident appeal to minors given that:
 - the Uber Eats website cannot be said to have a particular attractiveness for a minor beyond the general attractiveness it has for an adult;
 - the products, which are the subject of the Content, are liquor products which are explicitly targeted to adults for purchasing and consumption;
 - confectionary items³ and those other foods (e.g. KFC, Guzman y Gomez, Red Rooster and Noodle Box) that the Content was placed alongside have a general appeal across age groups that is not particularly stronger for minors than they are for adults;
 - the Content is simply a product listing and does not use imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to minors or that create confusion with confectionary or soft drinks;
 - the Content taken as a whole does not create an environment likely to strongly appeal to minors, particularly given Uber Eats' 18+ Policy.

Placement Rules

- Part 3(b)(iv) of the Code prohibits a marketing communication from being directed at minors through a breach of any of the placement rules.
- BWS submits that the 18+ Policy is a reasonable control implemented by Uber Eats to prevent minors from viewing alcohol products on the Uber Eats platform.

³ BWS would like to note that it is not clear in the Complaint whether the Content was actually placed alongside confectionary items. Nevertheless, our position remains unchanged.

- BWS is not in a position to provide data or other information in relation to the Uber Eats audience composition, but notes that Uber Eats' 18+ policy would appear to support the reasonable conclusion that its audience is well above 75% adult.
- BWS submits that a reasonable Viewer would not consider the Content to have been placed with content primarily aimed at minors. Due to the 18+ Policy, none of the content on the Uber Eats platform can reasonably be regarded as being primarily aimed at minors.

The Uber Eats Response

15. **Uber Eats** responded to the complaint by letter emailed on 13 December 2022. The principal points made by Uber Eats were:

- We have reviewed the copy of the complaint provided in the letter from ABAC. This complaint appears to be in relation to the browsing experience of consumers on our website, rather than a specific marketing communication.
- The photograph provided by the complainant is not, in our view, a marketing communication, but rather a photograph of the Uber Eats website browsing experience. This is akin to viewing products on the shelves of stores. The written description and reasons provided by the complainant focuses on how food items from popular restaurant brands and confectionery are also available for browsing and purchase via the Uber Eats website, in addition to alcohol.
- We have reviewed the ABAC Responsible Alcohol Marketing Code ("the Code"), including the description of Marketing Communications that are subject to the Code under Part 2. While we understand that the list of what is considered Marketing Communications in Part 2 is not exhaustive, we consider that the browsing experience of a consumer on an ecommerce website showing photographs of products that are available to purchase is not a Marketing Communication and given the types of activities included we consider the definition was not intended to cover this activity.
- The complainant does not appear to have a genuine complaint about Uber Eats Marketing Communications, and is rather concerned about the nature of the Uber Eats business and the browsing experience that a consumer has while on the Uber Eats website. We believe this is akin to concerns about

the layout of a shopping centre that contains liquor stores, or a supermarket that sells alcohol items in addition to food.

- Given this, we do not believe that the subject matter of this complaint is appropriate for ABAC to adjudicate on and request that the complaint be dismissed. If ABAC does not agree with our view, we would welcome additional correspondence between ABAC and Uber Eats clarifying that position and providing an opportunity to comment on the aspects of the complaint that ABAC feels constitute a Marketing Communication.
- While we do not believe the activities referenced in the complaint are subject to the Code, Uber Eats takes our role in preventing minors from both accessing alcohol and being subject to alcohol marketing seriously. We have outlined some of our policies and processes in this letter, and we feel strongly that we are operating in a way that is responsible and aligned to industry standards.

Alcohol Advertising Pre-vetting Service Approval

- The complaint does not appear to refer to a Marketing Communication, and thus Uber Eats did not seek Alcohol Advertising Pre-vetting Service Approval in relation to the subject of this complaint.

