



ABAC Adjudication Panel Determination No. 56/18

Product: Carlton Draught
Company: Carlton & United Breweries
Media: Television
Complainant: Confidential
Date of decision: 28 May 2018
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 a television advertisement for ‘The Front Bar’ which is sponsored by Carlton & United Breweries (“the Company”) and arises from a complaint received 30 April 2018.
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.
2. 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 meeting the standards contained in the ABAC.
 3. For ease of public access, Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by Ad Standards, a copy of the complaint is supplied to the Chief Adjudicator of the ABAC.
 4. 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.
 5. The complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

3. The complaint was received on 30 April 2018.
4. 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 completed in this timeframe.

Pre-vetting Clearance

5. 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 not obtained for this marketing communication.

The Marketing Communication

6. The complaint relates to a television advertisement for 'The Front Bar' which is an AFL commentary program sponsored by Carlton & United Breweries.
7. The advertisement opens with four men (the three regular hosts and one guest) sitting at a bar each with partially consumed glass of beer in front of them. One of the hosts Mick Molloy is saying "North Melbourne v Collingwood the grand final in the under 19 1991, we've missed one of the greatest potential clashes [laughter as we see a printout of the teams highlighting players Damien Hardwick for North Melbourne and Sam Pang for Collingwood]". The guest says "I reckon I remember you playing at half time in the middle there [laughter]". One of the hosts, Sam Pang responds, "I'm glad you're keeping a lid on it."
8. We then see the signage for 'The Front Bar' program with the Carlton Draught logo on the top left side with a banner advertising it for "Tonight 9:00" as a voiceover says "The Front Bar".

The Complaint

9. The complainant is concerned that the advertisement was shown at least twice in a family program and depicted four males all with a large glass of what was obviously beer in front of them and the ad concluded with the fact the show (The Front Bar) was sponsored by Carlton United Brewery. Further, alcohol and sport should not be shown together in a timeslot that children are watching (and during a show that does its best to show people making positive choices).

The ABAC Code

10. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (a)(ii) show (visibly, audibly or by direct implication) or encourage irresponsible or offensive behaviour that is related to the consumption or presence of alcohol;
 - (b)(iv) be directed at Minors through a breach of any of the Placement Rules.
 - (d) show (visibly, audibly or by direct implication) the consumption of an Alcohol Beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical co-ordination, such as the control of a motor vehicle, boat or machinery or swimming.

11. The definitions in Part 6 of the ABAC provide that 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.
12. The Commercial Television Industry Code of Practice provides:

6.2 Alcoholic Drinks

6.2.1 A Commercial for Alcoholic Drinks may be broadcast at any of the following times:

- a) in the M and MA15+ classification zones set out in Section 2 (except between 5.00 am and 6.00 am, and 7.30 pm and 8.30 pm); and
- b) as an accompaniment to a Sports Program on a Weekend or a Public Holiday; and
- c) as an accompaniment to the broadcast of a Live Sporting Event broadcast simultaneously across more than one licence area, if one of subclauses (a) or (b) is satisfied for:
 - a) the licence area in which the Live Sporting Event being broadcast is held, for an event taking place in Australia;
 - b) the majority of metropolitan licence areas in which the Live Sporting Event is shown, for an event taking place overseas.

2.2.2 M Classification zone. Subject to subclause 2.3.2(a), material that has been classified M may only be broadcast at the following times:

- a) School Days 7.30 pm to 6.00 am 12 noon to 3.00 pm
- b) Weekends and School Holidays 7.30 pm to 6.00 am
- c) Public Holidays 7.30 pm to 6.00 am

2.2.3 MA15+ Classification zone. Subject to subclause 2.3.2(b), material that has been classified MA15+ may only be broadcast between 8.30 pm and 5.00 am on any day.

