



ABAC Adjudication Panel Determination No 57/23

Product: Liquorland
Company: Coles Group
Media: Website (Third Party)
Date of decision: 5 May 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Jeanne Strachan

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 31 March 2023 and concerns website marketing for Liquorland (“the Product”) by Coles Group (“the Company”). The marketing was seen on Pedestrian.TV.
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 31 March 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 placement of the marketing.

The Marketing Communication

10. The complaint relates to marketing for Liquorland, seen on Pedestrian.TV. It takes the form of a listicle about “top picks from Liquorland’s Easter sale” and provides information, including the prices, of alcohol products sold by Liquorland. The listicle can be viewed at the following link:

[Ooft: Liquorland's Having A Huge Easter Sale On Beer, Vino & Spirits So You Better Hop To It \(pedestrian.tv\)](#)

The Complaint

11. The complainant objects to the marketing as follows:
 - *The post is a listicle that describes several alcoholic products and has tracked links to purchase the product. Each link to a product has a campaign ID linking the sale back to Pedestrian tv.*
 - *There is no age gate on this advertising/sale of the alcohol. This post is profiting from the Liquorland sales but making no effort to inform the audience that they'd need to be over 18.*

The ABAC Code

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

(b)(iv) be directed at Minors through a breach of any of the Placement Rules.

13. 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 to be age restricted in its entirety before it can be used to place a Marketing Communication.

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 Company's Response

14. The Company responded to the complaint by letter emailed on 21 April 2023. The principal comments made by the Company were:

- 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.

Ad description

- Article – The article is a listicle that describes several alcoholic products and has tracked links to purchase the products from Coles Liquor's Liquorland website. Below the heading "Ooft: Liquorland's Having A Huge Easter Sale On Beer, Vino & Spirits So You Better Hop To It" the article features an image from the American sitcom Brooklyn 99, and a disclaimer that "At Pedestrian.TV, we independently choose and write about stuff we love and think you'll froth too. We have affiliate partnerships so we might get a bit of money from any purchase you make based on our recs, cool? Cool. FYI – prices are accurate and items in stock at the time of posting".
- The article goes on to provide a list of six Liquorland products with corresponding images, prices, and respective paragraphs of text. Each product link has a campaign ID linking it back to Pedestrian TV's article (the article).

Reason for concern, as described by the complainant

- "There is no age gate on this advertising/sale of alcohol. This post is profiting from the Liquorland sales but [makes] no effort to inform the audience that they'd need to be over 18."

Coles Liquor's responses to ABAC's questions:

Alcohol Advertising Pre-vetting Service Approval

- The article was written by and managed by Pedestrian.TV. Resultantly, Coles Liquor did not obtain Alcohol Advertising Pre-vetting Service Approval prior to the article being published.

Relationship with Pedestrian.TV

- Coles Liquor advises that Liquorland is a Coles Liquor brand and is an affiliate partner of Pedestrian.TV.
- Coles Liquor advises that it did not write the article and was not given an opportunity by Pedestrian.TV to review the content of the article prior to its publication on Wednesday, 28 March 2023. Specifically, Coles Liquor's Content team, and Trade Planning team, were aware of Pedestrian.TV's activity to the extent that they had received communication of a proposed article's headline one week prior to the date of publication for the purpose of being able to recommend products for Pedestrian.TV to advertise. However, Coles Liquor had no visibility of the proposed article's content prior to publication.

- Once published, Coles Liquor was able to review the article and provided feedback to Pedestrian.TV. The initial changes, completed on the date of publication, resulted in alteration to the wording of the article due to usage of inappropriate language. Further changes to the article occurred on 6 April 2023 with the inclusion of two sentences at the conclusion of the article, reading: “Choose to DrinkWise. Please drink responsibly”; and “No Alcohol Can Be Sold Or Supplied To Anyone Under 18. It’s Against The Law”.
- In response to this complaint, Coles Liquor has advised Pedestrian.TV that all future affiliate marketing content involving Coles Liquor will be required to be reviewed and approved prior to publication. Additionally, Coles Liquor will require Pedestrian.TV to include “Choose to DrinkWise. Please drink responsibly”; and “No Alcohol Can Be Sold Or Supplied To Anyone Under 18. It’s Against The Law” in all future affiliate marketing content involving Coles Liquor.

