



ABAC Adjudication Panel Determination No. 2-4/19

Product: Hahn, Iron Jack, Jim Beam & Canadian Club
Companies: Lion & Beam Suntory
Media: Television
Date of decision: 5 February 2019
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 Hahn and Iron Jack by Lion and Jim Beam and Canadian Club by Beam Suntory (“the Companies”) with the television broadcast of various cricket matches (Test series, BBL and WBBL) on various dates on Channel 7 and arises from three complaints received on 2 January 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 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 complaints raise concerns under the ABAC Code and accordingly are within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaints were received on 2 January 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 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 Hahn, Iron Jack, Jim Beam and Canadian Club were seen by the complainants during Channel 7 broadcasts of cricket Test, BBL and WBBL matches.

The Complaint

11. The first complainant is concerned about Hahn and other advertising in breaks and as banners during the Australia v India Cricket Test series on Channel 7 and doesn't want his children exposed to the ads.
12. The second complainant is concerned about Canadian Club advertising in breaks and as banners during the Australia v India Cricket Test series on Channel 7 on Sunday 30 December at 10:30am while children and young adults are engaged in the sport coverage and believes the advertising should be directed away from children by changing the time of advertising to after an agreed time such as 8pm.
13. The third complainant is concerned about Canadian Club, Jim Beam and Iron Jack advertising during live WBBL, BBL and Test Cricket coverage on Channel 7 when children and young adults are watching.

The ABAC Code

14. 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.
15. 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

16. Lion responded to the complaint by letter dated 14 January 2019 with clarification in several emails. The principal points made by Lion were:

- a) We reiterate our commitment to the ABAC Scheme and take our obligations to responsibly promote our products very seriously. However, for the reasons set out below, and with respect to the complainant, we submit that there has been no breach by Lion – Beer, Spirits & Wine Pty Ltd (“**Lion**”) of Part 3(b)(iv) of the ABAC Code and complaints 2 & 4/19 should be dismissed by the ABAC Panel.
- b) Part 3 (b)(iv) of the ABAC Code prohibits marketing communications from being directed at minors through a breach of the Placement Rules. We refer the ABAC Panel to parts (i) and (iii) of definition of ‘Placement Rules’ set out in Section 6 of the ABAC Code, and confirm that the broadcast of the Advertisements:
 - i. complied at all times with the alcohol provisions in the Commercial Television Industry Code of Practice (the “**CTICP**”); and
 - ii. appeared during programs that have a higher proportion of adults in their audience (at least 80%) than the proportion in the general population.
- c) The placement of the Advertisements during the broadcast of the WBBL, BBL and Australia v India Test Series on Channel 7 did not breach the CTICP as the Advertisements appeared in timeslots expressly permitted by the CTICP. Section 6.2.1 of the CTICP provides that commercials for alcoholic drinks may be broadcast only during specified times which are:
 - i. In the “M” and “MA15+” classification zones (except between 5.00 am and 6.00 am, and 7.30 pm and 8.30 pm);
 - ii. as an accompaniment to a Sports Program on a weekend or a public holiday; and
 - iii. as an accompaniment to the broadcast of a Live Sporting Event broadcast across more than one licence area if, relevantly, the licence area in which the Live Sporting Event being broadcast is held for an event taking place in Australia.
- d) The Advertisements each featured during the WBBL, BBL and Australia v India Test Series sporting events that were played locally in Australia and

all broadcast live-to-air by Channel 7 across more than one licence area. The Advertisements were therefore broadcast in accordance with the advertising restrictions for alcoholic beverages set out in Section 6.2.1(c) of the CTICP.