Commercial for Alcoholic Drinks means a Commercial that directly promotes the use or purchase of one or more Alcoholic Drinks. It does not include:

- a) Program sponsorship announcements which make no direct reference to the price of goods or services;
- b) a Commercial which does not directly promote an Alcoholic Drink for an entity or company that participates in the manufacture, distribution or sale of Alcoholic Drinks;
- c) a Commercial where alcohol or a brand associated with alcohol is incidental and any alcohol consumption responsibly depicted;
- d) a Commercial for a licensed restaurant or club, entertainment venue, tourist attraction or dining establishment.

The Company's Response

13. The Company responded to the complaint by letter dated 14 May 2018. The principal points made by the Company are:
- a) The advertisement was not a marketing communication for CUB. The contract regarding CUB's sponsorship of 'The Front Bar' provides only for placement of the Carlton Draught brand on the show, not in advertisements. The advertisement was filmed and broadcast independently of CUB, with no oversight, input or requirement by CUB to include Carlton Draught branding in advertisements for 'The Front Bar'.
 - b) The sponsorship contract also specifies that any use of the Carlton Draught logo within 'The Front Bar' graphics are "subject to alcohol advertising restrictions within broadcast" and specifically requires that our products be consumed responsibly.
 - c) Consistent with the Panel's finding in ABAC Determination 78/17, the placement of the Carlton Draught brand within the advertisement does not show or encourage irresponsible behaviour related to the consumption or presence of alcohol while playing or discussing sport.
 - d) We do not believe that the advertisement breaches the Commercial Television Industry Code of Practice as it is not a 'Commercial for Alcoholic Drinks'. The depiction of the Carlton Draught brand is incidental to the

advertisement for 'The Front Bar', and the beer is not consumed at all during the advertisement.

- e) We do not believe that the advertisement breaches Part 3(b)(iv) of the Code by directing marketing at minors in breach of the Placement Rules. We note that 97.5% of the audience of the Home & Away program, as shown from 7 to 7.30pm on Thursday 26 April, are over the age of 18. Southern Cross Austereo has also confirmed that Home & Away is not a television program primarily aimed at minors.
- f) If, however, the Panel does not agree that no breach has occurred, we respectfully submit that such a breach should be classified as a 'no fault breach' pursuant to Part 4 of the Code. Firstly, the placement of our product within an advertisement for 'The Front Bar' was beyond our reasonable control, oversight or contractual arrangements, and, secondly, our contractual arrangements specify that any use of our branding are subject to alcohol advertising restrictions. In our respectful view, any breach of the Code was reasonably unforeseeable by and outside the reasonable control of CUB.

14. Southern Cross Austereo (SCA) responded to the complaint by letter dated 14 May 2018. The principal points made by SCA are:

- a) The promo was shown on Southern Cross TV in Tasmania at 7.16.31pm on Thursday 26 April 2017 during *Home & Away*.
- b) The audience split for 19:00:00 – 19:30:59 on Southern Cross TV Tasmania on 26 April is:

P0-17	2.5%
P18-54	47.0%
P55+	50.5%

- c) *Home & Away* is an award winning and long running Australian drama series set in the fictional Australian town of Summer Bay, a small coastal hamlet just north of Sydney. The series depicts the sun-drenched residents of a beachside resort. At times the series includes storylines dealing with themes of a social or ethical kind. The program is classified PG and broadcast Monday to Thursday at 7pm on Southern Cross Television. The Code allocates the period from 7pm weeknights to material classified PG, which recommends parental guidance for young viewers. While the series may attract younger viewers, the audience composition and content are primarily focused on those viewers aged 18 and above.

- d) CUB did not instruct or brief SCA to place the Carlton Draught product and brand in the advertisement for 'The Front Bar'.
- e) CUB was not involved with and did not exercise any control in relation to the way in which the Carlton Draught product and brand was portrayed in the advertisement for 'The Front Bar'.
- f) CUB was not involved with the placement and scheduling of the advertisements for 'The Front Bar'.

