



ABAC Adjudication Panel Determination No 28/23

Product: BWS
Company: Endeavour Group
Media: Instagram
Date of decision: 16 March 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Louisa Jorm
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 13 February 2023 and concerns Instagram marketing for BWS (“the Product”) by Endeavour Group (“the Company”).
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 the 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 13 February 2023.
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

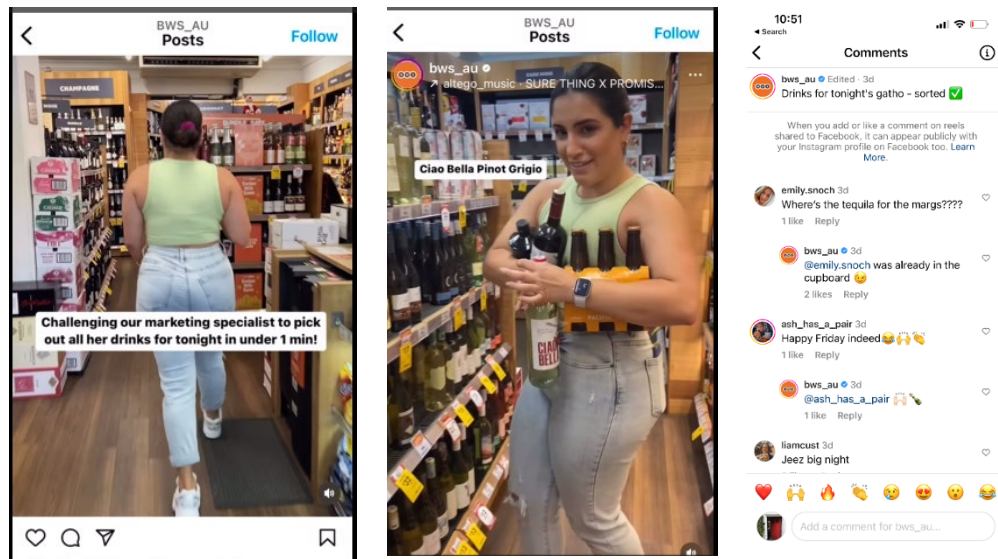
materials and advice and the availability of Panel members to convene and decide the issue. The complaint was completed in this timeframe.

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 marketing.

The Marketing Communication

10. The complaint relates to a post made to the Company's Instagram page, which shows a BWS staff member moving quickly around a bottle shop selecting a number of different alcoholic products. The commencing footage is superimposed with the words "Challenging our marketing specialist to pick out all her drinks for tonight in 1 minute", and the accompanying caption reads "Drinks for tonight's gatho – sorted".



The Complaint

11. The complainant objects to the marketing as follows:
 - *The video in question is a breach of section 3(a)(i) which states "A marketing Communication must not show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines.*
 - *The video has the following text "Challenging our marketing specialist to pick out all HER [emphasis added] drinks for tonight in 1 minute" - a reasonable*

person is to believe that this would imply that the woman in the video would be consuming all of the drinks she picks that same night.

- *Following this the woman then proceeds to pick a number of drinks that would be inconsistent with the number of standard drinks one person should consume in a day as per the Australian Alcohol Guidelines. This is further supported by a comment on the video which states "Jeez, big night".*

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (a)(i) show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines.

The Company's Response

13. The Company responded to the complaint by letter emailed on 22 February 2023. The principal comments 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).
 - At the outset, BWS would like to note the following:
 - Upon being made aware of the Complaint, the Advertisement was removed.
 - 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.
 - 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:

- 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.
- 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.
- For the reasons outlined below, BWS respectfully submits that the Advertisement does not breach any Part of the Code and it therefore requests the Panel to dismiss the Complaint.

Alcohol Advertising Pre-vetting Service Approval

- BWS did not seek Alcohol Advertising Pre-Vetting Service Approval for the Advertisement.

Responsible and moderate portrayal of Alcohol Beverages

- The Complainant's concern about the Advertisement raises Part 3(a)(i) of the Code which provides that a marketing communication must not show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an alcoholic beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines.
- In assessing the Advertisement'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 of the Code) (emphasis added).
- The Advertisement was posted on a Friday evening to generate excitement for the weekend and with the purpose of highlighting BWS's convenience offering and the fact that BWS offers a wide range of products that are suitable for gatherings of people with mixed preferences.
- BWS does not believe that Part 3(a)(i) has been breached on the basis that:
 - The reel was accompanied by a caption saying ""Drinks for tonight's gatho sorted". "Gatho" is a colloquial term to describe a party or gathering of people. The intention of the Advertisement was to show

the marketing specialist picking a selection of drinks for a party/gathering and therefore intended to be consumed by multiple people. BWS contends that the reel must be considered together with the caption, in order for the content as a whole to be considered in accordance with Part 5 of the Code.

