



ABAC Adjudication Panel Determination No 104/23

Product: Cabin Fever
Companies: Ahoy Management and Shelter Brewing Co
Media: OOH Billboard at Bus Stop
Date of decision: 24 July 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 26 June 2023 in relation to billboard marketing for Cabin Fever by Ahoy Management, which showed the logo of Shelter Brewing Co.
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 26 June 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

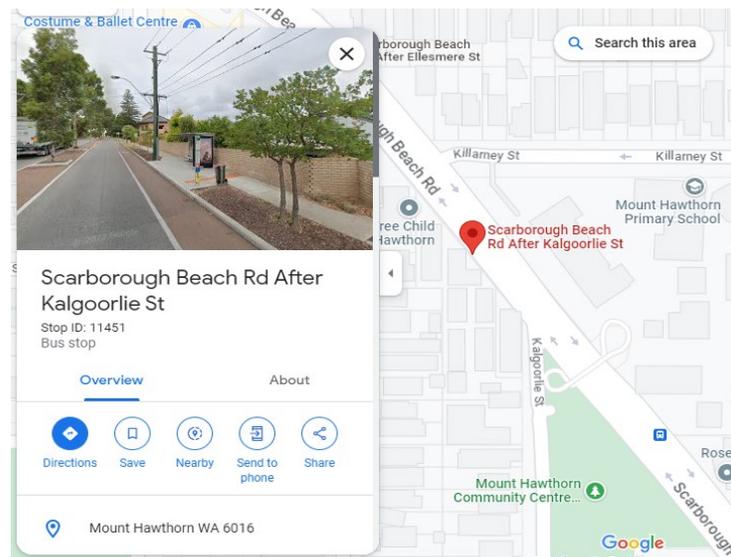
materials and advice and the availability of Panel members to convene and decide the issue. The complaint was completed in this timeframe.

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 obtained for the content of the marketing (Approval Number 5869).

The Marketing Placement

10. The complaint relates to a billboard which was seen at bus stop 11451 at Scarborough Beach Rd in Mount Hawthorn, Western Australia:



Complaint

11. The complainant objects to the marketing as follows:
- *This advertisement is placed on a bus stop directly opposite the Mount Hawthorn primary school.*
 - *This directly contravenes what is stated in the ABAC and OMA guidelines.*
 - *ABAC identifies that "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)", whilst OMA states "OMA members will not advertise alcohol products, wagering and gaming products, or adult and sexual services within a 150 metre sightline from the boundary of a school. Including: "advertising for a promotion involving alcoholic beverages, even if the advertiser does not primarily sell alcohol." As the bus stop is across the road from the boundary of the primary school, the advertisement would fall within the 150m sightline.*
 - *Young children from ages 3-12 would continuously be exposed to the image of alcohol multiple times over the two-week bus stop advertising period. Especially if they are using public transport to get to and from school or if they are walking past the bus stop. Young people should not have to be continuously exposed to a clear promotion of alcohol.*

The ABAC Code

12. Part 2 of the ABAC Code provides that:
- (a) 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 6 of the ABAC Code provides that:
- Marketer** means a producer, distributor or retailer of Alcohol Beverages.

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.

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).

15. The OMA Alcohol Advertising Policy provides that:

- 3.1 In accordance with the OMA's Placement Policy, members will ensure advertising that is captured by this policy is not placed on fixed signs located within a 150 metre sightline from the boundary of a school.
- 3.2 This policy, with regard to the placement of alcohol advertising, only applies to the following:
 - a. advertising for a business that primarily sells alcoholic beverages
 - b. advertising for an alcoholic beverage

- c. advertising for a promotion involving alcoholic beverages, even if the advertiser does not primarily sell alcohol
- d. brand extensions and non-alcoholic beverages.

The Company Responses

16. Shelter Brewing Co responded to the complaint by email on 3 July 2023. Its primary comments were:
- Shelter Brewing Co. is a sponsor of Cabin Fever Festival. Part of our agreement is that our logo is included in their marketing material.
 - The team at Cabin Fever designed and implemented the billboard. I believe it was done through an OOH ad agency (not sure which one), so the bus stop ad placements likely came as part of a package that covers certain suburbs.
 - As we didn't implement the billboard I can't speak to whether it breaches the code, as I haven't seen that specific one and I'm not familiar with the exact location of the bus stop.
 - I have just spoken with someone over at Cabin Fever and it sounds like that campaign ended and the billboard has been down since 19 June.
 - There was no intention from anyone at Shelter or Cabin Fever to target minors with the placement near a school.
17. Ahoy Management responded to the complaint by email on 7 July 2023. Its primary comments were:
- We have spoken with oOh! Media who ran the campaign on our behalf and can confirm that the campaign has now wrapped up (as of a couple of weeks ago).
 - Please note, the creative was previously vetted by ABAC - Approval Number 5869.
 - The creative (and Shelter's association with it) relates to a Sponsorship, which is not covered by the ABAC Code (Clause 2(b)(v)).
 - We've also been advised that the creative does not fall within the confines of Clause 3.2 of the OMA Alcohol Advertising Policy, and therefore the OMA Placement Policy.