The Panel's View

Introduction

- 15. 'The Front Bar' is an AFL themed panel discussion program broadcast on the seven network including stations within the Southern Cross Austereo stable. On 27 April 2017 the complainant was watching the long running drama "Home & Away" when an advertisement for 'The Front Bar' was broadcast. The complainant took the advertisement as promoting the alcohol product Carlton Draught and was concerned about an alcohol ad appearing before 7:30pm on a week night.
- 16. The complainant's concern is understandable. Alcohol advertising on free to air television has restrictions as to the time of day such advertisements can be broadcast. These restrictions are set out in a code of practice called the Commercial Television Industry Code of Practice (CTICP). While the CTICP is a bit complicated, an alcohol ad should not be aired with a program broadcast before 8:30pm. This determination explores how this came about and considers whether the applicable codes governing alcohol marketing had been breached.

'The Front Bar' & Product Placement

- 17. This complaint is not the first time that the Panel has considered the TV program 'The Front Bar'. In fact, the Panel has made two previous determinations about alcohol marketing and 'The Front Bar' program. This has arisen because CUB, the producer of Carlton Draught, is a "sponsor" of 'The Front Bar' and this relationship results in the Company's product and branding appearing on the show.
- 18. In these previous determinations, 78/17 & 99/17, the Panel held that 'The Front Bar' is an example of the marketing practice known as product placement. Product placement involves a commercial relationship whereby a brand is featured in otherwise unrelated program content. As a result of this relationship the depiction of Carlton Draught in 'The Front Bar' and displays of the product logo and branding must occur consistently with the standards contained in the ABAC.
- 19. Importantly the use of product placement as a marketing technique means the program can be characterised as having a primary and secondary purpose. The primary purpose of 'The Front Bar' is to be a sports based entertainment

program. Its secondary or incidental purpose is to be a vehicle for the promotion of Carlton Draught as an alcohol product.

Alcohol Advertising on Free to Air Television

20. The CTICP regulates alcohol advertising on free to air television. It does this primarily by designating time zones during which alcohol advertising can be broadcast. In broad terms alcohol ads can be shown after 8:30pm and at other times in conjunction with the broadcast of a live sports event. Hence, Home & Away is shown at a time when the CTICP does not permit the broadcast of alcohol advertisements. So, how did it happen?
21. The decisive reason the advertisement was broadcast prior to 8:30pm is that the television station did not consider the advertisement to be alcohol advertising within the scope of the CTICP.
22. The CTICP uses a definition of alcohol advertising which describes a “commercial for alcoholic drinks” as meaning an advertisement that directly promotes the use or purchase of alcoholic drinks. The definition goes on to exclude particular advertisements such as where alcohol or a brand associated with alcohol is incidental and any alcohol consumption is responsibly depicted.
23. ‘The Front Bar’ advertisement is primarily promoting the program. It does this by showing an extract from the program with the presenters shown on the program set which resembles a bar within a hotel. In the bar the Carlton Draught logo and product is shown in various ways. In other words, the advertisement features the same product placement that ‘The Front Bar’ itself displays.
24. Consistent with its earlier decisions the Panel considers the advertisement as an example of product placement. Both CUB and the television station believe that the CTICP does not capture product placement as the advertisement is taken to be for ‘The Front Bar’ and the references to the alcohol product and brand are only incidental. For this reason, the advertisement was not regarded as being subject to the time zone restrictions.

The ABAC & the CTICP

25. Since 1 November 2017 the ABAC has contained provisions dealing with the placement of alcohol marketing. Placement Rule 1 provides that a marketing communication must comply with codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies. The CTICP is such a code.
26. Generally, the differences in what the ABAC considers to be alcohol beverage marketing communications and what the CTICP takes to be included as a commercial for alcoholic drinks does not create particular difficulties. On this occasion however, the concept in the ABAC which captures advertisements that can have a primary purpose to promote a non alcoholic product or service and a secondary purpose to promote an alcohol product means a tension has arisen between the two codes.