- Part 3(a)(i) explicitly refers to 'consumption' of alcoholic beverages. ABAC has found on a number of occasions (for example, in determinations 158/21, 48/20 and 117/15), that there is a distinction between the promotion of the purchase of product/s and subsequent consumption, bearing in mind that most alcoholic beverages (particularly spirits) have a long shelf life and may be consumed by many people, not just a single person.
- A reasonable person would not view this Advertisement as an inducement to quickly or excessively consume the products purchased nor can it be said that the Advertisement reasonably implies or glorifies the misuse or abuse of alcohol or consumption that is inconsistent with the Australian Alcohol Guidelines.
- Further, the Advertisements do not show or encourage any irresponsible behaviour relating to the consumption of alcohol. There is no indication that the marketing specialist (depicted in the Advertisement) is intoxicated or that she intends to rapidly consume the purchased products.
- In relation to the user-generated comment (UGC) raised by the Complainant, BWS notes that all BWS social media pages are monitored Monday to Friday between 2 to 6 times per day (during business hours) to ensure the content and comments are compliant with the Code.
- Unfortunately, this particular UGC had not yet been moderated. We believe the reason for that is because the UGC was made outside of usual business hours. BWS notes that given the Advertisement has now been deleted, it is not in a position to verify the exact time the comment was made, however given BWS's diligent moderation practices, we assume it was outside usual business hours.
- However, for completeness, we have since circulated a guidance note to relevant marketing teams to remind them of ABAC's position in relation to post-moderation of UGC in line with ABAC's Best Practice For Responsible Digital Alcohol Marketing guidelines.

The Panel's View

14. This determination arises from a complaint about a video posted to the BWS Instagram account showing a BWS staff member moving quickly around a Company store, selecting multiple products from the shelves. The video is superimposed with the words “Challenging our marketing specialist to pick out all her drinks for tonight in 1 minute”. The text accompanying the post is captioned “Drinks for tonight’s gatho – sorted” . The post attracted a user generated comment that reads “Jeez big night”.
15. The complainant contends that a reasonable person would understand the post to imply that the staff member depicted was planning to drink in excess of the Australian Alcohol Guidelines through a combination of:
- text superimposed on the post reading "Challenging our marketing specialist to pick out all her drinks for tonight in 1 minute"; and
 - the person picking up four different products, one of which is a bottle of Hendrick’s Gin.

The complainant supports their interpretation of the marketing by referring to a comment on the post that reads “Jeez big night”.

16. The ABAC Code requires that a marketing communication must not show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines – Part 3 (a)(i). The question is whether this Code standard has been breached.
17. In response to the complaint, the Company deleted the post but maintained the ABAC standard had not been breached. The Company argued:
- the reel was accompanied by a caption saying “Drinks for tonight’s gatho sorted”. “Gatho” is a colloquial term to describe a party or gathering of people;
 - the intention of the advertisement was to show the marketing specialist picking a selection of drinks for a party/gathering and therefore intended to be consumed by multiple people;
 - there is a distinction between the promotion of the purchase of product/s and subsequent consumption, bearing in mind that most alcoholic beverages (particularly spirits) have a long shelf life and may be consumed by many people, not just a single person;
 - a reasonable person would not view this advertisement as an inducement to quickly or excessively consume the products purchased nor can it be said

that the advertisement reasonably implies or glorifies the misuse or abuse of alcohol or consumption that is inconsistent with the Australian Alcohol Guidelines; and

- the post does not show or encourage any irresponsible behaviour relating to the consumption of alcohol. There is no indication that the marketing specialist (depicted in the advertisement) is intoxicated or that she intends to rapidly consume the purchased products.
18. The assessment of whether a marketing communication is consistent with a Code standard is from the probable understanding of the marketing by a reasonable person taking the content of the marketing as a whole. This means the benchmark is the values, opinions and life experiences shared by most members of the community. If a marketing communication can be interpreted in several ways, the most probable understanding is to be preferred over a possible but less likely interpretation.
19. This is a case where reasonable minds might disagree. It is quite possible to interpret the post as contended by the complainant based on a combination of the superimposed text of "Challenging our marketing specialist to pick out all her drinks for tonight in 1 minute" with the video of the selection of the multiple products. The text can be taken to imply that "all her drinks for tonight" means that all of the alcohol selected is going to be consumed in a single night by a single person. If that is the most likely way the post would be understood, then this message clearly breaches the Code standard.
20. Alternatively, the accompanying caption of "Drinks for tonight's gatho sorted", places a different complexion on the post. This caption would likely be understood as referring to a "gathering" of people and hence the actions in the video would be purchasing alcohol for multiple people at the gathering. This understanding does not imply excessive consumption by a single person.
21. On balance the Panel believes the post does breach the Part 3 (a)(i) standard. While it is accepted that the Company did not intend to encourage excessive consumption, the Panel thinks the most probable take out from the post is that a single person is purchasing multiple alcohol products for consumption by a single person in a single evening. In reaching this conclusion the Panel noted:
- a reasonable person cannot be expected to study the post and accompanying text in fine detail and their impression will be shaped most strongly from the video and the text superimposed on the video;
 - the video and superimposed text imply a single person is purchasing all their alcohol for single night and that the alcohol is intended for consumption on this single occasion;

- the accompanying caption does place context to the purchase, but this text is not as influential as the video and the far more prominent text superimposed on the video;
- the user generated comment, although not the words of the Company, does tend to support that a viewer of the post also believed it was showing a large alcohol purchase for immediate consumption.

22. It is noted that the Company acted quickly to remove the post, and this shows good corporate responsibility from the Company. The complaint is upheld.