



## ABAC Adjudication Panel Determination No. 115/17

**Product:** Heineken  
**Company:** Lion  
**Media:** Outdoor  
**Complainant:** Confidential  
**Date of decision:** 8 December 2017  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Debra Richards  
Professor Richard Mattick

### Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns the placement of advertisements for Heineken in the Sydney Central train station by Lion (“the Company”) and arises from a complaint received on 15 November 2017.
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, the Advertising Standards Bureau (ASB) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the ASB, 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 the ASB 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 ASB 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 15 November 2017.
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 was determined within this timeframe.
9. The quasi-regulatory system for alcohol beverage marketing features independent examination of the content of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was obtained for the content but not placement of the marketing communications (15230).

## The Placement

10. A number of large Heineken 3 advertisements (three versions below) were placed on pillars in Sydney Central train station.



## The Complaint

11. The complainant is concerned that:
  - a) The entire Sydney Central train station is covered in giant images of Heineken beer bottles.
  - b) This is an area of high alcohol fuelled violence and lock out laws.

- c) The station is accessed by children, many unaccompanied school children on their way home and families.
- d) It is like walking in a case of beer.
- e) The bottles look like soft drinks for children in bright colours.

## **The ABAC Code**

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

(b)(i) have Strong or Evident Appeal to Minors

(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:

**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) If a media platform on which a Marketing Communication appears has age restriction controls available, the Marketer must utilise those age restriction controls to exclude Minors from the audience
- (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

**Strong or Evident Appeal to Minors** means:

- (i) likely to appeal strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;

- (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

## **The Company's Response**

14. The Company responded to the complaint by letter dated 1 December 2017. The principal points made by the Company were:
- a) Lion does not consider that the advertisements breach any section of the Alcohol Beverages Advertising Code (ABAC) or any other advertising code.
  - b) The bottle is clearly labelled Heineken which indicates that it is not a soft drink and is an alcohol. The colour of the bottle is consistent with the Heineken brand and in no way shape or form represents or looks like a soft drink. The term lager is clearly visible on the poster and this further indicates that this is not a soft drink but a style of beer.
  - c) We can confirm that the advertisement is not within 150m of a school.
  - d) As a responsible marketer, Lion has demonstrated a long-standing commitment to upholding both the letter and intent of the ABAC and AANA Codes.
  - e) Lion maintains strict internal and external processes to ensure this compliance.
  - f) As part of Lion's marketing approvals processes, this advertisement for Heineken was subject to:
    - Internal legal review and advice from an external legal firm specialising in FMCG marketing and advertising compliance and interpreting the relevant advertising codes and legislation;
    - Review by Lion's internal marketing compliance team to ensure its adherence to all relevant advertising codes;
    - Review and approval through ABAC's external and independent pre-vetting service (AAPS) at both concept and final stages, receiving approval before going to market.

## The Panel's View

### Introduction

15. The ABAC scheme commenced in 1998 and since that time the Code has been reviewed and revised on several occasions. The most recent revision took effect on 1 November 2017 and this is the first complaint determined by the Panel which raises issues that enliven the newly inserted provisions into the Code. For this reason this determination will briefly canvass the new provisions and their underlying policy intent in order to provide guidance for the ongoing understanding of the ABAC scheme
16. As mentioned earlier, the regulation of alcohol marketing comprises an amalgam of different laws and codes of practice and as a result is somewhat complicated to fully comprehend. To determine which set of rules need to be assessed in response to a public complaint will depend on:
  - where the complainant resides in Australia (different liquor licensing laws in each state and territory);
  - the medium by which the marketing item was communicated (e.g. specific rules apply to free to air television, outdoor advertising);
  - the nature of the concern expressed in the complaint particularly if it is related specifically to alcohol as product or whether the complaint was more generic in nature (alcohol as a product concerns are streamed towards the ABAC and more generic concerns towards the AANA Code of Ethics); and
  - whether the concern is about the content of the marketing or the placement of the marketing or both.
17. Prior to the 1 November 2017 version of the Code, the ABAC scheme was focused upon the content of alcohol marketing and not the issue of the placement. The revised Code extends to placement considerations to the extent that the placement might raise issues about the direction of the marketing item towards under 18 year olds. This means that a placement concern within a complaint that raises points other than 'direction at minors' will not enliven the Code. For instance, the following concerns about placement will not of themselves be capable of breaching the Code:
  - that an alcohol advertisement was located near a church or Centrelink office; and
  - that an alcohol advertisement was placed within the broadcast of a tv program dealing with alcohol related violence.
18. The new Code provisions go specifically to the policy goal that alcohol marketing should not be directed towards under 18 year olds. It does this by inserting within section 3(b) of the Code a new subsection 3(b) (iv) which states an alcohol

marketing communication must not be directed at minors through a breach of the Placement Rules.

