



ABAC Adjudication Panel Determination No 26/21

Product: James Squire Broken Shackles Lager and Heineken
Company: Lion Australia
Media: 10 Play
Date of decision: 16 March 2021
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 advertising for James Squire Broken Shackles Lager and Heineken by Lion Australia (“the Company”) on 10 Play during programs in the “Kids” category. It arises from a complaint received on 26 February 2021.
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 Code”) – 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 and Policies – which place 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 other codes as well as meeting the standards contained in the ABAC.
 4. For ease of public access, Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the Ad Standards, 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 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.
 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 26 February 2021.
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 was completed in this timeframe.

Pre-vetting Clearance

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 advertising (Approval Number 18298 for James Squire Broken Shackles Lager and Approval Number 19198 for Heineken).

The Placement

10. The complaint refers to advertising for James Squire Broken Shackles Lager and Heineken during programs in the “Kids” category on 10 Play.

The Complaint

11. The complainant is concerned about the advertising as follows:
 - *Daily this week in business hours my child was watching programs from the 'Kids' category.*
 - *James Squire Broken Shackles beer ads were regularly played, and the Heineken 'Cheers to all' advertisement where the bar service staff confuse men & women ordering beers and cocktails.*
 - *These ads are inappropriate for the age of viewer that these Channel 10 programs are for. I believe the ads was the first ad in each ad break during the kids category programs that my daughter was watching.*

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 4 of the ABAC Code provides that:

A breach of this Code that is reasonably unforeseeable by or outside the reasonable control of the Marketer or their agency will be classified as a no fault breach.

14. Part 6 of the ABAC Code provides that:

Minor means a person who is under 18 years of age and therefore not legally permitted to purchase an Alcohol Beverage in Australia.

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 Placement Policy).
- (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.
- (v) A Marketing Communication must not be sent to a Minor via electronic direct mail (except where the mail is sent to a Minor due to a Minor providing an incorrect date of birth or age).

The Company's Response

15. The Company responded to the complaint by letter emailed on 11 March 2021. The principal points made by the Company were:

- We reiterate our commitment to the ABAC Scheme and take our obligations to responsibly promote our products very seriously. As a responsible marketer, Lion maintains strict internal and external processes to help ensure this compliance with the ABAC Code, including taking all reasonable steps to ensure that the placement of our marketing communications do not appeal to minors. In this instance, we submit that complaint 26/21 should be deemed a no-fault breach by the ABAC Panel.
- The Advertisements referred to in the complaint have both received Alcohol Advertising Pre-Vetting Service Approval for their content.
- Whilst all activity booked with Network 10 and 10 Play had age gating applied to ensure we were only targeting channels with viewers over the age of 18, unfortunately a human error occurred at Network 10 in the coding applied to the program 'Blue's Clues', during which the Advertisements in question unfortunately featured.
- We can confirm that when the deal for Lion was set up with 10 Play, Network 10 was briefed extensively on all Lion Brand Safety measures and confirmed that all activity would adhere to Lion's own and the ABAC placement guidelines.
- Following an extensive investigation by Network 10, it has taken all necessary steps to ensure this error cannot be made again.

The Panel's View

16. It is evident that a breach of the ABAC Placement Rules has occurred in this case as alerted by the complainant. The breach was that alcohol advertising was inserted into the program 'Blue's Clues and You' which was accessed by the complainant and their child via the Broadcast Video by Demand platform 10 Play. Blue's Clues is a live-action/ computer-animated children's education television series. That a breach has occurred is not contested by the Company, although the circumstances of the breach are explained and argued to be such as to justify a finding of a no-fault breach. The issues canvassed in this determination are the identification of which of the five Placement rules have been breached and whether a no-fault finding should be made.

17. The ABAC Placement Rules seek to have alcohol marketing direct towards adults and to the extent possible away from minors. The rules consist of five separate, but interrelated obligations imposed on alcohol marketers. In this case the following rules are relevant:
 - that available age restriction controls are used by the marketer to exclude minors from viewing alcohol marketing (Rule 2);
 - if age restriction controls are not capable of excluding minors, then alcohol marketing may only be placed where the audience is reasonably expected to comprise 75% adults (Rule 3); and
 - irrespective of the expected audience, alcohol marketing must not be placed with programs or content primarily aimed at minors (Rule 4).
18. 10 Play is a platform which requires an account holder to register to access the digital channels and on demand program available from the platform. The date of birth of the subscriber is a required field of the registration process and this does enable the targeting of advertising content based on age of account holders. 10 Play does permit the exclusion of minors from being served alcohol advertising. Both the Company and the 10 Network advised that this age restriction control was used by the Company in the placement of its marketing over 10 Play. This means that Placement Rule 2 has not been breached.
19. The fundamental limitation however with the age restriction controls with 10 Play and indeed similar platforms used by the other television networks is invariably that in a household with children, the account holder of 10 Play is a parent and children watch programs from the single account. This co-viewership pattern means that the impact of the age restriction control is marginal in actually excluding minors from the audience of alcohol ads. This can be contrasted with social media platforms such as Instagram where it is far more common for a minor to hold their own account on their own device and hence age restriction controls have much greater impact in excluding minors from being served alcohol marketing.
20. The complainant did not nominate a particular program with which it was stated alcohol ads were seen on 10 Play but instead the concern was about alcohol ads shown with 'kids' category' programs. The advice from the Company was that its ad did appear with the program Blue's Clues and You on 10 Play. The Panel has proceeded on the assumption that the ads seen by the complainant were those shown with this program. The expected audience of a television program can be assessed from ratings data. While this data is more extensive for free to air linear television than it is for on demand programming accessed over a platform such as 10 Play, it is possible to make a reasonable assessment of the audience of Blue's Clues and You accessed on 10 Play. From this data it is apparent that Blue's

Clues episodes shown from 1 March 2020 to 28 February 2021 attracted an audience of 55% under 18-year olds. Accordingly, Placement Rule 3 has been breached.

21. Placement Rule 4 applies irrespective of the actual audience of a program and provides alcohol marketing cannot be placed with content or programs primarily aimed at minors. Blue's Clues is unambiguously a show directed at minors and Rule 4 has also been breached.
22. The Company contended that while the breaches have occurred, a no-fault finding should be made. A no-fault finding does not diminish that a breach has occurred and must be rectified but acknowledges that an alcohol marketer acted to meet its ABAC obligations but due to circumstances outside its reasonable control a breach happened. In this case the Company explained:
 - it did not select Blue's Clues or any other children's programs to place its advertising with;
 - it gave instructions which if followed would have both applied age restriction controls and placed its marketing only with adult directed programs;
 - an error occurred at the level of Network 10 which saw the children's label not added to the Blue's Clues designation
 - Network 10 has confirmed the mistake was at their end and that the Company gave clear instructions not to place advertising with children's programming.
23. The Panel accepts that a no-fault finding is appropriate in these circumstances. The complaint is upheld, and a no-fault finding made.