



ABAC Adjudication Panel Determination No. 100/19

Product: BWS
Company: Endeavour Drinks Group
Media: Mobile Outdoor
Date of decision: 25 November 2019
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns an outdoor advertisement flown by helicopter by Endeavour Drinks Group (“the Company”) and arises from a complaint received 5 November 2019.
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 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”) – 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 – which places 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 the other codes as well as meeting the standards contained in the ABAC.
 4. For ease of public access, Ad Standards (AS) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by AS, 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 AS 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 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 5 November 2019.
8. The Panel endeavour 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 has been determined within this timeframe.
9. The quasi-regulatory system for alcohol beverage marketing features 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 this marketing communication (17840).

Marketing Communication Placement

10. The following advertisement for BWS was flown by helicopter for 3 hours on Saturday 2 November on a round trip between Maroubra and Palm Beach.



The Complaint

11. It's outrageous that alcohol advertising (or any advertising) can be dragged along our beaches - in full view of children. Blatant low socioeconomic targeting.

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 includes definitions including:

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 Alcohol Guidelines).

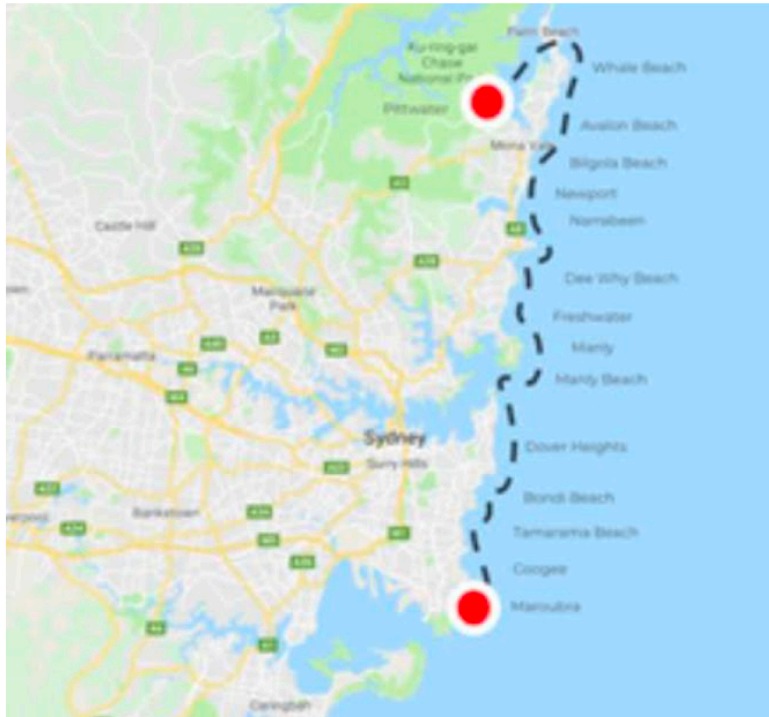
- (ii) A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.
- (iii) If a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, 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.

The Company's Response

14. The Company responded to the complaint by letter dated 18 November 2019 advising that:

- This response addresses advertising, marketing and retail activities under the control of Endeavour Drinks, which includes BWS. Endeavour Drinks' aim is to be Australia's most responsible retailer of alcoholic beverages. In 2013 we formalised our status as a signatory to the Alcohol Beverages Advertising Code (ABAC) Scheme. Prior to becoming a signatory, Endeavour Drinks demonstrated a long-standing commitment to supporting and adhering to ABAC and Advertising Standards Bureau principles. Endeavour Drinks maintains strict internal and external processes in addition to those required by the ABAC Scheme, which are relevant in this context. As part of our community charter, 'Our Community, Our Commitment', Endeavour Drinks has in place a range of industry-leading initiatives to ensure that minors are not served alcohol and to encourage responsible drinking practices. These include:
 - ID25 (ask for ID from anyone who looks under 25);
 - Don't Buy It For Them (stopping secondary supply to minors);
 - our Intoxication Policy (refusal of service to anyone who may be intoxicated); and
 - Staff training that exceeds legal requirements, including "Don't Guess, Just Ask", team talkers, and regular refresher and reminder courses, and implementation of the award-winning training program "Safe".
- In marketing alcoholic products, Endeavour Drinks is fully aware of the Code's requirement not to direct marketing at minors through a breach of any of the Placement Rules. It is our view that the Ad is not directed at minors through a breach of any of the Placement Rules.

