



ABAC Adjudication Panel Determination No 78/24

Product: Tooheys New
Company: Lion Beer Australia
Media: Billboard
Date of decision: 1 July 2024
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 21 May 2024 in relation to an alcohol advertisement for Tooheys New (“the Product”), by Lion Beer Australia (“the Company”), which was placed on a bus shelter shed near a school.
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 21 May 2024.
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 Advice

9. A component of the ABAC Scheme is an advice service by which an alcohol marketer can obtain an independent opinion of a proposed alcohol marketing communication against the ABAC standards prior to public release. Pre-vetting advice is separate from the complaint process and does not bind the Panel but represents best practice on behalf of alcohol marketers. Pre-vetting advice was not obtained for placement of the marketing.

The Marketing

10. The complaint relates to an alcohol advertisement for Tooheys New which was placed on a bus shelter shed near the Maria Regina Primary School on Sydney's Northern Beaches.

Complaint

11. The complainant objects to the marketing as follows:
 - *There is an ad directly outside Maria Regina Primary School on an Ooh media bus stop, literally 10m from a primary school.*
 - *As per alcohol restrictions I believe alcohol cannot be within 150m of a school. The address is corner of Central Road & Barrenjoey Road - Stop ID: 210714.*

The ABAC Code

12. Part 4 of the Code provides that:
 - (a) An Alcohol Marketing Communication must comply with code provisions regulating the placement of Alcohol marketing and an Alcohol Alternative Marketing Communication must comply with code provisions regulating the placement of Alcohol Alternative marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy).

The Company Response

13. The Company responded to the complaint by letter emailed on 30 May 2024. Its primary comments were:
- We refer to your letter dated 22 May 2024 (Letter) in relation to a complaint received by ABAC about a Tooheys advertisement (Advertisement) being placed at a bus stop near Maria Regina Primary School in Avalon, NSW (Placement).
 - Thank you for raising this complaint and providing the opportunity for us to respond to the concerns of the complainant. Lion – Beer, Spirits & Wine Pty Ltd (Lion) reiterates its commitment to the ABAC Scheme and that it takes its obligations to responsibly promote its products seriously.
 - For the following reasons, and with respect to the complainant, we submit that there has been no breach of Part 4 of the ABAC Code by Lion and the Complaint should be dismissed by the ABAC Panel. We requested that Lion’s media agency, UM investigate this Complaint and they have advised as follows:
 - the Placement is around 100m from Maria Regina Primary School, however, it is around the corner from the school on Barrenjoey Rd and a large ambulance station is between the school and relevant bus shelter:



- UM’s internal systems and MOVE (Out of Home Audience Measurement System) did not flag this location as raising concerns under the Outdoor Media Association Placement Policy (OMA Placement Policy); and
 - the Advertisement was displayed at the Placement between 6 to 19 May 2024, and hasn’t been booked for any later weeks during this campaign for Tooheys or any other Lion brand.
- Part 4 of the ABAC Code, which incorporates the OMA Placement Policy, requires that no alcohol advertising is displayed within 150m sightline of a

school. We submit that this Placement is not in sightline of the school and there has been no breach on this basis.

- Notwithstanding this and in the spirit of complying with Lion's obligations under the ABAC Code, we have requested that this site be excluded from future Lion placements.
- We also respectfully submit that the ultimate placement of the Advertisement was beyond Lion's reasonable control, and any finding against Lion based on this Complaint should be a no-fault breach under Part 6 of the ABAC Code.
- As a responsible marketer, Lion has demonstrated a long-standing commitment to upholding both the letter and spirit of the ABAC and AANA Codes. Lion maintains strict internal and external processes to help ensure its compliance.

The Panel's View

Introduction

14. The Maria Regina Primary School is a Catholic school offering classes from pre-school to grade 6 at Avalon Beach in Sydney's Northern Beaches. The school is located at 42 Central Road which runs behind a major arterial road, Barrenjoey Road. Positioned on Barrenjoey Rd and near the intersection with Central Rd is a bus stop with a shelter shed. It is advertising for Tooheys beer placed on the bus shelter shed during May 2024 that has attracted the complaint.
15. The complainant contends that alcohol advertising should not be placed on the bus shelter shed given its near proximity to the school. Specifically, the complainant notes restrictions exist regarding the location of outdoor alcohol ads within 150m of a school and it argued the bus shelter shed and hence the Tooheys' ad was well within the 150m radius.
16. The complainant's concern brings into focus the regulatory regime that governs the placement of alcohol advertising in outdoor locations (also known as Out Of Home (OOH) advertising). Like most aspects of alcohol marketing regulation, the applicable requirements for outdoor alcohol marketing are a little complicated with rules and obligations sourced in a mix of direct government regulation and industry led codes and policies.
17. Direct government regulation of the placement of alcohol ads in outdoor and OOH settings varies from jurisdiction to jurisdiction. In some States, alcohol ads are not permitted on government controlled lands and assets such as railway stations. Further, individual local councils might have town planning or other by-laws that control where alcohol signs might be placed.