- e) In addition, Lion takes all reasonable steps to ensure our alcohol marketing is directed to adults and does not appear in media where children and young people make up a significant proportion of the audience. Before booking spots on television for the advertisement of our alcoholic beverages, Lion's internal policy mandates that the program must have an audience profile of at least 80% of people who are 18 years or older.
- f) Audience profile for the Cricket last year using eTam (Nielsen data) for the Ashes Test Matches and Australia v England One Day International series on Nine network and BBL and WBBL on Ten network show:
 - i. There were no matches/time slots on Network Nine that had an audience of P0-17 greater than 25%.
 - ii. There are a couple of Big Bash replays on multi-channels (ONE) that have an audience of P0-17 greater than 25% however we were not a sponsor nor did we have any standard spots in replays.
- g) The live cricket ratings for the 2018-2019 series indicate that approximately 90 per cent of viewers watching the WBBL, BBL and Australia v India Test Series on Channel 7 were over the age of 18. We attach audience composition data provided by OzTAM Pty Limited ("**OzTAM**") to support this. As the Panel will be aware, OzTAM is an independent company owned by Australia's major commercial television broadcasters (the Seven Network, Nine Network and Network 10) to provide reliable and up-to-date data to the industry, including data to help us understand viewer behaviour (including demographics).
- h) Lion confirmed that no paid spots appeared in any time slots that show an audience of P 0-17 over 25%.
- i) There were however two bonus spots that ran on digital channels when the audience was 73-74.9% adults. Bonus spots are ads placed by the network and the marketer and its media agency is not aware of the placement until after it has run. In terms of the Melbourne spot, this is right on the border line of the threshold so I don't think there are any significant factors that have led to this percentage of audience. The Brisbane spot on the other hand, ran in the pre game show in the Brisbane market. This is usually a place that wouldn't encroach on the age restriction limit. However, given that the Test was held in Adelaide and the 30 min time difference between the two states meant that the spot ran pre 9am on a Sunday. This is a timeslot that typically see a higher ratio of PPL 0-18 viewership. The marketer has asked the network to no longer place its ads on digital channels as a bonus spot.

- j) On the basis of these statistics, Lion does not believe the broadcast of these sporting events was primarily aimed at minors.
 - k) As a responsible marketer, Lion takes the placement of its advertisements very seriously and has demonstrated a long-standing commitment to upholding both the letter and spirit of the ABAC and AANA Codes. Lion maintains strict internal and external processes to help ensure this compliance.
17. Beam Suntory responded to the complaint by emails dated 17 and 20 January 2019. The principal points made by Beam Suntory were:
- a) Beam Suntory advertising and media placement raised in these complaints received alcohol advertising pre-vetting and were placed by media broadcasters that comply to the governance of alcohol advertising media placement.
 - b) Historically audience composition in cricket coverage angles older and comfortably meets all alcohol advertising requirements.
 - c) Beam Suntory double-checked the placement of each individual spot and that every spot broadcast does comply with the Commercial TV Code. BSI continually complies with all marketing and advertising codes.
 - d) Data was supplied that shows each date, time slot and program information of all advertising for Jim Beam and Canadian Club (paid, bonus spots and make-goods) that were broadcast between 16 December and 5 January. That data was matched with OzTam/Nielsen TV audience measurement data for each ¼ hour timeslot in which an ad was broadcast.

The Panel's View

Introduction

18. For many decades television summer sports coverage in Australia has been dominated by the broadcast of cricket and tennis with the 9 Network broadcasting cricket and the 7 Network broadcasting tennis. In the summer of 2018/19 the broadcast arrangements effectively reversed with channel 9 now broadcasting tennis and channel 7 taking up the airing of cricket. For cricket the 7 Network has gained broadcast rights across the various formats of the game namely test cricket, one day cricket and the more recently introduced format of 20/20 or 'Big Bash' games.
19. 2018 was the first full year that the ABAC scheme incorporated rules going to the placement of alcohol marketing in addition to the long standing requirements as to the content of alcohol marketing. The five placement rules create differential requirements on where alcohol ads might be broadcast, published, transmitted or located depending on the type of media involved. The policy aim of the rules is to better direct alcohol marketing towards adult audiences and away from under 18 year olds. For broadcast media such as television the technology (unlike digital internet platforms) does not permit specific targeting of

audiences by age and hence the rules have the more limited aim of endeavouring to direct broadcast of alcohol ads:

