



ABAC Adjudication Panel Determination No 174/23

Product: First Choice Liquor
Company: Coles Group Limited
Media: Digital – Microsoft Edge News Feed
Date of decision: 12 December 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Louisa Jorm
Ms Jeanne Strachan

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 6 November 2023 in relation to an online advertisement for First Choice Liquor (“the product”) by Coles Group Limited (“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 6 November 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

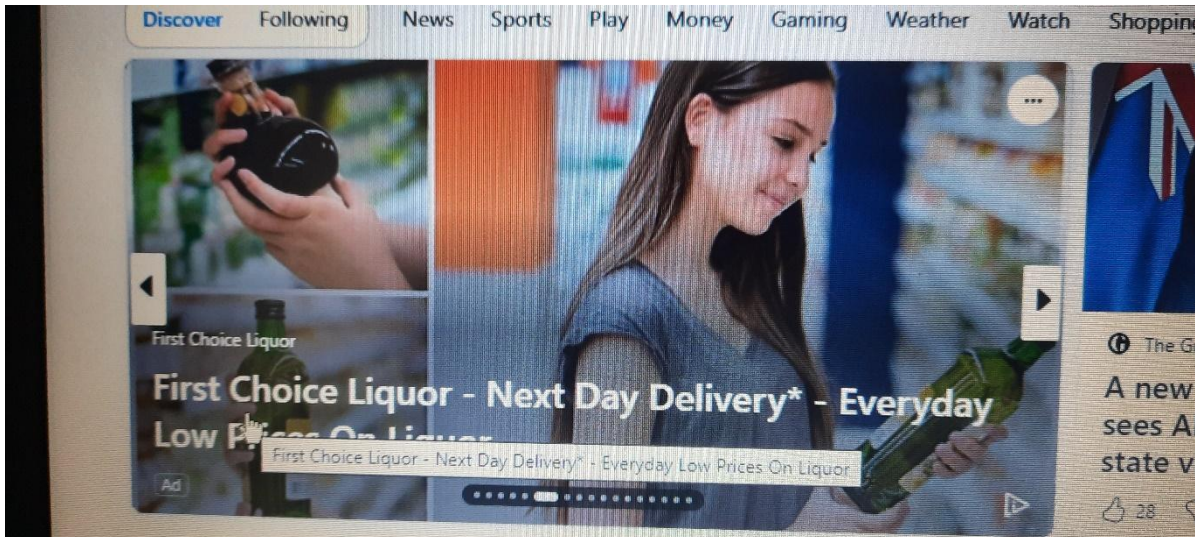
materials and advice and the availability of Panel members to convene and decide the issue. The complaint was completed in this timeframe.

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

10. The complaint relates to the following advertisement seen by the complainant on their Microsoft Edge news feed:



Complaint

11. The complainant objects to the marketing as follows:
 - *The online advert features a young lady looking at a bottle of alcohol. My issue with it is that she looks all of 15 years of age. Really? Couldn't find someone who doesn't look underage to advertise the product/business. Never made a complaint before about an advert but this irked me that a company as large as this could look at this and not see an issue with it.*

The ABAC Code

12. Part 3 (b) of the Code provides that a Marketing Communication must NOT:

...

- (ii) depict a person who is or appears to be a Minor unless they are shown in an incidental role and there is no implication they will consume or serve Alcohol; or
- (iii) depict in a visually prominent manner:
 - (A) paid models, actors or Influencers that are and appear to be Adult but are under 25 years of age; or
 - (B) other people that are and appear to be Adult but are under 25 years of age UNLESS the depiction has been placed within an Age Restricted Environment.

The Company Response

14. The Company responded to the complaint by letter emailed on 8 December 2023. Its primary comments were:
- 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.
 - Coles Liquor confirms it will accept the decision made by the ABAC Adjudication Panel in relation to this complaint.

The Complaint

- Coles Liquor understands that the complaint relates to an internet advertisement promoting First Choice Liquor that the complainant viewed on the Microsoft Edge news feed. Coles Liquor advises that First Choice Liquor is a brand within Coles Liquor.

Ad description:

- The advertisement provided shows a series of three images overlaid with the text “First Choice Liquor – Next Day Delivery* - Everyday Low Prices On Liquor”. The first image shows a person’s hands holding a bottle with a dark liquid in it (top left corner). The second image shows a person’s hand holding a dark green bottle with a yellow and white label (bottom left corner). The third image shows a female holding and looking at a dark green bottle with a yellow and white label, which appears to be the same as the bottle in the image in the bottom left corner. The background of each of the images is blurred, however it appears to be a retail environment (the Advertisement).