18. In Victoria, section 115B of the Liquor Control Reform Act does not permit static alcohol advertising to be displayed within 150 metres of a school. This limitation does not apply to a sign on a building occupied by a person conducting business that is associated with the supply of liquor or signage within or on the exterior of a licensed premise. Equally the restriction does not apply to a sports facility that might be within 150 metres of a school nor does it stop signs on vehicles transiting past a school.
19. The more detailed and nationally applicable regime applying to outdoor alcohol locations is contained in industry led provisions. With apologies to the complainant for making this determination more involved than is strictly necessary, the balance of this decision explains the industry regime applying to outdoor alcohol marketing before turning to whether the placement of the ad near the Maria Regina school was a breach of the ABAC standards. Accordingly the determination is structured as follows:
 - OMA Policies
 - ABAC Placement Standards
 - Have the OMA and ABAC requirements been breached
 - Observations on OOH Advertising.

The Outdoor Media Association (OMA) policies

20. The OMA is the peak industry body representing companies that place advertising for products and services of all types (including alcohol products and alcohol retailers) in a wide variety of out of home settings. This includes roadside billboards, signs on street furniture such as bus shelters, shopping centres, petrol stations and transport precincts. Additionally, signage on and inside buses, trams and trains fall within the scope of services provided by OMA members.
21. According to its 2022 Annual Report, the OMA endorses 17 different codes of practice and policies that govern the display of out of home advertising, with some being OMA policies as well as codes or policies from other bodies that intersect with out of home marketing. One of the 'external' codes referenced is the ABAC whereas the 8 policies developed by the OMA itself include the:
 - OMA Code of Ethics;
 - OMA Alcohol Advertising Policy; and
 - OMA Placement Policy.
22. The OMA Code of Ethics might be considered the foundational statement of principles governing out of home marketing from which the other OMA policies

provide more elaboration. It binds OMA members to uphold a system of self regulation and only endorse advertising that adheres to relevant codes and policies referenced in section 5 the Code of Ethics. In relation to alcohol advertising specifically, the OMA Code requires members to:

- support all ABAC determinations on complaints about out of home advertising and remove any content found by the ABAC Panel to be a breach of the ABAC (section 5.4)
- only endorse the display of advertising that adheres to various codes including the AANA Code of Ethics, the Children's Advertising Code and the ABAC (section 5.6)
- commit to responsible advertising of alcohol beverages as outlined in its Alcohol Advertising Policy and Placement Policy and:
 - (a) not display alcohol advertisements within 150 metres sightline of a primary or secondary school; and
 - (b) only display alcohol advertising that has been approved by the ABAC pre-vetting service. (section 5.7).

23. The OMA Alcohol Advertising Policy builds upon the Code of Ethics and acknowledges that 'extra care' is required to ensure that alcohol advertising in the public domain meets community standards, especially when it comes to the exposure of children and young people to advertising. The Policy provides inter-alia:

- in accordance with the Placement Policy, advertising captured by the policy is not placed on signs within 150 metres sightline from the boundary of a school (section 3.1);
- under section 3.2, the advertising captured by the policy is for:
 - (a) alcohol beverages
 - (b) businesses that primarily sell alcohol beverages
 - (c) advertising for a promotion involving alcohol products even if the advertiser does not primarily sell alcohol; and
- the policy does not apply to transit advertising eg signage on buses, trains and taxis (section 3.3) and to advertising located on premises that sell alcohol where the advertising relates directly to the business of the venue (section 3.4).

24. The policy goes on to state that OMA members should only accept advertising that has been given ABAC pre-vetting approval or been advised by a lawyer to

comply with ABAC standards. (sections 3.6 and 3.7). In the event of the ABAC Panel finding a breach of ABAC, OMA members are obliged to facilitate the removal of the offending advertisement. (section 3.9). The balance of the Alcohol Policy contains a restatement of the ABAC content standards.