- during time slots where it is more likely the viewing audience will not be children (rule1);
 - at audiences which can be reasonably expected to be at least 75% adult (rule 3); and
 - with content not primarily aimed at minors (rule 4).
20. Alcohol companies have long advertised their products in conjunction with the broadcast of sports events. It was not surprising therefore that when the placement rules came into operation in November 2017 that complaints were received about the airing of alcohol ads with the broadcast of the various formats of cricket games. In large measure the previous complaints mirror the points made in the three current complaints, namely that alcohol advertising in conjunction with cricket television broadcasts should either be banned outright (one complainant made the same point about fast food and sports betting ads) or at least more restricted than it is now. This is argued as being justified by the perceived negative consequences of alcohol use and the impact advertising could have in attracting younger people to drink.
21. It is a legitimate viewpoint to advocate for the prohibition of alcohol advertising with sport or more broadly. This however is an issue of public policy to be instigated and decided by government as to whether the public interest would be advanced or not by such a step. It is not a matter which the Panel can decide and the ABAC placement rules assume that alcohol advertising will occur and the only question is whether the specific requirements of the rules have been satisfied in relation to particular marketing.
22. As noted the broadcast arrangements for cricket in Australia have altered with rights to the games now vesting in the 7 Network. In turn the 7 Network shows some of the games live on its principal free to air channel and also some games are replayed on the sister digital channels of the network. It is because of this change in network and the presentation of the games, ie new commentators, a greater focus on female players and viewers, and a recast style of the broadcast that it is timely to review once again the issues canvassed in earlier determinations concerning the broadcast of cricket and the placement rules.

Placement Rule 1

23. Placement rule 1 incorporates into the ABAC the requirements on the placement of alcohol marketing found in other media industry codes. For current purposes this means the Commercial Television Industry Code of Practice (CTICP) which governs free to air television. This code does restrict the time of day at which alcohol ads can be shown, however the code expressly allows alcohol advertising in conjunction with live sports events. The broadcast of the games in which the various alcohol product ads were placed occurred in both live coverage and with replays of games principally 20/20 fixtures.
24. In the case of the live broadcasts, it is clear that the ABAC placement rule 1 has not been breached as the CTICP permits alcohol advertising with such

broadcasts irrespective of the time of day of the broadcasts. In relation to the replays of games, these replays either occurred at a time at which alcohol advertising is permitted under the CTICP or no alcohol ads were placed at the times the ads are not permitted to be screened. Accordingly rule 1 has not been breached.

Placement Rule 3

25. Placement rule 3 applies when the media platform over which the alcohol ad is conveyed does not have the technical capacity to put into place age restriction controls. Such controls do exist for platforms based on the internet such Facebook or Instagram but by its nature television is a broadcast medium. This means there is no control in the hands of the advertiser as to who might be watching a program irrespective of the time of day the program is shown.
26. This means rather than endeavouring to control the potential audience for an alcohol ad in a direct sense, the intent of rule 3 is to target advertising to be screened in conjunction with programs where the audience is reasonably expected to comprise at least 75% adults. The requirement established by this rule is based on a 'reasonable expectation' of what the audience is likely to be rather than a post facto test of what the actual audience was. This distinction is important as it means the requirement for the marketer is to use available information prior to the screening of the ad to assess whether it's likely the ad will be seen by no more than 25% minors. If the assessment based on the available data, such as previous audience figures for a like program demonstrates a reasonable basis for forming the view of the likely audience, then the rule won't be breached if it turns out the actual audience was in fact less than the 75% adult benchmark.
27. Data on the audience demographics for television is available via the TV ratings system. This system provides good data on what the viewers age breakdown is for programs shown across different time slots. The Companies in responding to the complaints have provided the Panel with the ratings obtained for broadcasting test cricket, one day internationals, and 20/20 fixtures. This data is publicly available at a higher level than supplied by the Companies and this public data confirms the advice provided by the Companies. So it is known with some certainty the age breakdown of audiences actually viewing the games in which the complained of ads were broadcast.
28. Of course at the time the ads were shown this data was not known as it becomes available only after the broadcast. Therefore the Companies in placing their ads were relying on the data relating to the broadcast of cricket in earlier seasons. As cricket has been shown over the television for a long time, this data set is very rich and the Companies would have a very good idea of the nature of the audience cricket games attract. The one unknown for the 18/19 summer of cricket is the impact on audience age makeup the change in broadcaster to the 7 Network would have caused (if anything).
29. The data shows that the audience for cricket broadcasts is overwhelming adult with viewing figures generally in excess of 80% adult and often over 90%. Even though cricket is a national sport played and followed across ages groups, its audience on television tends to be older rather than younger. The data supplied