Nature of relationship with Endeavour Group - BWS

- Uber Eats has entered into a merchant agreement with Endeavour Group Limited (covering BWS), which enables Endeavour Group Limited to display their products for sale on our website. Under the merchant agreement, Uber Eats is permitted to use or display the name and logo of Endeavour Group Limited in connection with making their items available through the Uber Eats website.
- The Uber Eats app utilises a machine learning algorithm that places merchants and items within the app in a specific order which is personalised for each eater. The ranking prioritises merchants and items we believe the individual customer viewing the app will order from based on several factors, including, for example, their order history, time of day, availability of the merchant, delivery zone, estimated delivery time and popularity with other customers. As a result, the browsing experience is personalised and continuously changing for each customer. In the event the customer is not logged in to their account, factors such as a customer's order history are not considered by the algorithm.

- The ability to view alcohol products on the Uber Eats website typically does not change depending on whether or not the user is logged in, but there are some exceptions. The following groups of consumers will not be able to see alcohol on the Uber Eats website once they have logged into their account:
 - Users who have voluntarily requested to be excluded from alcohol on Uber Eats,
 - Users who are prevented from purchasing alcohol on Uber Eats as the outcome of a third party request to exclude them from alcohol purchases, and
 - Users who are prevented from purchasing alcohol on Uber Eats as the outcome of a safety investigation by Uber Eats.
- Uber Eats offers a “guest checkout” option on orders that do not contain alcohol. This allows the consumer to browse and checkout without having to create an account or logging into their account. However, this feature is not available on any order containing alcohol. The consumer must log into their account or create a new account to place an order for alcohol.
- We note that it is a common experience of many major retail brands in Australia that users can browse the website without logging in. This includes retailers that primarily sell alcohol. We believe this reflects a pragmatic approach, which allows consumers to review and understand a retailer’s offering before committing to creating an account and sharing their personal information with the retailer. It also reflects a common shopping experience in the non-digital world, where some grocery stores sell alcohol in their store, or may have an adjoining liquor store located next door.

Responsibility toward Minors

- The complaint does not appear to refer to a Marketing Communication, and thus Uber Eats does not believe that it has breached Part 3 (b)(i) of the Code.
- Additionally, we do not consider that the food items and brands shown alongside alcohol items and brands on the Uber Eats website have a strong or evident appeal to minors, or are specifically targeted at minors. While minors may enjoy consuming these food items, we do not believe that the brands mentioned in the complaint have a particular attractiveness to minors beyond the general attractiveness they have for adults. Further, under our

General Terms of Use, a person must be at least 18 years of age to obtain an Uber account, so the Uber Eats website is not intended to target minors and is not specifically created to appeal to minors.

Placement Rules

- Uber Eats takes seriously its responsibility to ensure that minors are not able access alcohol through Uber Eats and are not exposed to Uber Eats Marketing Communications promoting our alcohol delivery services.
- Uber Eats follows the Code with respect to using available age restriction controls to exclude minors from viewing Marketing Communications. However, as previously noted in this letter, this complaint does not relate to any Marketing Communications and thus the age restriction controls referenced in the Code are not applicable to the subject matter of this complaint.
- As stated above the Uber Eats website is the same as other food and alcohol websites which allow all users to browse the site without logging in. Similarly, it is practically not possible to prevent minors from viewing alcohol products when walking past retail outlets (eg, in a shopping centre) or viewing all outdoor advertising etc. We therefore consider that even if ABAC takes the view that a website is a Marketing Communication, there has been no breach of the placement rules for alcohol marketing.
- In accordance with our terms and conditions, all Uber Eats account holders must be at least 18 years of age. When we become aware that a user may be a minor, their account is blocked until they can provide evidence of age demonstrating that they are at least 18 years of age.
- When completing an order for alcohol on the Uber Eats mobile app or website, the consumer will be asked to confirm that they are 18 years or above. In NSW, the user will also be asked to provide their date of birth before completing check-out (this feature is being introduced in all other Australian markets where alcohol delivery is available by the end of December). When the items are delivered to the consumer, the delivery person will be prompted by the app to request and scan their ID with the app. If the recipient is not able to provide valid ID evidencing the recipient is not a minor, the app will prompt the delivery person to refuse the delivery and return the alcohol items to the store.