25. The final component of the OMA suite of policies directly relevant to alcohol marketing is the Placement Policy. This policy applies to advertising for certain products that are illegal to sell to minors as well as occasional food and drink products e.g. alcohol, gaming and gambling and sexual products and services. Essentially the policy provides that advertising for these products/services will not be located within a 150 metres sightline from the boundary of a school.
26. Supporting material published by the OMA explains the 150 metre delineation was selected because of the science behind how people look at signage and that for most people absorbing the message of a sign occurs within 100 metres of a sign and even large signs have a practical viewing distance of no more than 140 metres.
27. The implementation of the OMA policies regarding placement is via the Measurement of Outdoor Visibility and Exposure (MOVE) tool. This tool purports to provide audience measurement for some 77,500 out of home advertising sites within the five capital cities of Sydney, Melbourne, Adelaide, Brisbane and Perth. Attached to MOVE is the school mapping tool which according to the 2022 OMA Annual Report contains the boundary locations of some 12,185 schools in each Australian State other than Tasmania.
28. Drawing all this together, the position regarding out of home advertising and the OMA is as follows:
 - OMA members have access to and place advertising on many tens of thousands of OOH sites and settings around Australia;
 - in placing advertising, the OMA complies with government regulation and a series of industry based codes and policies; and
 - taken together the OMA regime requires that its members only place alcohol ads that:
 - (a) in terms of content, are consistent with the ABAC standards and which have been confirmed as such via ABAC pre-vetting or legal certification;
 - (b) are located on sites outside of 150 metres sightline of the boundary of a primary or secondary school unless positioned on premises actually selling alcohol; and

- (c) will be removed if determined by the ABAC Panel to be inconsistent with ABAC standards.
- the implementation of the OMA policies is based upon the matching of OOH sites with the mapping of school sites through the MOVE tool.

ABAC Placement Standards

29. The ABAC consists of two parts, namely standards going to the content of alcohol marketing and standards going to the placement of alcohol marketing. While the Code content standards came into effect with the commencement of the ABAC Scheme in 1998, the placement standards were not added to the Code until 2017.
30. The Placement Standards have the policy aim for alcohol marketing to be directed to adults and to the extent reasonably possible away from minors. The standards create differing requirements on alcohol marketers related to the technical capacity of different communications mediums to effectively target marketing to audiences based on age.
31. At the time of the inclusion of the placement standards into the Code, there were two pre-existing regimes going to the placement of alcohol marketing namely an earlier version of the OMA requirements described above and the time of day restrictions on the broadcast of alcohol ads on 'traditional' free to air TV i.e. linear broadcasts that need a TV aerial to be received. The TV placement requirements are contained in the Commercial Television Industry Code of Practice (CTICP).
32. The ABAC Placement Standards adopted these existing regimes as a starting point and then created new requirements for alcohol marketers. The new requirements applied to communication mediums that had not previously been subject to any restrictions regarding the placement of alcohol ads e.g. print, radio, cinema and digital channels and created additional obligations on marketers to exclude minors from the audience of marketing communications where the available technology made this possible.
33. The placement standards are of most value for marketing transmitted via digital platforms as the technology and data analytics of these mediums permit targeting of marketing and in important instances the exclusion of minors from receiving alcohol marketing. Equally, the new standards were important because the utility of time of day restrictions on traditional television advertising had declined due to the introduction of digital TV channels and streaming services that were not subject to time of day advertising restrictions.
34. In response the ABAC Placement Standards introduced the 80% adult audience benchmark for programs with which alcohol marketing can be placed. This relies on the use of comprehensive ratings data and is a more direct

means to limit the exposure of minors to alcohol advertising than the proxy measure of assuming minors will be a lesser component of an audience if a program is screened after 8-30 pm.

35. For outdoor advertising, the ABAC Placement Standards did not create new obligations but rather in effect incorporated the requirements of the pre-existing OMA regime. This is done through the standard in Part 4 (a) of the Code which provides an alcohol marketing communication must comply with code provisions regulating the placement of alcohol marketing that have been published by Australian media industry bodies. The OMA policies are given as an example of such provisions.
36. This means that the ABAC placement limitation on outdoor alcohol advertising is in essence the 150 metres sightline exclusion zone from a primary or secondary school. In other words, an alcohol ad cannot be located within 150 metres of a school if the ad can be seen from the school. In this respect the 'sightline' qualification to the 150 metre exclusion of alcohol advertising placement is important.
37. The Panel considered the sightline qualification in Determination 52/18. In that case an electronic sign was positioned on the facade of the Murray Hotel within 150 metres of the Perth Modern School in Western Australia. It was argued that the ABAC placement standard was not breached because:
 - placing the ad on a sign on a hotel fell within the exception to the restriction about signage relating to a business selling alcohol; and
 - dense foliage between the school and the sign meant the ad could not actually been seen from the school.
38. The Panel rejected both these arguments. The electronic sign was advertising various products including an alcohol product and was not advertising the Murray Hotel as such. While it is reasonable that say a pub established prior to a school being built nearby can have sign identifying that it is a pub, the sign in this case was positioned on the building because it was on a busy road and it was only incidental that the building housed an alcohol retailer. Hence the ad did not fall within the limited exception to the 150 metre exclusion area given to alcohol retailers advertising their own business.
39. The Panel also rejected that the 'sightline' requirement could be tied to something as variable as the density of foliage as otherwise an ad might or might not be permitted near a school depending on whether a tree was trimmed or not. Rather the sightline requirement must be understood as relating some feature permanently and fully blocking visibility of the ad from the school.

