

ABAC Adjudication Panel Determination No. 118/17

Product: Glenmorangie Whisky
Company: Moet - Hennessy Australia
Media: Cinema
Complainant: Confidential
Date of decision: 14 December 2017
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Debra Richards
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns the placement of an advertisement for Glenmorangie Whisky by Moet – Hennessy Australia (“the Company”) with the movie, *Thor: Ragnarok* during an 8:30pm cinema screening and arises from a complaint received on 30 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 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 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 30 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 is not generally sought for the placement of a marketing communication and was not sought in this case.

The Placement

10. An advertisement for Glenmorangie Whisky was seen by the complainant at 8:30pm during pre-movie advertisements for *Thor: Ragnarok* at Hoyts Cinema, Northland.

The Complaint

11. The complainant is concerned that the advertisement is being displayed to an audience which could be (and was) full of people under the legal drinking age during an M rated movie.

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:

Placement Rules (in part) 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

The Company's Response

14. The Company responded to the complaint by emails dated 6 and 8 December 2017. The principal points made by the Company were:
 - a) M rated movies have no age restriction. *Thor: Ragnarok's* audience profile is 85.4% aged 18+, so we were in compliance with the placement ruling.

- b) We do not regard *Thor: Ragnarok* to be primarily aimed at minors. This view is based on –
- i. Past experience with the audience composition of previous movies within the Marvel genre
 - ii. Classification - it's rated M, with Action Violence consumer advice
 - iii. Timing - it was released outside of the school holidays (movies that target minors are typically scheduled to coincide with school holiday weeks).

The Panel's View

Introduction

15. On 1 November 2017 the ABAC was revised through the introduction of new Placement Rules. The rules seek to address concerns regarding the direction of alcohol advertising towards minors (under 18 year olds). Prior to the inclusion of the Placement Rules, the ABAC only set out standards regarding the content of marketing and not where the marketing item might be located or the medium by which the marketing item was transmitted or published.
16. 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).
17. This determination is the second made by the Panel since the commencement of the new rules and it is the first to deal with the placement of an advertisement with a movie broadcast in a cinema. In order to provide

guidance on the future use of the Code, this determination provides a detailed explanation of the applicable rules and their interpretation by the Panel.

The Complaint

18. The complaint concerns the placement of an advertisement for Glenmorangie Whisky within the series of pre-screening advertisements shown before the movie *Thor: Ragnarok*.
19. The complainant believes the placement of the advertisement was inappropriate as the movie was given a 'M' classification and the cinema had an audience of many under 18 year olds. The complainant raised no concern about the content of the advertisement and did not contend that the advertisement itself was appealing to minors.
20. The complaint raises potentially the consistency of the placement of the advertisement with the movie with three of the Placement Rules. Each of these rules will be examined in turn.

The classification of movies screened at cinemas and Placement Rule (i)

21. The Classification (Publications, Film and Computer Games) Act 1995 establishes the classification system in Australia for movies that screened at public cinemas. The Act provides that movies can be classified as follows:
 - G – General;
 - PG – Parental Guidance;
 - M – Mature;
 - MA 15+ - Mature Accompanied;
 - R 18+ - Restricted;
 - X 18+ - Restricted; and
 - RC – Refused Classifications
22. Decisions on the appropriate classifications for a cinema release are made by an independent statutory body called the Classification Board. In making classification decisions, the Board applies guidelines for the classification of films. The guidelines provide that there are three principles in assessing films namely:
 - The importance of context;
 - Assessing impact; and
 - Six classifiable elements – themes, violence, sex, language, drug use and nudity.

23. A film given a 'M' classification is not recommended for persons under the age of 15 however there are no legal restrictions on access to the cinema by children under 15. Such movies can be expected to contain 'moderate' levels of violence and a sense of threat or menace if justified by the context of the movie. Equally some sexual activity might be discreetly implied and coarse language and nudity justified by context might be included.
24. This means that the classification of *Thor: Ragnarok* as 'M' carried with it no legal restrictions as to its audience. The classification did reflect the view that it contained mature themes and moderately impactful theme elements and was not 'recommended' for under 15 years.
25. The Placement Rules in Rule (i) require compliance with 'codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies'. While the Classification Board might be regarded as a 'media industry body', the work of the Board does not go to the placement of alcohol marketing. In fact, there is no specific code that goes to the placement of alcohol advertising with cinema movies. This means the rule has not been breached.
26. The media agency, Val Morgan, is responsible for the placement of the majority of advertising on Australian cinema screens. Advice from Val Morgan is:
 - Internal guidelines are followed which aim to schedule alcohol advertising in a responsible fashion;
 - Alcohol advertising is scheduled with movie titles where the audience is reasonably expected to comprise at least 75% of people aged 18 years or over;
 - Audience assessment includes the experience of previous comparable releases and past film audience statistics;
 - Film classification is taken into account and alcohol advertising will not be scheduled with 'G', 'PG', and 'M' films appealing to minors; and
 - PG classified films can have a predominantly adult audience profile e.g. *Hidden Figures* a 2017 film about the role of African American women in NASA's Apollo Moon Mission.