did indicate that 20/20 games attract more younger viewers than test matches but even this form of the game is watched far more by adults than minors with audiences in excess of 75% adults.

30. The data did however show that there was across the summer a small number of occasions where an alcohol ad appeared at a time that the ratings for that time slot revealed an audience with less than 75% adults. This occurred twice when 'bonus spots' awarded by the 7 Network to Lion (Hahn and Iron Jack products) were shown with replays of the Big Bash League (domestic 20/20 games). In these cases the adult audience was 73% and 74% respectively and hence lower than the 75% benchmark required by the rule 3.
31. The 7 Network broadcasts the Big Bash League on both its main station and over its sister digital channels. The replays of the games are shown on the digital channel. Lion points out that it did not seek to have its ads shown on the digital channel at the time the audience turned out to be under 75% adults, but rather the ads were broadcast 'free of charge' by channel 7 in a practice known as 'bonus spots'. It seems that bonus spots are provided to advertisers who purchase a particular quantum of paid space as reward. The advertiser does not know when the bonus spots will be scheduled.
32. While it can be accepted that Lion was not given prior notice of the placement of the ads with the replayed 20/20 games, this does not diminish the advertiser's overall responsibility for the conduct of its marketing campaigns. The Company retains responsibility to ensure that marketing on its behalf is conducted consistently with the obligations in the ABAC. That said, based on previous audiences for cricket games it was reasonable to expect that the likely audience for the replayed games at the time the ads appeared would have been at least 75% adults. Accordingly the Panel does not believe the rule 3 requirement was breached on this occasion.
33. The data supplied also revealed that one ad broadcast at 9-25 pm on 2 January for Beam Global (Jim Beam and Canadian Club) reached an audience of 25.2% minors which is higher than the 25% benchmark in the placement rule. The Company points out that the ratings for this game at this time-slot is out of character with the ratings achieved by other games which generally showed an adult audience in excess of 80% and many instances over 90% adult. It is surmised that the data in this one instance may have been inaccurate. In any event given the past history the Company can reasonably maintain that the expected likely audience was consistent with the rule 3 requirement and hence the Panel believes no breach has occurred.

Placement Rule 4

34. Placement Rule 4 provides that regardless of the expected audience, it is not permitted to place an alcohol ad with a program which is primarily aimed at minors. To use a fanciful illustration of this rule, it would not be permitted to place an alcohol ad with the TV program 'Play School' even if it could be established that the audience for the program was 100% people aged over 18. This is because the content, themes and appeal of Play School is clearly directed towards children. This rule therefore asks the Panel to assess whether it can be said that broadcasts of cricket games is primarily directed to minors.

35. In making an assessment of this nature the Panel has regard to factors such as:
- the actual audience of a program;
 - any classification of the program given by regulatory or other authorities eg is the program;
 - given a 'G' rating or a higher classification such as 'MA';
 - the themes of the program, plot lines, characters etc; and
 - the use of language and the presence and treatment of violence and sexuality.
36. In the case of cricket, it would be fair to say the sport and hence its broadcast has appeal across age groups including under 18 year olds. Different formats of the game have slightly different appeal with the Big Bash games possibly being more attractive to younger audiences than test matches. It would be fair to say that the 7 Network coverage of the sports has a more contemporary feel than that employed by the previous broadcaster. That said, the Panel believes the broadcast of cricket cannot be fairly said to be primarily directed towards minors. Certainly the audience watching the games is overwhelmingly adult and accordingly the Panel does not believe that rule 4 has been breached.
37. The complaints are dismissed.