



## ABAC Adjudication Panel Determination No 45/21

**Products:** James Squire, Furphy and Heineken  
**Company:** Lion  
**Media:** TV – Free to Air  
**Date of decision:** 26 April 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”) arises from a complaint received on 23 March 2021. The complaint concerns the placement of free to air television advertising for James Squire, Furphy and Heineken (“the Products”) by Lion (“the Company”), on Channel Seven from 8:30am onwards during the Sunrise program.
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 23 March 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 television commercials (James Squire – Approval Number 18298; Furphy – Approval Number 18223; Heineken – Approval Number 19198)

## The Placement

10. This determination relates to advertisements for James Squire, Furphy and Heineken seen on free to air television from 8:30am onwards, during Channel Seven's Sunrise program.

## The Complaint

11. The complainant has the following concerns about the placement of the television advertisements:
  - *This saturation advertising would set off alcoholics.*
  - *It is way too early in the morning to be advertising this kind of thing.*
  - *There is just ad after ad - all alcohol.*

## 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 provides that:

### **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**

14. The Company responded to the complaint by letter emailed on 1 April 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, for the reasons set out below, we submit that complaint 45/21 should be dismissed by the ABAC Panel.
- The Advertisements referred to in the complaint all received Alcohol Advertising Pre-Vetting Service Approval for their content.
- We can confirm that no breach of Part 3(b)(iv) of the Code took place, and the content was not aimed at minors.
- Television Post Reconciliation indicated that there were no spots that ran in non-compliant parameters for any of our brands. In this instance, we believe the complainant viewed the Advertisements during catch-up online video activity.
- The Advertisements in question were served on Sunrise via Broadcast Video On Demand (BVOD), and the 7plus user profile is 98 per cent 18 years and over, and all our campaigns have strict targeting in place to

ensure we are only targeting an audience that is at least 80% over the age of 18.

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

15. It has been a longstanding requirement of the regulatory regime applying to free to air television that alcohol advertising is restricted to particular times in the day to limit the potential audience of minors from viewing the advertising. The restrictions have been embodied in the Commercial Television Industry Code of Practice (CTICP) which in turn has been approved by the government regulator of broadcast mediums the Australian Communications and Media Authority (ACMA). The ABAC has adopted the restrictions on free to air television contained in the CTICP through Placement Rule 1.
16. The CTICP was developed and implemented prior to the expansion of now extensive television-based entertainment options. Subscription TV (Foxtel etc) was first introduced in 1993 with digital channels becoming progressively available in the 2000's. Advances in internet delivered technologies has seen multiple streaming services e.g. Netflix become a common option in many households. Smart TV's and other internet capable devices enable a person to view a program broadcast over free to air TV at a later point (catch up TV or Broadcast Video on Demand) and a program can be live streamed and viewed at the same time it is broadcast on free to air TV.
17. Each of the television networks has a platform from which its various digital channels and other services such as catch-up TV and live streaming of free to air programming can be accessed. The 7 Network platform is 7plus which can be accessed via an app over internet capable devices and through a smart TV or various kinds of set top boxes or via a gaming console as such as a PlayStation. To access 7plus a user needs to register and create an account. The registered user provides basic information including their age. The detail of the user's age enables the 7 Network to gather information which is used in targeting advertising towards particular demographics. The age data is also used to age restrict content such as alcohol advertising to adult registered users.
18. The significance of this background information flows from the nature of the complaint. The complaint is straightforward, namely that a series of ads for the Company's alcohol products were broadcast in conjunction with the Sunrise program, which is the 7 Network's weekday breakfast program. The concern was not about the content of the ads but rather the sheer volume of the ads and the time of day the ads were broadcast.
19. Under the CTICP and hence Placement Rule 1 of the ABAC, it is not permitted to screen alcohol ads at 8:30am on free to air TV (unless a live sporting event was being broadcast which is not the case here). The Company in response to the complaint states that none of its advertising was screened with the Sunrise

program on free to air TV. It advises its ads were served with Sunrise via Broadcast Video on Demand (BVOD) and this was to users aged over 18 and that that the audience of Sunrise over BVOD is predominately adult.

20. While the complainant believed the ads were seen on free to air TV, this is almost certainly not the case. The complainant was more likely live streaming Sunrise through the 7plus platform. This means the complainant was seeing the same program at the same time as that being broadcast on free to air TV with the difference being in the advertising inserted into Sunrise. On free to air TV, no alcohol ads were shown, while on the live streamed version, the alcohol ads were inserted. The complainant might say - surely the difference in the delivery platform between the free to air channel 7 and the live streamed 7plus version of Sunrise is immaterial - but in regulatory obligation terms the difference is quite decisive.
21. The Company has complied with its regulatory obligations. It has:
  - not had advertising screened on free to air TV in breach of the CTICP and hence ABAC Placement Rule 1 has been complied with;
  - it has applied age restriction controls available to 7plus - i.e. no alcohol advertising to users aged under 18 and hence Placement Rule 2 has been complied with;
  - Sunrise seen over 7plus has at least a 75% adult audience i.e. Placement Rule 3 is complied with; and
  - Sunrise is not a program which is primarily aimed at minors i.e. Placement Rule 4 is complied with
22. ACMA does place controls on the volume of advertising per minute of programming broadcast on free to air TV. These controls however do not restrict the volume of ads on specific products or services, so it is permitted to screen multiple alcohol ads. The regulation of advertising over digital platforms is less restrictive than that applied to free to air TV.
23. It is appreciated that the complainant might find this outcome quite unsatisfactory. It can be validly argued that Australia's regulatory settings on broadcast mediums have not kept pace with the technological changes of the last decade or so. Whatever the merits of that argument, the Panel can only apply the ABAC as it is framed, and it is evident that the ABAC obligations have not been breached.
24. The complaint is dismissed.