27. The Panel's obligation is to apply the ABAC consistently with its policy purpose and the spirit and intent of its provisions. Placement Rule 1 is to be understood as requiring all alcohol marketing communications to meet the placement and location restrictions as detailed in the relevant media codes such as the CTICP. The fact that the other codes adopt different definitions as to what is included within the scope of alcohol marketing for the purposes of those particular codes should not be taken as reading down the meaning of a marketing communication for ABAC purposes. In other words, the ABAC incorporates the requirements as to placement and location found in the other codes and applies those to ABAC marketing communications.

Does 'The Front Bar' Advertisement Breach the Placement Rules?

28. CUB argues that it had no involvement in the development of the advertisement and this raises the issue of whether the ad is a marketing communication for ABAC purposes. To fall within the scope of the ABAC a marketing communication must be generated by or within the reasonable control of an Australian alcohol company.
29. While the Panel has previously decided that the placement of CUB's product and branding within 'The Front Bar' program is captured by the ABAC the advertisement for the program is another step removed from the program itself. The company explains that it's commercial relationship with the program does not extend to advertisements for the program and this particular advertisement had no input from it. Further, there is no requirement that Carlton Draught branding be included in any Front Bar advertising.
30. The company does have control over the manner in which its branding is portrayed and the decision to include the products branding in the advertisement (even if done without prior knowledge of CUB) would trigger rights for the company to protect its brand.
31. It is beyond the Panel's remit to conduct an examination of the commercial relationship between CUB and the producers of 'The Front Bar' program. It does seem the Company could object to the use of its branding in the advertisement if its brand was being used in a manner which was damaging to the Company's interests. While it is accepted that the Company had no input into the advertisement it can be reasonably concluded that its right to protect its brand would enable it to effectively stop future use of its branding in such advertisements.
32. The Panel concludes that the advertisement is a marketing communication over which the company can exercise a reasonable measure of control. Accordingly, the advertisement is within the scope of the ABAC.
33. As explained earlier, the Panel believes the broadcast of the advertisement prior to 8:30pm does not comply with the CTICP time zone restrictions. Accordingly, the broadcast of the advertisement was in breach of Placement Rule 1.
34. Placement Rule 3 provides that a marketing communication may only be placed where the audience is reasonably expected to comprise at least 75% adults. Data supplied by CUB and Southern Cross Austereo is that the audience of

Home & Away on 26 April 2017 was overwhelmingly aged over 18 years with only 2.5% of the audience being minors. Accordingly, Placement Rule 3 has not been breached.

35. Placement Rule 4 provides that a marketing communication must not be placed with programs or content primarily aimed at minors. 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.
36. Home & Away has aired since 1988. Since 2008 the program has had a PG rating and has dealt with themes which appeal across age groups. Characters within the show are depicted as aged from school aged children to middle aged adults. While the show cannot be considered entirely adult in nature the Panel does not believe it can be fairly characterised as being primarily aimed at minors. Accordingly, Placement Rule 4 has not been breached.

Conclusion

37. The Panel has found that the advertisement for 'The Front Bar' is a marketing communication for ABAC purposes. As a result, the ad must meet the placement rules. Placement Rule 1 requires that the ad be broadcast consistently with the time zone restrictions contained in the CTICP.
38. The CTICP has been interpreted by the television station in a manner that the advertisement is not considered a commercial for alcoholic drinks. This means the television station did not treat the advertisement as needing to meet the time zone restrictions. The differences between the ABAC and CTICP has proven problematic as a result.
39. For its part, CUB did not have any input into the advertisement. The Panel believes in these circumstances and given the tension between the ABAC and CTICP provisions it is appropriate to make a no fault finding on behalf of CUB.
40. The Panel believes the tension between the ABAC placement rules and the CTICP needs to be addressed. The ABAC Management Committee has indicated its intention to review the placement rules after an initial period of operation to iron out issues that have arisen in the implementation of the new rules. In the meantime, further dialogue might usefully be held with FreeTV to

seek a workable position that provides certainty to alcohol marketers and television networks.

41. Accordingly, the complaint is upheld as a no fault breach in relation to Placement Rule 1.