



## ABAC Adjudication Panel Determination No. 121/17

**Product:** XXXX  
**Company:** Lion  
**Media:** Television  
**Complainant:** Mr McKeich  
**Date of decision:** 21 December 2017  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Jeanne Strachan  
Professor Louisa Jorm

### Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns the placement of advertisements for XXXX by Lion (“the Company”) with a broadcast of the recent Cricket test match in Adelaide and arises from a complaint received on 6 December 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 6 December 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.

### **Pre-vetting**

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 of the advertisements but is

not generally sought for the placement of a marketing communication and was not sought in this case.

### **The Placement**

10. Advertisements for XXXX were seen by the complainant every day and evening during the Channel 9 broadcast of the recent cricket test match in Adelaide.

### **The Complaint**

11. The complainant is concerned that children are viewing the match. The broadcast of alcohol advertisements (and gambling advertisements) are argued to contribute to social harm such as binge drinking and violence.

### **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 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 letter dated 8 December 2017. The principal points made by the Company were:

- a) The advertisement does not breach Part 3 (b)(iv) of the Code by directing the marketing at minors by a breach of the placement rules.
- b) The placement of the ads during the broadcast of the cricket test match in Adelaide also does not breach the Commercial Television Industry Code of Practice (CTICP).
- c) I refer to section 6.2.1 (b) and (c) of the CTICP - A Commercial for Alcoholic Drinks may be broadcast at any of the following times: as an accompaniment to a Sports Program on a Weekend or Public Holiday; and as an accompaniment to the broadcast of a Live Sporting Event broadcast simultaneously across more than one licence area.
- d) The live cricket ratings for the 2016-2017 season indicate approximately 90% of the viewers watching the Big Bash, Test cricket, One Day International and 20/20 were all over the age of 18.
- e) On the basis of these statistics, we do not believe the broadcast of the cricket test match in Adelaide was primarily aimed at minors.
- f) As a responsible marketer, Lion has demonstrated a long-standing commitment to upholding both the letter and intent of the ABAC and AANA Codes. Lion maintains strict internal and external processes to ensure this compliance.
- g) As part of Lion's marketing approvals processes, the commercials for XXXX were subject to:
  - a. 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;
  - b. Review by Lion's internal marketing compliance team to ensure its adherence to all relevant advertising codes;
  - c. 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 is primarily concerned with the content of alcohol marketing communications rather than where the communication might have been located. The key exceptions to this general proposition relates to section 3(b)(iv) of the Code, which provides that a marketing communication must not be directed at minors through a breach of any of the Placement Rules.

16. The Placement Rules were inserted into the Code effective from 1 November 2017. In essence, the Rules create a cascading and interlinked series of requirements which a marketer must satisfy in placing an alcohol marketing item in outdoor, 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 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, 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 on 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. In the current case, the complainant is concerned that alcohol advertisements were shown during the Channel Nine broadcast of the recent Australia v England cricket test match in Adelaide. The complaint brings into focus Placement Rules (i), (iii) and (iv) which will be addressed in turn. It is noted the complaint does not contend that the content of advertisement was problematic as such. Rather it is argued that any alcohol advertising is undesirable when shown with cricket games that will be seen by minors.
18. In large measure the complainant is raising a public policy argument that alcohol advertising should be prohibited. This is a valid policy debate but is beyond the scope of the Panel to decide. It is a question for governments and parliaments to decide if alcohol marketing (or indeed gambling) should be prohibited outright or specific measures taken such as stopping alcohol companies sponsoring sports teams and competitions. The Panel has a much more limited role and that is to determine if a particular alcohol marketing communications' content and placement is consistent with the requirements contained in the ABAC.

## **Placement Rules**

19. Placement Rule (i) requires that the placement of alcohol advertising comply with 'codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies'. As the advertisement in this

case was aired on free to air television, the applicable code is the Commercial Television Industry Code of Practice (CTICP).

20. The CTICP limits when alcohol advertising can be broadcast to after 8.30 pm however an exemption to this is advertising in conjunction with live sports events. The cricket test match falls within this exemption and hence Rule (i) has not been breached.
21. Rule (iii) provides if there is no age restriction controls available to exclude minors (such controls exist with social media platforms such as Facebook and YouTube) then alcohol advertising can only be placed where at least 75% of the audience is reasonably expected to be adult. Free to air television has no age restriction controls on who may view it and hence the 75% adult audience requirement is applicable.
22. The question of the audience composition of a program with which an alcohol advertisement is placed is essentially an issue of fact. It is necessary to assess available data on the audience and draw a conclusion.
23. Audience composition data on free to air television is generally available due to the ratings system. Cricket matches tend to attract an older audience and the data supplied by the Company show the under 18 year old component of the audience is well under the 25% threshold, at between 8% to 10%. Accordingly, Rule (III) has not been breached.
24. Rule (iv) provides that irrespective of the expected audience of a program, an alcohol advertisement must not be placed with a program or content primarily aimed at minors.
25. This rule requires the Panel to form a judgement about the nature of the program content and its intended primary audience. In making this assessment a number of factors can be considered including (but not limited to):
  - The actual audience composition of the program;
  - The subject matter of the program and whether the subject matter has themes likely to predominantly appeal to children or adolescents;
  - The use of techniques such as familiar children characters or the use of children and adolescents within the program;
  - The storyline of the program and whether the complexity of the plot suggests its target audience is adult; and
  - The use of language.
26. It should be noted that 'primarily aimed at minors' is a more narrowly framed test than 'strongly or evidently' appealing to minors which the ABAC applies in assessing the content of alcohol marketing. In other words a program could be strongly or evidently appealing to minors but not be regarded as 'primarily aimed' at minors.

27. In assessing if a program is primarily aimed at minors, the Panel is to have regard to the probable understanding of the program by a reasonable person. This means that the values, attitudes and life experience commonly shared in a majority of the community is to be the benchmark.
28. While cricket can fairly be said to be an Australian national sport meaning it is played and followed across the country and is popular in all age groups, the Panel does not believe a broadcast of a cricket test match can be characterised as being primarily aimed at minors. Under 18 year olds will watch cricket (a much smaller broadcast audience than over 18 years old) but cricket on television has a general appeal and tending towards an older focus as opposed to being primarily aimed at under 18 year olds.
29. Accordingly, the complaint is dismissed.