



ABAC Adjudication Panel Determination No. 70/19

Product: Liquorland
Company: Coles Liquor
Media: Digital (Spotify)
Date of decision: 21 October 2019
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns advertising on Spotify for Liquorland (“the Company”) and arises from a complaint received 17 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 17 September 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 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. A 30 second advertisement for products available at Liquorland was placed in a music playlist accessed via the music streaming platform Spotify. The content of the ad is not in contention as such but rather its placement on Spotify.

The Complaint

11. The 16 year old complainant is concerned that she has received an alcohol advertisement when listening to Spotify, particularly as she believes that Spotify's algorithms are aware that she is under 18, given she constantly receives advertisements about university and tertiary providers.

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.

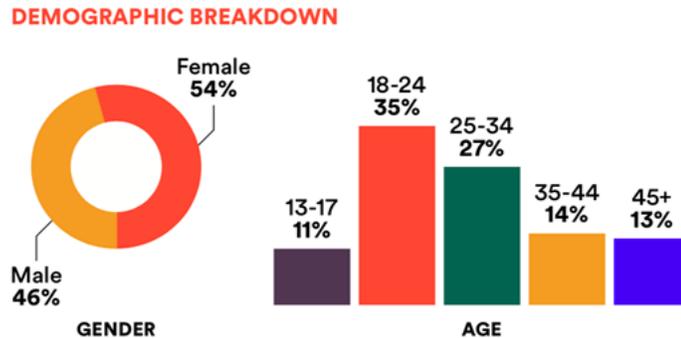
The Company's Response

14. The Company responded to the complaint by letter dated 8 October 2019 advising that:

- As you will be aware, Coles has been a signatory to the Alcohol Beverages Advertising Code since 2013. Coles Liquor takes its alcohol advertising obligations very seriously and is committed to industry best practice. Coles has demonstrated a long-standing commitment to the responsible service, supply and promotion of alcohol. We maintain robust internal compliance processes in relation to liquor advertising and have a strong culture of compliance training embedded throughout the business to ensure our teams have the necessary skills to successfully navigate this heavily regulated environment. Coles is also a key contributor to DrinkWise, an independent, not-for-profit organisation whose "primary focus is to help bring about a healthier and safer drinking culture in Australia".
- We have investigated this matter and provided responses to the questions you have raised in your correspondence and additional supporting information below. The advertisement was a Liquorland Advertisement which appeared on Spotify (**The Advertisement**). Based on the date of the complaint, Coles has inferred that The Advertisement related to a promotion for Rapaura Springs Sauvignon Blanc, as this promotion was run by Liquorland on Spotify from 12 September 2019 until 15 September 2019. A copy of the audio which was provided to Spotify for this advertisement has been provided. A copy of the visual advertisement which may have accompanied the audio is also included for reference.
- Liquorland engages an advertising agency called OMD to buy its Spotify advertising. OMD has obtained the details from Spotify which have been included in this response. Spotify collects users' personal data when they sign up to the Spotify service (<https://www.spotify.com/au/signup/>), including their date of birth. Spotify has advised it has age restriction controls in place to target advertisements to users above a certain age or within a certain age range. Spotify advised it uses the date of birth data point to inform which users meet the age parameters and should only play these advertisements to the appropriate users. Liquorland and OMD requested The Advertisement be targeted to 25-54 year olds. Spotify advised OMD that it did apply its age restriction controls to the playing of The Advertisement on its platform. However, based on this reported instance, Spotify is continuing to investigate how The Advertisement may have come to be played to this consumer's account. OMD is yet to receive a final outcome of this investigation. Liquorland believes that if Spotify confirms The Advertisement was played to any individuals under the age of 18, that this would constitute a no fault breach in accordance with part 4 of the ABAC Code as it was reasonably

unforeseeable by Liquorland and also outside of Liquorland's control that the age restrictions Spotify uses did not operate effectively in this instance.

- Liquorland has ceased all advertising with Spotify until it can substantiate that its age restriction controls are operating effectively.
- Audience composition data below confirms 89% of Spotify users are 18 years old or older.



The Panel's View

15. Spotify is the world's most used audio streaming subscription service, with over 140 million active users in 80 countries, including Australia, being able to access 30 million musical pieces and 450,000 podcasts. The Spotify model permits users to access the service free of charge or through a paid subscription. Around three quarters of the platform's users access the free subscription and these users will receive advertising of various types. This determination concerns an alcohol ad placed on Spotify.
16. The complainant was 16 years old at the time of the complaint. The clear implication from the complainant is that the Spotify service accessed was subscribed in the complainant's own name, and in making the subscription, a correct date of birth was entered. The complainant notes that the type of other advertising received while using the service, such as ads about university and tertiary education providers, indicates that the platform's 'algorithms' have factored in the complainant's age. Accordingly, it is argued the placement of an alcohol ad should not have happened as it was directed towards a minor.
17. The Company's position is also that its advertising placed on Spotify should not be directed towards minors and that its instructions to its advertising agency was to have its ad (which is surmised to be for a brand of wine given the date it was accessed on the platform) targeted towards 25 to 54 year olds. So, how did the complainant come to have the ad served to her while using the Spotify service, and does this amount to a breach of the ABAC obligations?

18. The ABAC Placement Rules have the policy intention that alcohol marketing should as far as reasonably possible be directed towards adults and away from under 18 year olds. The Rules create differential obligations on marketers, which are linked to the technical capacity of a communications medium to target the audience of the advertising placed on the medium. When digital platforms such as Spotify are used to carry an alcohol ad, the requirement is that the marketer must utilise available age restriction controls to exclude minors from viewing the ad.
19. Spotify uses first party data to enable marketers to target their advertising towards audience segments which are expected to respond most favourably towards the product or service being marketed. First party data gathered by Spotify appears to be quite sophisticated and is drawn from both the type of music and the time of day different genres of music are accessed. This is combined with data on age, gender, location and the kind of device being used to access the platform to create a profile on individual users. Advertising can then be designed and targeted to maximise its impact.
20. Spotify, accordingly, has age restriction/age targeting capacities and these should have meant that the complainant was not served with the Company's ad. The Company advised it required the available age restriction controls to be used. It has been unable to identify why the ad was then accessed by the complainant and has ceased all advertising via Spotify until it can substantiate that age restriction controls are operating effectively.
21. In these circumstances the position seems to be that:
 - the complainant is correct (ie a correct date of birth has been entered on the Spotify account and the account being used by the complainant is not an adults' which is then shared with the complainant); and
 - the Company has properly taken steps to use age restriction controls available to it when marketing over Spotify.
22. On this basis the Panel upholds the complaint as Placement Rule 2 appears to have been breached but makes a finding of a no fault breach as the Company has apparently carried out its obligations under the Rule and the breach arises from issues outside of its control.