- Alcohol delivery is optional for delivery people on Uber Eats. Only delivery people who completed education materials will be allowed to receive alcohol delivery requests on Uber Eats. These delivery materials vary by State, in accordance with State laws, but all materials include information regarding the delivery to minors and the obligation to confirm age with a valid form of ID.
- To ensure our systems are effective, we conduct weekly mystery shopping, using a third-party provider with shoppers aged 18-22. Our mystery shopping audits have a significant focus on whether an ID is checked for each delivery. We believe that our rate of compliance with ID checking obligations is among the highest in the industry and thus we have confidence in our processes.

The Panel's View

Introduction

16. Uber Eats is an extension of the worldwide ride share service Uber and commenced Australian operations in 2016. Initially the service matched consumers with food suppliers (restaurants/cafes etc), with the model subsequently adding the home delivery of other items. Alcohol appears to have been first added as an ordering option in Melbourne in 2017 with other regions following thereafter.
17. In late November 2022 the complainant went onto the Uber Eats website and was disappointed to see on the website's landing page alcohol products ranged with restaurants and other food items including confectionery. The complainant's concern arose particularly from being confronted with alcohol given the complainant's issues with alcohol dependency. Beyond this, it was also observed that children should not be exposed to alcohol products on the site.
18. It seems that the placement of various products and food outlets displayed on the Uber Eats website is determined in part by the physical location of the consumer entering the site. This meant for the complainant, the alcohol products displayed on the website were sourced from the major retailer BWS. Accordingly, both BWS and Uber Eats were invited to respond to the complaint.
19. Both entities have argued that the website landing page does not offend ABAC obligations because the website was not a 'marketing communication' within the scope of the ABAC Scheme. Alternatively, it was contended that if the landing page was considered to be captured by the Scheme, then both the content and

placement of the alcohol products on the page was consistent with ABAC requirements.

20. This means the determination needs to deal with threshold questions about the remit of the Scheme before consideration of the substantive issues raised by the complaint.

Can the content of the Uber Eats Website landing page be regarded as a marketing communication?

21. Combined, BWS and Uber Eats advance two arguments as to why the Uber Eats website and its landing page are not within the ambit of the ABAC Scheme, namely:
 - that the content of the landing page is not a 'marketing communication' within the intended scope of the ABAC (submitted by both entities); and
 - Uber Eats is not itself an 'alcohol marketer' and BWS did not create nor have control over the content appearing on the website landing page (submitted by BWS).
22. In relation to the first argument, the ABAC applies to all marketing communications in Australia generated by or within the reasonable control of a 'marketer'. The term marketer is defined to mean a producer, distributor or retailer of alcohol beverages. Part 2 (a) of the Code provides non-exhaustive examples of marketing communications as follows:
 - brand advertising (including trade advertising)
 - competitions
 - digital communications (including in mobile and social media and user generated content)
 - Alcohol Beverage product names and packaging
 - Advertorials
 - alcohol brand extensions to non-alcohol beverage products
 - point of sale materials
 - retailer advertising

- Marketing Collateral.
23. It is contended that the Uber Eats website is not a marketing communication because:
- it contains images, names and prices of alcohol products and this alone is 'not a form of marketing';
 - rather, the landing page is akin to viewing products on the shelf of a store;
 - to be marketing, a 'communication' must have an element of promotion with the intent to increase sales and the mere listing of items for sale on the website does not satisfy this element of marketing; and
 - the browsing experience of the landing page should not be considered marketing.
24. In short, the argument is that to be 'marketing' the communication must be promoting the attributes of the product or pointing out an advantage the product offers or there is a 'call to action' by a consumer to purchase the product. The simple public listing of the product for sale is not enough to be regarded as marketing.
25. The Code does not endeavour to precisely define a 'marketing communication'. This is not an oversight, but a policy choice adopted and then re-affirmed in the various reviews of the Code undertaken since the commencement of the ABAC Scheme in 1998. It has enabled the Code to adapt to changes in marketing techniques and the emergence of new mediums.
26. For instance, the concept of a marketing communication was held by the Panel to capture social media in 2009, user generated comments in 2010 and social influencer posts in 2017. These decisions were based on the Panel being mindful of the 'spirit and intent' of the Code and its underlying purpose within the regulatory framework applying to alcohol.
27. It should be noted that the structure of Part 2 (a) in describing examples of marketing communications for ABAC purposes combines both 'message and medium'. That is, the examples include both types of marketing such as brand advertising and retailer advertising and the medium of 'digital communications'.