19. In essence, the Placement Rules create a cascading and interlinked series of requirements which a marketer must satisfy in placing an alcohol marketing item in broadcast and digital locations and platforms. These requirements are:
  - Compliance with all applicable media specific codes regulating the placement of alcohol marketing;
  - The use of available age restriction digital controls that permit the exclusion of under 18 year olds from the potential audience of the marketing communication;
  - If an age restriction control is not available on the digital or other media platform, then an alcohol marketing item may only be placed where the audience is reasonably expected to comprise at least 75% adults;
  - In addition to the availability of age restriction controls and the placement of a marketing item where the audience will likely be predominately adult, an alcohol marketing communication must not be placed with programs with content primarily aimed at under 18 year olds; and
  - Finally, a marketing communication must not be sent to a minor via electronic direct mail (noting this may occur if an incorrect date of birth has been entered).

### **The Complaint**

20. The complaint concerns the placement of a number of advertisements for Heineken beer on pillars at Sydney's Central railway station. It is argued that the advertisements are irresponsible because:
  - the railway station is located in an area marked by incidents of alcohol fuelled violence;
  - the station is accessed by children particularly school children who will be unaccompanied by adults; and
  - the depictions of the Heineken bottles look like soft drink for children in bright colours.
21. The complaint accordingly raises issues which go to both the placement of the marketing and the content of the marketing. Both aspects will be dealt with in turn.

### **The Placement concerns**

22. The placement concerns go to two separate issues, namely that alcohol advertising should not be placed in areas alleged to be prone to occurrences of alcohol related violence and secondly that the advertisements are placed where they will be seen by under 18 year olds.

23. As explained earlier, the Placement Rules are confined to the policy goal of avoiding the direction of alcohol marketing towards minors. The rules do not purport to regulate the placement of alcohol advertisements more generally other than the requirement in rule (i) that all other codes regulating placement published by Australian media industry bodies must be complied with.
24. The applicable code for an outdoor alcohol advertisement is the Outdoor Media Association Alcohol Guidelines. The guidelines provide that alcohol advertising is not to be placed on fixed signs located within a 150 metre sight line of a primary or secondary school. The advertising at the central railway station is not within 150 metres of a school and accordingly the guideline has not been breached.
25. The remaining Placement Rules in rule (ii) and (iii) relate to digital electronic and broadcast media and not to outdoor placement such as the pillars at Central railway station. Further the advertising in this case does not fall within rule (iv) and (v) which go to advertising placed with programs e.g. a tv show or cinema movie or the sending of materials by direct mail.
26. Accordingly, the placement of the advertisements on the pillars at Central railway station are not in breach of the Placement Rules.

### **The Content concerns**

27. In addition to the placement concern, the complainant has argued that the advertising features bottles that 'look like soft drinks for children in bright colours'. The definition of strong or evident appeal to minors in the Code provides in part that an alcohol marketing communication must not use images or designs that create confusion with soft drinks.
28. In assessing if an ABAC standard has been breached, the Panel is to have regard to the probable understanding of the advertisement by a reasonable person. The reference to a 'reasonable person' is borrowed from the common law system and means the opinions, values and attitudes held in a majority of the community are to be the benchmark.
29. The Panel does not believe the depiction of the bottle on the advertisement would create confusion with a soft drink. The bottle is an actual depiction of the product which is a reasonably well known alcohol brand in a standard beer bottle. The labelling used is that of the actual product and does not include any imagery or design which would lead a reasonable viewer to think the product was a soft drink. Further, the other messaging on the pillars refer to alcohol specific matters such as describing the product as mid-strength. Taken as a whole, the advertisements do not create confusion with a soft drink.

### **Conclusion**

30. The Panel has decided that the advertisement is not in breach of the relevant standards within the ABAC. In doing so the Panel has noted:
  - there is no restriction created by the Placement Rules regarding the location of alcohol advertising in public places such as a railway station (assuming the railway station is not located within 150 metres of a school);

- the Placement Rules do not go to issues beyond alcohol advertisements being directed at minors and hence the placement of an advertisement in an area alleged to have a history of alcohol related offensive behaviour will not of itself be a breach of the rules;
- the advertisements are not located within 150 metres of a school and hence the Outdoor Media guidelines are not breached; and
- the advertisement cannot reasonably be considered as creating confusion with a soft drink.

31. As a result the complaint is dismissed.