Placement Rules

- Pedestrian.TV have advised Coles Liquor that their website does not have age-gating functionality.
- Pedestrian.TV have provided data to Coles Liquor produced by Ipsos, a market research company, from February 2023, assessing visitors to the Pedestrian.TV website (the website) from users of a smartphone, PC/Laptop and Tablet device from individuals aged 14 years old and above. Ipsos’ data indicated that at least 90% of visitors were adults (11% of visitors were aged between 14 – 24 years of age; 35% aged 25 – 39; 25% aged 40 – 54; 13% aged 55 – 64; and 17% were 65 years old, or older).
- The website also advises that Pedestrian.TV considers their core demographic to be aged between 18-34 years old.
- Coles Liquor confirms that, to its understanding, the article was not placed within programs or content aimed at Minors. We also note that Pedestrian.TV’s website Terms of Use specifically states, “[t]he majority of content contained on the Pedestrian Digital Network is not suitable for viewing by children”.
- In respect to Coles Liquor’s responsibility towards minors in accordance with the ABAC Code, Coles Liquor submits that the article 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 article directed towards minors in respect to distribution or was placed in programs or content primarily aimed at minors.
- For the reasons outlined above, Coles Liquor respectfully notes that in its view the article does not contravene the ABAC Code.

The Panel's View

Introduction

15. This determination arises from a complainant's concern that alcohol advertising was seen on the Pedestrian.TV website, which did not employ age-restriction controls to ensure that minors were not able to view the marketing.
16. The marketing viewed by the complainant was an article providing a list of six alcohol products with corresponding images, prices, and respective paragraphs of text. Each product link had a campaign ID linking it back to Pedestrian TV's article.
17. In response to the complaint, the Company has advised that:
 - the article arose as a consequence of the affiliate relationship between the Company and Pedestrian.TV;
 - the Company provided products and information to be included, but did not review or approve the article before it was published;
 - since being published, the Company has requested that changes be made;
 - The Company has advised Pedestrian.TV that all future affiliate marketing content involving Coles Liquor will be required to be reviewed and approved prior to publication.
18. The threshold issue is whether the listicle is a marketing communication for ABAC purposes. As a general proposition, media articles that reference alcohol will not be a marketing communication of an alcohol company, even if the company took actions to seek media attention. To be a marketing communication, the material must have been generated by or be within the reasonable control of an alcohol marketer.
19. In this case, the Company advises that although it did not write the listicle, the involvement of Pedestrian TV arose because of its affiliation with the Company. Further the control the Company has over the items appearing on Pedestrian TV and the ability to have changes made means the listicle is an alcohol marketing communication within the reasonable control of the Company, and therefore falls within the ABAC Scheme's remit.

ABAC Placement Rules

20. The point made by the complainant is not about the content of the listicle as such but the placement of the marketing on a website where it could be seen by minors. This brings into play the ABAC Placement Rules. The Rules have the policy aim that to the extent possible alcohol advertising should be directed towards adult audiences and away from minors.

21. There are three rules which could be of relevance to the complaint namely:
 - does the media platform on which the marketing item appeared have age restriction controls to exclude minors, and if so, were they used - Rule 2
 - was the audience of the content with which the marketing was placed in excess of 75% adult - Rule 3; and
 - can the Pedestrian.TV website be regarded as being 'primarily aimed' at minors - Rule 4.
22. Rule 2 requires that age restriction controls should be used when available. The Code defines age restriction controls as meaning age restriction, targeting or affirmation technologies available to restrict a Marketing Communication to Adults. The definition specifically excludes the requirement for websites that are not primarily related to alcohol to be age restricted in their entirety before being used to place a Marketing Communication.
23. It is not disputed that minors are able to view the Pedestrian.TV website and hence access the listicle. However, the question is firstly whether the Pedestrian.TV website has age restriction controls to restrict the marketing communication to adults. Secondly, is Pedestrian.TV a website that is not primarily related to alcohol.
24. Pedestrian.TV is a digital news and entertainment website that commenced operating in 2005. From 2018 it has been 100% owned by Nine Entertainment. It appears that the site does not have age restriction capacity nor is the site primarily related to alcohol. The net effect is that the Company cannot age restrict the listicle and rule 2 has not been breached.
25. Rule 3 goes to the audience of the content with which an alcohol marketing communication is placed. It provides that alcohol marketing may only be placed where the audience is reasonably expected to comprise at least 75% adults.
26. The Company has provided data on Pedestrian.TV. This data shows that overwhelmingly the viewers of Pedestrian.TV are adults - in the order of 90%. On this basis, Rule 3 has not been breached.
27. Rule 4 goes to the content of the website and raises the question of whether Pedestrian.TV can be said to be primarily aimed at under 18-year-olds. Some factors to be considered in assessing this question include:
 - the actual audience composition of the website;
 - the subject matter of the website and whether it has themes likely to predominantly appeal to children or adolescents;

- the use of familiar children's characters or the use of children and adolescents within the website;
- whether the content suggests its target audience is adult; and
- the use of language and the presence of adult themes such as violence and the portrayal of sexuality.

28. The Panel is of the view that placement of alcohol advertising on Pedestrian.TV would not breach Placement Rule 4 after considering that:

- a review of the website shows that its articles feature adult language and themes and are directed towards an adult audience;
- the depiction of minors, or celebrities or themes of significant appeal to minors, is not evident in the website's material; and
- the actual viewers of the site are predominantly adults.

29. The complaint is dismissed.