28. The Panel believes the first argument advanced as to why the Uber Eats website landing page is not capable of being a marketing communication for ABAC purposes must be rejected. In reaching this conclusion the Panel had regard to:
- the Code is to be understood consistently with the spirit and intent of the ABAC Scheme and that supports a common sense and not technical interpretation of a ‘marketing communication’;
 - websites are a standard and core medium for the carrying of ‘marketing’ material and the ABAC Scheme has applied to the internet since the Code review conducted in 2004;
 - previous Panel decisions have treated retailer catalogues as a ‘marketing communication’ and these catalogues have essentially comprised photos of alcohol products, brand name and product price - see Determination 7/20, Determination 20/19; and
 - a marketing communication includes the name and packaging of alcohol products and these are clearly shown in the images on the website.
29. If the landing page was nothing more than a listing of products and prices akin to a supermarket shelf it might be accepted that it is not ‘marketing’, however the landing page does more than this. It displays attractive and set piece photographs of the available food and products clearly aimed to depict the products in a favorable light. It can contain discounts or offers on products. It provides a more than factual description of products - for instance the section showing wines is headed ‘Wines for any occasion’.
30. In another context, product copy with this content will be accepted as a marketing communication. For example, imagine a roadside billboard showing a photograph of a bottle of wine, with the brand name under a strapline - ‘A wine for any occasion’. There is no question such a billboard would be regarded as a marketing communication for ABAC purposes. There is no reason to think that such an anodyne marketing message would offend any ABAC standard, but it is still a marketing communication within the intended scope of the Code.

The status of Uber Eats and does BWS have reasonable control over the display of its products on the landing page?

31. The second argument is that Uber Eats is itself not an alcohol retailer and BWS did not have control over how its brand and products were portrayed on the

website, and this means the website landing page is not within the remit of the ABAC Scheme.

32. Firstly, is Uber Eats itself an ‘alcohol retailer’? Afterall it is facilitating the purchase of alcohol by a consumer. As explained by BWS and Uber Eats, the relationship between the entities is documented in a merchant agreement. It is beyond the remit of the Panel to explore the commercial terms of this agreement and it is noted that the exact legal status of the parties under Uber Eats contracts has on occasions been contested - for instance see the decision of the full bench of the Fair Work Commission concerning whether ‘delivery partners’ are independent contractors or employees of Uber Eats. (2020 FWCFB 1698).
33. In the Fair Work Commission decision, the basic business model of Uber Eats is described as involving four parties namely:
 - the customer who orders the food/alcohol or other items;
 - the source retailer of the items sought by the customer eg a restaurant or alcohol retailer;
 - the ‘delivery partner’ who collects the item from the source retailer and delivers it to the customer; and
 - Uber Eats itself which provides the IT platforms to connect the other parties, and has in place the logistical and payment systems to enable the transaction to occur.
34. Uber Eats describes itself as a ‘technology services provider’ and not a retailer. And it is fair to say it is not an alcohol retailer in the same sense that BWS is a specialist alcohol retailer. Uber Eats, via its specialist apps, is facilitating the delivery of a far wider range of products than simply alcohol and the number and value of alcohol orders would presumably be relatively minor compared to meals and the totality of products available to be ordered via its customer app. That said, Uber Eats has adopted the same obligations as an alcohol retailer, particularly regarding the responsible service of alcohol. For instance:
 - all account holders must be aged 18 and over;
 - alcohol cannot be ordered by a minor;
 - in NSW and shortly throughout Australia, the consumer is required to enter a date of birth before completing check-out;