Reason for complaint, as described by the complainant:

- “The online advert features a young lady looking at a bottle of alcohol. My issue with it is that she looks all of 15 years of age. Really? Couldn’t find someone who doesn’t look underage to advertise the product/ business. Never made a complaint before about an advert but this irked me that a company as large as this could look at this and not see an issue with it”.

Why the image was used

- The images displayed in the Advertisement were not generated by Coles Liquor, nor were the images approved by Coles Liquor. At the time the Advertisement was published to the Microsoft Edge news feed, Coles Liquor had not provided its own image extensions to Microsoft Ads for use. As a consequence, the images were drawn from Microsoft’s dynamic stock image library and paired with the text “First Choice Liquor – Next Day Delivery* - Everyday Low Prices On Liquor”.
- Following receipt of the complaint, this issue was immediately raised with Microsoft who has subsequently reviewed why the image was selected. They have indicated that their systems have checks in place to review sensitive images from their contracted image providers. The library contains millions of images and utilises multiple checks and balances to tag images as sensitive or inappropriate. They have further indicated that while the image does not fit in the category of either sensitive or inappropriate, the image has been removed from their library. Further, Coles Liquor understands the stock image appears on the Shutterstock stock image website (Stock Photo ID 1725205360) and depicts, as they describe it, a “collage with teen girl and female hand who chooses olive oil and balsamic vinegar. Concept of healthy food, bio, vegetarian, organic”. Please find the image on the Shutterstock website here:
<https://www.shutterstock.com/image-photo/collage-teen-girl-female-hand-who1725205360>.

- Coles Liquor notes that, from the description provided by Shutterstock, the two products depicted in the Advertisements were not alcohol. The image in the top left corner appears to be a bottle of balsamic vinegar, and the two other images contain what appears to be a bottle of olive oil. Coles Liquor is of the view that this is a unique and novel scenario that, to the best of our knowledge, has not previously been experienced by Coles Liquor or the wider industry and is a direct result of the ever-changing innovations and advancements of digital platforms like Microsoft Edge.
- As per the above, Coles Liquor had no knowledge or control over the use of the stock image within the Advertisement generated by Microsoft. Despite this, we have reinforced our expectations with Microsoft to ensure this does not occur again.
- In addition, Coles Liquor has also uploaded a series of pre-approved images that can be drawn on if any text ads are escalated in the future by Microsoft Ads. This will ensure that all images in Microsoft's Audience Network, including those that appear on the Microsoft Edge news feed, have been vetted by Coles Liquor.

Approval of content to appear on Microsoft Edge news feed

- Coles Liquor does not place marketing on the Microsoft Edge news feed by choice. As of 2023, Microsoft introduced a new process by which all advertisers using the Microsoft Search network (Bing Search) to place text ads are automatically 'opted into' Microsoft's Audience Network (for example, the Microsoft Edge news feed). Coles Liquor originally requested an exemption from participation in this process, which was approved by Microsoft representatives. It was Coles Liquor's understanding that if the business would like to utilise the feature in future, Coles Liquor would have to opt-in. Unfortunately, however, this feature was recently applied to Coles Liquor's account without our knowledge.

How the ad was generated

- Coles Liquor understands that existing Bing Search (text) campaigns are converted into Audience Ads. These are developed and published to the server by Microsoft Ads' systems. The system pulls the ad text directly from the advertiser's text campaigns and then combines that ad text with an image. If the advertiser has uploaded image extensions into their ad group, campaign, or account, the system will pull one of those images to combine with the text. In instances where the advertiser has not included image extensions, the system will pull a stock image instead - as occurred in this instance.

Responsibility toward Minors

- As discussed above, the Advertisement was automatically generated by Microsoft Ads, pairing First Choice Liquor's ad text with a stock image. As such, the marketing communication was not generated by or within the reasonable control of Coles Liquor.
- Coles Liquor has no knowledge of the age of the person within the Advertisement. Notwithstanding, there is no suggestion or implication the products within the Advertisement are described by Shutterstock as, or appear to be, alcohol.
- Coles Liquor understands that the Microsoft Edge news feed is not an Age Restricted Environment.
- Once again, we thank ABAC for the opportunity to respond to the complaint and trust that this information will assist the ABAC Adjudication Panel with its determination.