- The Ad was executed by a media agency at the direction of BWS and involved a banner being flown from a helicopter. The helicopter flew for three hours from 11am to 2pm on Friday 1 November and Saturday 2 November 2019. The banner in question was approximately 2000 square meters in size; and the flight was a return trip from Maroubra to Palm Beach, following the flight path shown below.



- As the Ad was an outdoor advertisement, Placement Rule 1 of Part 6 of the Code (Placement Rule 1) is the only applicable Placement Rule. In ABAC Adjudication Panel Determination No. 127/17 (at paragraph 19), the Panel stated that 'the remaining Placement Rules relate to digital electronic and broadcast media and not to outdoor placement'. Furthermore, in ABAC Adjudication Panel Determination No. 80/18 (at paragraph 23), the Panel concluded that Placement Rule 3 of Part 6 of the Code (Placement Rule 3) 'does not apply to outdoor advertising'.
- Placement Rule 1 requires 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).'
- The Outdoor Media Association (OMA) Placement Policy states at section 3.1 that 'OMA members will not advertise products that are illegal for sale to minors [including alcohol] within a 150-metre sightline of a primary or secondary school.' Endeavour Drinks has been advised by the media agency that executed the Ad that the banner typically flew at an altitude of 304.8m,

and was not permitted to fly below an altitude of 152.4 metres. On this basis, we believe the Ad would not have been within a 150-metre sightline of a primary or secondary school, and is therefore in compliance with the OMA Placement Policy and not in breach of Placement Rule 1.

- Additionally, the Guidance Notes - ABAC Responsible Alcohol Marketing Code (ABAC Guidance Notes) interprets the OMA Policy as a requirement 'to ensure alcohol advertising is not placed on fixed signs that are located within a 150 metre sight line of a primary or secondary school (save licensed premises).' It should be noted that the Ad involved the use of a mobile banner, and was not a fixed sign.
- Notwithstanding that Placement Rule 3 does not apply to the Ad, Endeavour Drinks notes that, as at the 2016 ABS census, 77.9% of the population of Greater Sydney are adults (and for North Bondi it is 76.5%) and therefore it is reasonable to conclude that the relevant audience of the Ad was likely to be at least 75% adults.

The Panel's View

15. In early November 2019 the Company arranged for a large banner advertising a special on beer available from its retail outlets to be hung from a helicopter flying over Sydney's beaches. The complainant saw the banner and believed it to be inappropriate as it would be seen by children. There is no concern about the actual message in the ad but rather that alcohol advertising of any type would be conducted in this manner.
16. The ABAC goes to both the content of alcohol marketing and where the marketing is placed. The Code Placement Rules have the policy aim that alcohol marketing should be directed toward adults and away from minors. The ability to do this is essentially linked to the technical capacity of the medium by which the marketing is carried to target audiences.
17. Accordingly, digital marketing conveyed over the internet has the greatest capacity to apply age restriction controls and the ABAC Placement Rules require that available age restriction controls be utilised. Broadcast mediums such as television cannot be age restricted but advertising can be restricted to particular times of day and/or to being placed with programming likely to have predominately adult audiences. Advertising placed on fixed outdoor settings such on billboards and bus shelter sheds can be restricted to areas away from an area of a high concentration of young people such as a school.
18. In this case the marketing took the form of a mobile banner strung from a moving helicopter. Neither the ABAC nor other applicable codes such as that applying to outdoor media, contains any express restriction over such a form of alcohol marketing. It can be surmised that marketing of this type is reasonably unusual, and this is the first occasion the ABAC scheme has ever received a complaint about

advertising being towed from an aircraft. So, while the complainant is making a legitimate enough point, there is no ABAC standard or Placement Rule which envisages the situation.

19. Placement Rule 1 in effect provides that a fixed outdoor ad cannot be placed within 150 metres of a school, and while it is conceivable the helicopter flew the banner within sight of a school this rule would not apply as the ad was not 'fixed' to particular location and advice from the Company is that the banner would always be physically over 150 metres above the ground.
20. In these circumstances it is evident no ABAC provision has been breached and the complaint must be dismissed.