- the delivery partner should not leave alcohol with a minor and is required to scan the customer's ID when delivering to a residence;
 - delivery partners are to undertake education on alcohol delivery requirements;
 - an account holder has options to exclude alcohol products being displayed when logged in; and
 - Uber Eats can refuse to match a customer's order with an alcohol merchant if the customer's ordering pattern indicates unusual and excessive purchases are occurring.
35. On the available information it is not open to the Panel to find that Uber Eats is itself an alcohol retailer within the intended scope of the ABAC Scheme. That said, it is now a participant in the alcohol industry and it is fully appropriate that its operations reflect that fact. As noted by BWS, the merchant agreement between it and Uber Eats requires the 'parties 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' ie the ABAC.
36. The next limb of the argument is that BWS did not create the content on the Uber Eats landing page and had no control over how its products were placed on the page vis a vis other items, such as food and confectionery. As a result, BWS contends that the landing page cannot be a marketing communication for which it can be held responsible in relation to ABAC requirements.
37. The Panel does not accept this argument. BWS has entered into the agreement with Uber Eats knowing that its products will be displayed on the landing page of the Uber Eats website. While the layout of the landing page and the occasions BWS products appear in response to customer searches as opposed to another alcohol retailer might be outside its direct control, BWS:
- entered into the agreement to have its products available to be ordered by consumers;
 - provided information on the products stocked and hence available to be ordered and displayed on the landing page; and
 - has rights in regard to its branding and pricing information etc included on the website.

38. In short, BWS's agreement with Uber Eats means it has either 'generated' the placement of its products on the landing page or has given it a sufficient degree of control over the placement of its products to have the references to its products on the site captured by the intended scope of an ABAC marketing communication.

Is the reference to alcohol products on the landing page consistent with ABAC requirements?

39. The complainant's principal concern is that alcohol products should not be placed on the landing page alongside food and confectionery items. This was distressing to the complainant as a person dealing with alcohol dependency issues and argued it should not be permitted in relation to minors accessing the Uber Eats website.

40. The ABAC does not contain express standards going to the issue of alcohol marketing and alcohol dependent persons as such, in contrast to the standard in Part 3 (b) that requires alcohol marketing not have strong or evident appeal to minors. Rather the Code has standards about the responsible depiction of alcohol use, namely that an alcohol marketing communication must not:

- encourage the misuse or abuse of alcohol - Part 3 (a)(i);
- encourage irresponsible or offensive behaviour that is related to the consumption or presence of alcohol - Part 3 (a)(ii);
- suggest that the consumption of alcohol may create or contribute to a significant change in mood or environment - Part 3 (c)(ii);
- suggest that alcohol leads to the achievement of success in life - Part (c)(ii); and
- suggest that the consumption of alcohol offers any therapeutic benefit or is a necessary aid to relaxation - Part 3 (c)(iv).

41. In assessing if a marketing communication is consistent with an ABAC standard the Panel is to consider how the marketing item would be probably understood by a reasonable person. This means the benchmark is the life experiences, values and opinions shared commonly in the community.

42. It can be readily acknowledged that it is challenging for persons dealing with alcohol dependency to navigate the ubiquitous references to alcohol in society and to come across the product on the Uber Eats web page adds to this

challenge. That said, the landing page provides essentially factual information about the availability of alcohol products from BWS that can be ordered and delivered via the Uber Eats system. It does not portray alcohol use in a manner inconsistent with the ABAC standards going to the responsible use of alcohol.

43. The complainant has argued that a child should not be exposed to alcohol advertising when browsing the Uber Eats platform. As an alcohol retailer BWS has two obligations regarding its marketing and minors, namely:
 - the content of its marketing communications must not have strong or evident appeal to minors - Part 3 (b)(i); and
 - it must endeavour to limit the exposure of minors to its marketing by meeting the ABAC Placement Rules- Part 3 (b)(iv).
44. The complainant did not object to the 'content' of the BWS alcohol marketing on the landing page in regard to children, but rather submitted that children should not be exposed to alcohol products from any supplier on the page that referenced food and confectionery. This means the concern triggers the consideration of the Placement Rules.
45. There are five Placement Rules, three of which are directly relevant in the current case namely:
 - if a media platform on which the marketing item appears has available age restriction controls to exclude minors, then these controls must be used - Rule 2;
 - if age restrictions controls cannot exclude minors, then marketing can only be placed where the audience is reasonably expected to comprise at least 75% adults - Rule 3; and
 - marketing must not be placed with programs or content primarily aimed at minors - Rule 4.
46. The Code defines 'available age restriction controls' to mean age restriction, targeting or affirmation technologies available to restrict a marketing communication to adults. The definition goes on to state that a third-party platform, website or account that is not primarily related to alcohol is required to be age restricted in its entirety before it can be used to place a marketing communication.