The Panel's View

15. This is a somewhat unusual case as it involves an ad about the Company which the Company itself says it was unaware of until the receipt of the complaint. The background seems to be that the complainant was apparently accessing the internet by means of the Microsoft browser Microsoft Edge. A feature of Microsoft Edge is a news feed and an ad ostensibly for the Company was served to the complainant via the news feed.
16. The ad showed a photograph of a young woman apparently within a retail store of the Company examining a bottle of wine. Superimposed over the image was the Company's name and accompanying text of 'Next day delivery- Everyday low prices on liquor'. The complainant was concerned that the woman appeared to be very young - maybe only 15 years old.
17. The Company was surprised by the complaint. Not that someone would be troubled by the image of the young woman, but that the ad existed at all. According to the Company:
 - it had not commissioned the ad as such and it was not expecting an ad of this nature to be served to users of the Microsoft Edge news feed;
 - the image was not of a person actually within one of its stores but was created by Microsoft using a stock image;
 - the actual image seems to have been photoshopped from a staged image of the women in a grocery shop holding a bottle of olive oil or vinegar;
 - it had not 'opted in' to having ads served with the Microsoft news feed and in fact had told Microsoft it did not want this; and

- Microsoft caused the ad to be created and served to the complainant without the Company's knowledge.
18. Given these circumstances the Panel must assess three issues, namely:
- is the ad an 'alcohol marketing marketing communication' within the scope of the ABAC standards; and if so
 - is the ad consistent with the relevant standard; and if not
 - do the unusual circumstances warrant the finding of a no-fault breach.
19. To fall within the scope of the ABAC an alcohol marketing communication must have been generated by, for, or be within the reasonable control of, an alcohol producer, distributor or retailer. Clearly the Company is an alcohol retailer, however the Company submits it did not generate the ad, had no knowledge of the image used in the ad and had asked Microsoft not to include advertising for it in the 'Microsoft Audience Network' which includes the Microsoft Edge news feed.
20. The Panel accepts the Company's advice that it did not consciously produce the ad nor give instructions for the ad or indeed any ad to be included in the Microsoft suite so that the ad would be served to the Microsoft Edge news feed of the complainant. That said, it is self-evident that the Company does advertise via Microsoft channels and hence there is a commercial relationship between the Company (either directly or through advertising/placement agents) and Microsoft.
21. The Company has a responsibility to properly manage its marketing activities. It does place advertising with Microsoft and while Microsoft doing something outside its instructions from the Company is relevant to a 'no -fault' finding, the Panel believes that the ad created by Microsoft arose because of the relationship between the Company and Microsoft and it must be regarded as a marketing communication to which the ABAC obligations apply.
22. The second issue is whether the ad is a breach of the ABAC standard. Part 3 (b)(ii) of the Code provides that an ad must not depict a person who is or appears to be a minor unless they are shown in an incidental role and there is no implication they will consume or serve alcohol. Part 3 (b)(iii) additionally provides that adult models appearing in alcohol ads cannot be under the age of 25.
23. The Company is not aware of the identity of the young woman in the ad nor her age. It was explained the photograph used came from the 'Shutterstock image' website and was described as 'a collage with teen girl and female hand who chooses olive oil and balsamic vinegar'. Assuming the description is accurate,

then the woman was a model for the ad and her age could be between say 15 years and 19 years.

24. In any event it is sufficiently clear that the woman is under the age of 25 and could potentially be under the age of 18. This means the ABAC standard regarding the age of models to be used in alcohol advertising has been breached by the ad.
25. The final issue is whether the circumstances justify the making of a no-fault finding. A no fault finding is appropriate if a breach of an ABAC standard occurred which was reasonably unforeseeable by or outside the reasonable control of a marketer or their advertising agency. A no-fault finding does not diminish that the breach occurred and that the concern of the complainant has been fully vindicated. And the alcohol company must act to remove the offending marketing item.
26. The Panel does believe the circumstances warrant a no-fault finding. It is reasonably clear that the Company did not itself create the ad or choose to use the image of a person under the age of 25. Further, it had given instructions to Microsoft not to place ads that would appear on the Edge news feed. In these circumstances, the breach that has occurred was outside its reasonable control.
27. The complaint is upheld and a no-fault finding made.