The Panel's View

Introduction

18. In July each year the Western Australian Margaret River region is the location for the Cabin Fever Festival. The festival features entertainment and a focus on local food and beverages. The organisation and conduct of the festival is done by a professional events company- AHOY Management. The festival is supported by various local businesses including the Busselton based 'Shelter' which is a business that comprises a craft brewery, restaurant and functions area.
19. The festival is marketed via social media channels as well as physical signage including bus shelter sheds. This determination arises from a complaint concerning an advertisement for the festival placed on a bus shelter shed opposite the Mount Hawthorn Primary School. The advertisement features the Cabin Fever logo and the strapline 'When it rains, we pour' above a hand holding a glass of wine. At the very bottom of the advertisement are listed the names of seven supporters of the festival including 'Shelter'.
20. The concern of the complainant is not about the content of the advertisement as such but its location adjacent to the primary school. It is contended that young people should not be exposed to alcohol marketing and the placement of the ad is a contravention of the ABAC and the Outdoor Media Association's (OMA) Alcohol Advertising Policy.
21. At the outset, the Panel accepts that the complainant's concern is well founded and that an advertisement featuring the depiction of an alcohol product should not be placed opposite a school. It is however somewhat more complicated as to whether the placement of the advertisement was a breach of the ABAC requirements. This is because of the remit of the ABAC Scheme and the interplay between the ABAC and the OMA Alcohol Policy.

The ABAC Requirements and the Placement Rules

22. A key policy aim of the ABAC Scheme and alcohol regulation more generally is that alcohol should not be consumed by minors and that the marketing of alcohol products should not strongly appeal to minors. The ABAC requirements approach this policy goal through the imposition of both content standards on the messaging of alcohol marketing and Placement Rules that create restrictions on the location of alcohol marketing communications. The aim of the Placement Rules is that alcohol marketing be directed toward adult audiences and to the extent possible away from minors.
23. Placement Rule 1 provides that an alcohol marketing communication must comply with codes regulating the placement of alcohol marketing that have

been published by Australian media industry bodies, including the OMA. The OMA Alcohol Advertising Policy in turn requires that that advertising 'captured by this policy' is not placed on fixed signs located within a 150 metre sightline from the boundary of a school.

24. Clearly the bus shed and hence the ad was within 150 metres of the Mount Hawthorn school, but the threshold issue is whether the bus shed ad can be fairly regarded as 'an alcohol marketing communication' for ABAC purposes.
25. There are numerous references to and images of alcohol products and alcohol use which might be encountered in everyday life and only a specific category of these are 'alcohol marketing communications' captured by the ABAC obligations. In most instances the ABAC Scheme is dealing with marketing from alcohol product brand owners or alcohol retailers and it is self-evident the marketing falls within the ABAC remit. Equally it is generally clear when the ABAC Scheme has no application to an alcohol reference, as the reference is not contained within an advertisement. For instance:
 - a private communication (in person or via social media) between individuals about alcohol; or
 - a depiction of alcohol use in a movie or TV drama.
26. The issue of the ambit of the ABAC obligations is less clear cut if alcohol is shown in an advertisement but the advertisement is not for an alcohol brand as such. For instance, an ad for lotto and the winners are shown celebrating their win with a glass of champagne.
27. For an ad or some other form of marketing material to be 'an alcohol marketing communication' within the remit of the ABAC Scheme, the item must have been generated by or be within the reasonable control of a producer, distributor or retailer of alcohol beverages. In the case of the Mount Hawthorn bus shed ad:
 - it is advertising the Cabin Fever Festival and not a branded alcohol product; and
 - it was created by the events business Ahoy Management and not an alcohol industry entity.
28. Alcohol is available at the festival but this appears to be at the individual venues at which activities are being held e.g. a winery or the Shelter venue in Busselton. AHOY does not hold a liquor licence and does not itself retail alcohol.
29. Shelter is an alcohol industry participant being both a producer of craft beer beverages and holding a liquor license to retail alcohol at its Busselton venue.

