



ABAC Adjudication Panel Determination No. 64/19

Product: James Squire One Fifty Lashes
Company: Lion – Beer Spirits & Wine Pty Ltd
Media: Television
Date of decision: 24 September 2019
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns television advertising for James Squire One Fifty Lashes by Lion (“the Company”) and arises from a complaint received 9 September 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 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, Ad Standards (AS) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by AS, 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 AS 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 Ad Standards Community Panel 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 9 September 2019.
8. The Panel endeavours 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 has been determined within this timeframe.
9. 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 obtained for the content of this marketing communication.

Marketing Communication Placement

10. The complaint refers to a television advertisement being broadcast on SBS during the US Open Semi Final at 8:20am.

The Complaint

11. The complainant is concerned that the advertisement was broadcast:
 - in violation of alcohol advertising standards; and
 - when kids are watching the US Open semi-final as it's a major event.

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:

Available Age Restriction Controls means age restriction, targeting or affirmation technologies available to restrict a Marketing Communication to Adults, but this does not require a third party platform, website or account that is not primarily related to alcohol to be age restricted in its entirety before it can be used to place a Marketing Communication.

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) A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.
- (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 16 September 2019 advising that:

- 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 complaint 64/19 should be dismissed by the ABAC Panel.
- 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:
 - complied at all times with the alcohol provisions in the Commercial Television Industry Code of Practice (the “**CTICP**”); and
 - appeared during programs that have a higher proportion of adults in their audience (at least 75%) than the proportion in the general population.
- The placement of the Advertisements during the broadcast of the US Open Men’s Final on SBS 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:
 - In the “M” and “MA15+” classification zones (except between 5.00 am and 6.00 am, and 7.30 pm and 8.30 pm);
 - as an accompaniment to a Sports Program on a weekend or a public holiday; and
 - 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.
- The Advertisement featured during the US Open Men’s Final sporting events that were played locally in Australia and all broadcast live-to-air by SBS across more than one licence area. The Advertisement was therefore broadcast in accordance with the advertising restrictions for alcoholic beverages set out in Section 6.2.1(c) of the CTICP.
- 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.

- The live ratings for the 2018 and 2019 US Open indicate that approximately 96 per cent of viewers watching the tournament on SBS 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).
- On the basis of these statistics, Lion does not believe the broadcast of these sporting events was primarily aimed at minors.
- 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.

The Panel's View

15. The US Open is one of the Grand Slam tennis championships and as such is a major international sporting event. The 2019 tournament was broadcast in Australia by SBS. Due to the time differences between the United States and Australia, the live broadcast of matches traversed various times of day including early mornings.
16. This complaint concerns the broadcast with a men's semi-final of an advertisement for James Squire beer produced by the Company. The advertisement was seen by the complainant at 8:20am and the complainant contends this is an inappropriate time for alcohol advertising to occur as children will be viewing the broadcast. The concern raised was not about the content of the advertisement nor was it confined particularly to the Company's product but is directed more generally to the practice of alcohol advertising occurring with major sporting events irrespective of the time of day.
17. The issue of the relationship between alcohol marketing and sports and cultural events is the subject of some community debate. The debate generally focusses on whether alcohol companies should be permitted to sponsor sporting competitions or teams and if so on what basis as well the question of the advertising of alcohol in association with sports/cultural events. Ultimately these are issues of public policy to be assessed and determined by government and are beyond the remit of the Panel.

18. The Panel has a much more confined role and that is to assess the consistency of an individual advertisement against the standards and requirements contained in the ABAC. The Code goes to both the content of marketing communications and where and when a marketing communication might be placed. It is the ABAC Placement Rules which are raised by the complaint.
19. The Placement Rules create a series of obligations on alcohol companies to direct alcohol marketing towards adults and away from minors. The obligations are related to the technical capacity of various mediums of communication to target the likely audience of an advertisement. Hence, marketing conveyed via digital platforms, which generally have age restriction capacities, is to occur consistently with the application of the available age restrictions to endeavour to exclude minors from accessing the material. With broadcast media such as television it is not possible to exclude minors from viewing an alcohol ad, so the Rules go to limiting the likely audience of minors of a particular marketing communication.
20. There are 3 rules which potentially apply to the TV broadcast of an ad with a sports event.
 - Rule 1 which relevantly requires that the Commercial Television Industry Code of Practice must be complied with.
 - Rule 3 which provides an ad may only be placed where the audience is reasonably expected to comprise at least 75% adults.
 - Rule 4 which provides an ad must not be placed with programs or content primarily aimed at minors.
21. The CTCIP generally provides that alcohol advertising is limited to particular times of day e.g. after 8:30pm but it permits the showing of an alcohol ad with live sports events including at 8:20am. Accordingly this requirement has not been breached.
22. Rule 3 requires an assessment of the reasonably expected audience of a program with which an ad has been placed. For TV, good data is available because of the rating system used to track TV audiences for different time slots in different cities and regions. As the actual audience for a program cannot be known until after the program is aired, a 'reasonable expectation' of the likely audience will usually rely on the past audience of the same or a similar program obtained when previously broadcast. For tennis generally, and for the US Open specifically, data from ratings indicates that the audience demographics exceed 85% adults and often is over 95 % adults. Accordingly, the broadcast of the ad with the men's semi-final was reasonably expected to be to an audience which was overwhelmingly adult and in excess of the 75% adult benchmark required by Placement Rule 3.
23. The final rule goes to the content of the program with which the ad was shown and requires that irrespective of the program's audience, an ad cannot be shown with content primarily directed at minors. The Panel has previously considered the

appeal of tennis and concluded that although the sport has appeal across age groups it cannot be reasonably believed that the TV broadcast of Grand Slam tennis championships is 'primarily aimed' at minors. As the TV ratings indicate, the primary appeal of such broadcasts is towards adults and not minors.

24. The complaint is dismissed.