



## ABAC Adjudication Panel Determination No. 90/20

**Product:** Bundaberg Rum & Captain Morgan's Rum  
**Company:** Diageo  
**Media:** Television  
**Date of decision:** 15 July 2020  
**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 Bundaberg Rum & Captain Morgan's Rum by Diageo ("the Company") on Peach 10 between 11am and 12pm during Spongebob Squarepants cartoons and arises from a complaint received on 24 June 2020.
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 24 June 2020.
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. In this case no alcohol advertisements were identified as having been broadcast during the program.

### **The Placement**

10. Advertisements for Bundaberg Rum and Captain Morgan's Rum were seen by the complainant during a Peach 10 broadcast of Spongebob Squarepants between 11am and 12pm.

### **The Complaint**

11. The complainant is concerned that the ad was shown during children's scheduled television programming on Channel 10 Peach.

### **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. Diageo responded to the complaint by letter dated 3 July 2020. A subsequent letter from Ten and an email from WIN confirmed that Diageo's ads were not placed during SpongeBob SquarePants. The principal points made by Diageo were:

- a) Diageo takes an industry leading approach to alcohol advertising, which complies with both local and global policies and practices. We were deeply concerned to receive a complaint of this nature.
- b) In partnership with our media agency, Spark Foundry, we conducted a thorough investigation into our advertising activities for Diageo during the period of June 2020. The investigation involved checking whether the ads (paid or bonus) appeared within the specified programming by reviewing post spot logs. As this review did not show evidence that the ads appeared, we broadened our investigation to look at all paid and bonus ads for Diageo products on Foxtel and Broadcast Video On Demand (BVOD). Additionally, we took a broad geographical lens as the complaint came from Palm Beach on the Gold Coast. Specifically, the investigation involved:
- reviewing the post spot logs for SpongeBob Squarepants on Ten/WIN in all Metro and Regional TV markets for 21 – 24 June inclusive to check which advertisers ran in this programme;
  - reviewing all Diageo spots (Paid and Bonus) in Regional QLD & NSW on Ten/WIN from 7 – 24 June inclusive;
  - reviewing all airtime with Foxtel for the week commencing 21 June to confirm that no spots for Diageo ads ran in Children's Programming;
  - reviewing our BVOD agreements to confirm that we were not accessing any children's content and specifically confirming that we had not run in SpongeBob SquarePants;
  - reviewing the programming that Diageo advertising ran in via BVOD streaming between 11am-12pm on 24 June; and
  - confirming with both Network Ten & WIN that their automated and manual CAD check process was in place during this period and that all Diageo ads had the correct CAD classification applied.
- c) This investigation showed no evidence that Diageo ads were broadcast during SpongeBob SquarePants or that any of our advertising ran before 8:30pm on TV in Free-to-air (FTA) TV. We could also find no evidence that any of our ads ran in SpongeBob SquarePants via BVOD. Based on this evidence, we do not believe that ads for Bundaberg Rum and Captain Morgan were run during the programming detailed by the complainant.

### **The Panel's View**

15. SpongeBob SquarePants is a popular children's animated series which premiered on the Nickelodeon subscription TV channel in May 1999. In Australia the show can be accessed several ways over various media platforms including on the free to air TV platform 10 Peach. On or about 24 June 2020 the complainant believed that several advertisements for products from the Company were broadcast in conjunction with SpongeBob on 10 Peach between 11am and 12 noon. It was naturally contended by the complainant that alcohol

advertising should not be screened with a children's TV program such as SpongeBob.

16. There is no question that several requirements of the ABAC Placement Rules would be breached if alcohol advertising was placed with television broadcasts of SpongeBob and certainly the Company makes no attempt to argue that SpongeBob would be a program suitable for alcohol marketing given the show is directed primarily at minors. Rather, the Company provided information to establish that its ads did not show with SpongeBob as claimed.
17. To this end, the Company supplied data from the Ten Network and its regional affiliate WIN as to when its ads did broadcast and what ads were shown during the broadcast of SpongeBob. In addition, express statements were made by the 10 Network and WIN that alcohol advertising did not appear with the program. The Company advised it undertook a wider search of other platforms such as Foxtel, over which SpongeBob can be accessed, and these searches found that none of its advertising has been shown with the program.
18. The position therefore appears somewhat puzzling. There is no reason to believe that the complainant is not genuine in raising the concern and clearly thought that ads were screened with the show. Equally however, both the detailed data from the 10 Network/WIN supplied by the Company and the confirmation direct from the 10 Network demonstrate that alcohol ads did not air as contended in the complaint.
19. It is not possible for the Panel to resolve why the complainant clearly believes the ads were shown when the data demonstrates this was not the case. In these circumstances, the apparently unequivocal data and statements from the television network have to be accepted and the complaint dismissed.