Its support of the Cabin Fever Festival is recognised on the bus shed ad along with the other six supporters of the festival, but it is somewhat of a long bow to portray the ad as promoting the alcohol business of Shelter.

30. Shelter did not have an involvement in the creation of the ad as such, with its sponsorship of the festival giving it the entitlement to have its name mentioned in marketing material. Again, it would seem a very forced interpretation of the relationship to conclude Shelter had 'reasonable control' over the ad and its placement on the bus shed.
31. Given the factual circumstances, the Panel concludes that the bus shed ad is not an 'alcohol marketing communication' within the intended meaning of the ABAC as the ad was not generated by an alcohol producer, distributor or retailer but by AHOY Management as the organisers of the festival. Further, while Shelter is a supporter of the festival, this relationship did not give Shelter 'reasonable control' over the ad so as to make the ad a marketing communication for which Shelter can be held responsible for.

The OMA Alcohol Policy

32. As mentioned, Placement Rule 1 in effect incorporates into the ABAC the restrictions contained in the OMA Alcohol Policy regarding the placement of alcohol ads on billboards and other outdoor fixed sites. It is the OMA policy from which the prohibition on alcohol ads being located 150 metres line of sight of a school is sourced.
33. That said, the OMA policy and the ABAC potentially apply to slightly different types of marketing. ABAC applies to marketing generated by or within the reasonable control of an alcohol industry entity. In contrast, the OMA policy is stated to apply to 'alcohol advertising' which falls into one of the following categories:
 - advertising for a business that primarily sells alcoholic beverages;
 - advertising for an alcoholic beverage;
 - advertising for a promotion involving alcoholic beverages, even if the advertiser does not primarily sell alcohol;
 - brand extensions and non-alcoholic beverages.
34. Possibly the advertisement for the Cabin Fever Festival could fall within the category of 'advertising for a promotion involving alcoholic beverages, even if the advertiser does not primarily sell alcohol'. On one interpretation, the 'advertiser' is AHOY Management, which is not a business which primarily sells alcohol but the bus shed ad is promoting the festival using a depiction of alcohol. Alternatively, the category might be understood as applying to

advertising from a mixed business such as a restaurant which does not primarily sell alcohol but alcohol is a secondary part of the business model. This means the advertising would have to be from an alcohol retailer and AHOY Management is not in this category.

35. It is not for the Panel to determine the intended scope of the OMA Alcohol Policy, as this is clearly a question for the OMA itself. It is understood that while the OMA does not operate a formalised public complaints process akin to the ABAC Scheme, it will accept and consider public complaints about advertising contended to be in breach of its policies, including its Alcohol Advertising Policy.

Conclusion

36. Drawing this together, the Panel concludes:
- the bus shed ad was for the Cabin Fever Festival under the control of the events management firm AHOY Management;
 - the alcohol retailer and craft brewery 'Shelter' was a one of multiple supporters of the festival;
 - Shelter's support of the festival resulted in its name being included at the bottom of the bus shed ad but the ad cannot be fairly understood to be an ad for Shelter as such;
 - further Shelter did not create the ad nor was its relationship with AHOY Management such that it can be considered to have 'reasonable control' over the placement of the ad on the bus shed;
 - this means the bus shed ad cannot be fairly regarded as an 'alcohol marketing communication' within the intended scope of the ABAC Scheme;
 - it is possible the scope of the OMA Alcohol Policy does capture the ad and if so, the placement of the ad on the bus shed is inconsistent with the OMA policy; and
 - the determination of the scope of the OMA policy and the breach of its provisions is not given to the ABAC Panel, but is a question for the OMA to consider.
37. It is appreciated that this decision will not be satisfying for the complainant, who has raised a perfectly legitimate concern about an ad showing alcohol being placed adjacent to a school. The Panel believes it was wrong for the ad to be placed on the bus shed, although for the reasons explained, the Panel finds the ad itself does not fall within the jurisdiction of the ABAC Scheme.

38. The Panel asks that the complainant be assisted to take the complaint to the OMA for consideration of whether the OMA policy has been breached. Further the Panel recommends that AHOY Management in any future promotions for the Cabin Fever Festival give clear instructions that any material showing alcohol products not be placed on sites situated near schools.
39. The complaint is dismissed.