47. To BWS, the Uber Eats website is a third party website that is not primarily related to alcohol beverages i.e. it lists for customer orders a wide range of foodstuffs and other items of which alcohol beverages are one. Accordingly, BWS can place its marketing on the website without the entire website being restricted to minors but it must seek to have available age restriction controls applied.
48. It seems that Uber Eats does not give to BWS or any of the alcohol retailers that list products with it, the capacity to exclude minors from viewing alcohol products on the Uber Eats website. While the website has the capacity to exclude minors from opening an account and making orders, this does not extend to the visibility website as a whole.
49. It is unclear whether Uber Eats has the technical capacity to exclude minors from entering the website site and does not or whether this technical ability is not open to it. In either case, it means that from the perspective of BWS it does not have an option to use an age restriction control for its marketing carried on the Uber Eats website. Accordingly, Placement Rule 2 has not been breached.
50. Placement Rule 3 requires that alcohol marketing only be placed where the audience is reasonably expected to comprise 75% adults. In some mediums such as TV with the ratings system and the demographic data available on social media platforms such as Facebook, the assessment of the expected audience of a marketing item is generally straightforward.
51. Neither BWS nor Uber Eats gave detailed information as to the makeup of the audience of the website landing page. BWS commented that the fact that accounts to make orders are open only to adults and not minors, it could be surmised that the audience must be well in excess of 75%.
52. The Panel believes it is likely the audience of the website would be predominantly adult. To make orders for food and other items requires an account (available to over 18-year-olds) and a credit or debit card to pay for the orders. While minors can view the site, common sense indicates that the site will be accessed largely by adults.
53. Equally Placement Rule 4 is not breached. This rule provides an alcohol ad must not be placed with programs or content primarily aimed at minors. While the information on the landing page might have some interest to some minors, the site cannot be said to be primarily aimed at minors when the customers for items able to be ordered from the site must be adults.

Conclusion

54. This has been a complicated and technical decision arising from the need to firstly determine if the ABAC Scheme applied to the Uber Eats website and if so, on what basis, and then assess if ABAC requirements have been met.
55. On the threshold question of the application of the ABAC Scheme to the Uber Eats website landing page, the Panel has concluded that:
 - on the available information, Uber Eats is not itself an alcohol retailer within the intended scope of the ABAC;
 - BWS is self-evidently an alcohol retailer and its marketing must occur consistently with ABAC obligations;
 - BWS and Uber Eats have an agreement whereby BWS alcohol products are available to be ordered and delivered to consumers via the Uber Eats IT platforms and logistics/payment arrangements;
 - this relationship results in part in BWS alcohol products being listed on the landing page of the Uber Eats website;
 - the listing of the alcohol products on the landing page in terms of its content falls within the intended scope of a ‘marketing communication’ for ABAC purposes;
 - BWS through entering into the merchant agreement with Uber Eats has either ‘generated’ the product listing on the landing page or has given it sufficient control over the listing to make it a BWS marketing communication that must meet ABAC requirements.
56. On the consistency of the listing of the alcohol products on the landing page with ABAC requirements, the Panel has found:
 - the content of the listing does not portray alcohol and the use of alcohol in an irresponsible manner and does not breach ABAC content standards;
 - the listing does not breach the ABAC Placement Rules given;
 - from BWS’s perspective, the Uber Eats website is a third party website that is not primarily related to alcohol;

- BWS does not have access to an age restriction control that would exclude minors from entering the Uber Eats website;
 - the likely audience of the Uber Eats website exceeds 75% adults; and
 - the Uber Eats website is not primarily aimed at minors.
57. The complaint is dismissed.