Rules (iii) and (iv)

27. Placement Rule (iii) provides that where there is no age restriction control available, a marketing communication may only be placed where the audience is reasonably expected to comprise at least 75% adults. This rule asks the Panel to assess available audience composition data and draw an objective conclusion.
28. It is noted that the complainant's personal experience was that the session of *Thor: Ragnarok* attended by the complainant had a large number of under 18 year olds present. While this may have been the case, the subjective impression obtained by the complainant is not the benchmark.

29. The Company has advised that the audience profiles for *Thor: Ragnarok* is 85.4% 18 years or older. A brief internet review indicated that the movie's United States opening weekend audience was 63% over age 25. The Panel was unable to source other audience composition data for the film.
30. The basis of Rule (iii) is that, to the extent possible the assessment of audience make up should be data based. While available data is limited, it does support the conclusion that the audience of the movie could reasonably expected to be 75% or greater aged 18 or over. Accordingly, Rule (iii) appears to have been complied with.
31. Placement Rule (iv) provides that a marketing communication must not be placed with programs or content primarily aimed at minors. This rule applies irrespective of the expected audience make-up of the program. The Rule requires the Panel to assess if *Thor: Ragnarok* is primarily directed at under 18 year olds.
32. The ABAC creates two benchmarks for the standards applying to alcohol marketing and its interaction with under 18 year olds. The benchmark for the content of alcohol marketing is that the marketing communication must not have 'strong or evident appeal' to minors. The benchmark in relation to the Placement Rules is that an alcohol marketing communication must not be placed with programs 'aimed primarily at minors'.
33. The concept of 'strong or evident appeal' has been a feature of the ABAC since its commencement in 1998. As a result, a large number of Panel determinations have dealt with the standard in a range of different contexts. In 2014 a definition of 'strong or evident appeal to minors' was included into a revision of the Code and this stated the concept captured marketing content:
 - Likely to appeal strongly to minors;
 - Specifically targeted at minors;
 - Having a particular attractiveness for a minor beyond the general attractiveness it has for and adult; and
 - Using images, designs, motifs, animations or cartoon characters that are likely to appeal strongly to minors.
34. The Placement Rule (iv) is not as expansive as the strong and evident appeal benchmark. Rather it aligns to a particular example of what would fall within the concept of strong and evident appeal, namely that the program was specifically targeted to minors. This means, a program might have strong and evident appeal to minors but could not be said to be primarily aimed at minors.
35. In assessing if a program or content is primarily aimed at minors, the following factors will be relevant:
 - An objective as opposed to subjective test is to be applied i.e. how would a reasonable person understand the primary appeal of the program;

- Each program will need to be assessed individually on its own content;
 - A program that has appeal across age groups, including but not limited to minors will not generally be 'primarily aimed' at minors; and
 - Classifications such as those given by the Classification Board or by television networks are a relevant consideration but will not always be decisive e.g. a PG classification movie may be appropriate for children but still not be primarily directed at minors such as a political documentary.
36. The Panel does not believe that the movie *Thor: Ragnarok* can be regarded as being primarily aimed at minors. In reaching this conclusion the Panel has noted:
- The movie carried a 'M' classification which indicates that the Classification Board did not believe it was recommended for under 15 year olds;
 - It was a major 'blockbuster' movie within a franchise of similar themed movies which have an appeal across age groups including but by no means limited to young adults and adolescents; and
 - While the appeal of the movie to adolescents is accepted, it cannot be fairly concluded that the movie was primarily aimed at the under 18 year old market.

Conclusion

37. The complaint has raised the operation of the ABAC Placement Rules and their interaction with the placement of an alcohol advertisement with pre-screening advertisements for the 'M' classified movie *Thor: Ragnarok*.
38. In Australia, films for cinema release are given a classification by the Classifications Board. A 'M' classified movie means that the movie contains mature themes and moderate impact elements such as violence, sex and language. While a 'M' classified movie is not recommended for children aged under 15, there is no legally enforced restriction on who may enter a cinema and view the movie.
39. Unlike free to air television, there is no specific code that purports to guide or regulate the placement of alcohol advertising with cinema screened movies. Hence, the screening of an alcohol advertisement with *Thor: Ragnarok* is not a breach of Placement Rule (i).
40. Extensive audience information about who is actually attending the cinema to view the movie is not publicly available. Advice from the Company and limited public information, however, indicates that the expected audience for *Thor: Ragnarok* is at least 75% adult. This means Placement Rule (iii) has not been breached.

41. The question of whether *Thor: Ragnarok* can be said to be primarily aimed at minors requires the Panel to assess the available information from the view point of a reasonable person. Relevant considerations in this case include the 'M' classification, the audience demographic information, the theme and nature of the movie and its membership within the class of super hero blockbuster movies. The Panel concludes that it could not be fairly said that the movie is primarily aimed at minors although the movie would have appeal across age groups including adolescents. Hence, Placement Rule (iv) is not breached.
42. Accordingly, the complaint is dismissed.