Have the OMA and ABAC provisions been breached

40. The bus shelter on which the Tooheys beer ad was placed is located on Barrenjoey Rd in front of the Avalon Beach Ambulance Station. The Maria Regina school is on Central Rd. The complainant is quite correct that the distance between the bus shelter and the school is far less than 150 metres.
41. For its part, the Company contends that the bus shelter and its ad was about 100m from the school, but argues that the bus shelter and any advertising placed on the shed is not within the sightline of the school. This is because the Avalon Ambulance Station is a large building that blocks sight of the bus shelter from the school.
42. The Ambulance Station is a substantial building and clearly it is a permanent obstruction to the visibility of the school from Barrenjoey Rd. Equally, a person standing on the footpath outside the school cannot see the bus stop and shelter shed located on Barrenjoey Rd in front of the Ambulance Station. The bus shelter becomes visible when walking from the school, past the neighbouring St Marks Anglican Church and upon reaching the intersection of Central and Barrenjoey Roads.
43. The school is built on a slope and also consists of two story buildings. While the Panel has not been able to view the outlook from the school buildings, a video tour of the school is contained on the school website and in part this shows an outlook from the school buildings towards the Avalon beach. This gives visibility above the Ambulance Station, but the vista goes to the sea and not apparently the bus shelter.
44. Finally, it is noted there are basketball courts on Barrenjoey Rd opposite the Ambulance Station and the bus shelter. If these courts were sports facilities of the school, then the bus shelter could be taken to be within the sightline of the school. It does not appear however that the courts are part of or related to the school but are a local authority public recreation facility.
45. Drawing this together, the bus shelter and the advertising that is placed on the shelter cannot be fairly concluded to be within the sightline of the school. This means the OMA policies and hence the ABAC standard in Part 4 (a) have not been breached even though the bus shelter and the Company's ad was within 150 metres of the school.

Observations on OOH Advertising

46. This is the first time that the Panel has considered a complaint regarding alcohol advertising on a bus shelter that is within 150 metres of a school but not within the sightline of the school. Further other issues going to outdoor and OOH marketing have arisen in other recent complaints and as a result the

Panel believes it is appropriate to make some observations about the operation of the regime applying to OOH marketing.

47. By its nature, outdoor advertising is not able to be specifically targeted at particular age groups in the way that narrowcast marketing via digital platforms can be. And while the MOVE tool apparently is able to produce audience measurement for OOH advertising, to date the available data has not been sufficient to assess the composition of minors reasonably expected to view a specific outdoor advertising site so as to use the data for regulatory benchmarks. Hence the proximity of OOH sites to schools is used as a proxy for limiting the exposure of minors to outdoor alcohol advertising.
48. It is noted that the 150 metre delineation for advertising placement is used on the argument that messaging from outdoor signs is not readily absorbed at this distance. This means if an ad is on a sign outside 150 metres from a school, then students while physically on the school grounds should not be impacted by the location of the sign. Equally, if the sign is closer than 150 metres but can't be viewed from the school, then the same contention applies.
49. But the placement of alcohol advertising at a bus stop has a dimension beyond the viewing of the ad from the grounds of a school. It can be reasonably assumed that a proportion of school students will travel to and from school by taking buses that use the nearby bus stop.
50. It is noted that the Company, while arguing that the OMA/ABAC provisions have not been breached, nonetheless has directed that the bus shelter be excluded from future advertising in the spirit of complying with the ABAC standards. This is a welcomed commitment from the Company, but it is only one alcohol marketer and the bus shelter will remain available for use by alcohol companies more generally.
51. The Panel believes the bus shelter near the Maria Regina school should not be used for alcohol ads and recommends that the Scheme Management Committee engage with the OMA with the view of revising the relevant OMA policies so as to:
 - exclude alcohol advertising being placed on bus shelters within 150 metres of a school irrespective if the bus shelter is within the sightline of a school or not;
 - further exploration be taken as to use of all reasonable steps to exclude alcohol marketing from placement on buses used for school routes; and
 - testing the MOVE data and technology as a potential basis to more precisely eliminate specific OOH sites for alcohol advertising if the reasonably expected audience of an alcohol ad exceeds 20% minors.

52. The Panel accepts the legitimate concern of the complainant as to the use of the bus shelter near the Maria Regina school for alcohol advertising but for the reasons explained finds that the ABAC standard has not breached. Accordingly the complaint is dismissed.