



ABAC Adjudication Panel Determination No 278/21

Product: White Claw Hard Seltzer
Company: Lion
Media: Television Advertisement
Date of decision: 23 December 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 a television advertisement for White Claw Hard Seltzer (the “Product”) by Lion (the “Company”), viewed with the Sunrise TV program accessed via 7plus. It arises from a complaint received on 6 December 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:
 - 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 the retail and wholesale sale of alcohol, and contain some provisions dealing with alcohol marketing;
 - 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 meet 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 6 December 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 an independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for the content of the marketing communication.

The Marketing and Placement

10. The complaint concerns the placement of a television advertisement for the Product on 7plus during Sunrise.

A link to the advertisement on YouTube, and a brief description is provided below:

<https://youtu.be/3eo4MOe7PB4>

The advertisement is set to the song "Good Love" by Jung Youth feat. Coney Island High.

With the exception of coloured images of the product superimposed on the beginning and ending scenes, the commercial is in black and white.



The advertisement commences with footage of a person wearing headphones who appears to be skateboarding.



The same person is then shown reaching into a fridge in a retail outlet to retrieve a can of White Claw Hard Seltzer.



We then see silhouetted people playing volleyball on the beach at night.



Followed by people sitting and socialising on the beach, holding cans of White Claw Hard Seltzer (and we can hear the sound of the waves).



The Complaint

11. The complainant objects to the advertisement as follows:
- The advertisement shows *young people skateboarding and rollerblading while focusing on the hard seltzer.*
 - I object to the advertising *because it goes against the time frames allowed, we only watch a few on TV, to avoid the alcohol and tobacco advertising. I'm a firm believer that alcohol advertising has too much influence on people's drinking behaviour.*
 - *This advertisement is advocating casual drinking in young people like it should be part of your everyday life - it shouldn't, that's how alcoholics start.*
 - *I live with an ex-alcoholic, so when he sees them (ads) in the few shows we watch it causes him distress. He shouldn't have to not watch the news because of companies going against standards put in place to protect people.*

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (b)(i) have Strong or Evident Appeal to Minors;
 - (b)(iv) be directed at Minors through a breach of any of the Placement Rules.

13. Part 6 of the ABAC Code provides that:

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 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).

Strong or Evident Appeal to Minors means:

- (i) likely to appeal strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
- (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionery or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

The Company's Response

14. The Company responded to the complaint by letter emailed on 16 December 2021. Its principal comments 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, including taking all reasonable steps to ensure the advertising does not encourage irresponsible or offensive behaviour. In this instance, for the reasons set out below, we submit that complaint 278/21 should be dismissed by the ABAC Panel.

- The Advertisement referred to in the complaint did not receive Alcohol Advertising Pre-Vetting Service (AAPS) Approval for their content. Pre-vetting is not required for digital advertising, according to the ABAC.
- The Advertisement opens with an adult woman leisurely riding along on her skateboard whilst listening to music, and then depicts a group of adults participating in a range of activities, including twilight beach volleyball under fairy lights, and a campfire-side social gathering.
- The Advertisement does not breach Part 3 (b)(i) of the Code by having strong or evident appeal to minors. It in no way advocates casual drinking in minors by showing an adult skateboarding leisurely in the opening frame, as this scene does not depict any consumption of the product in question.
- There is no way the average viewer would interpret this scene in the Advertisement, or the Advertisement as a whole for that matter, as having strong or evident appeal to minors.
- All actors who appear in the Advertisement are over the age of 25, which was filmed overseas by White Claw's brand owner Mark Anthony Brands International.
- We understand the complainant saw the Advertisement whilst watching BVOD (Broadcast Video On Demand), on 7plus, which is an age-gated channel, with an audience of at least 75% adults, according to data provided by the network.
- Lion purchases advertising spots through BVOD based on audience data, rather than by programme. We only purchase spots on programmes with clear data to demonstrate the advertising will not be shown during BVOD with an adult audience of less than 75%.
- The Advertisement aims to capture a lifestyle enjoyed by many in an entirely responsible way. The average viewer would not perceive it to encourage or suggest any sort of irresponsible behaviour.

The Panel's View

Introduction

15. The background to the complaint is explained to be that the complainant's partner previously experienced alcohol addiction and that seeing alcohol advertising is potentially triggering and distressing. As a consequence, the couple is careful in watching TV to avoid alcohol ads when possible, and the appearance of the ad during the Sunrise breakfast program was unexpected. The complaint goes on to

make a general point about the ad encouraging young people to treat alcohol as an everyday part of life.

16. There is no doubt that these concerns are genuine and it is a perfectly legitimate view that alcohol advertising should be subject to greater restrictions or prohibited outright. The overall treatment of alcohol as a product and the public policy framework for the regulation of alcohol marketing is however well beyond the remit of the Panel and rests with Australian governments. The Panel's role is to assess the compliance of alcohol ads against the standards contained in the ABAC. And these standards presuppose that alcohol is both a lawful product and can be marketed to adults.
17. As a result, this determination relates to three ABAC standards potentially in play due to the nature of the complaint, namely that:
 - the commercial was shown at a time and during programming when alcohol advertising is not permitted - this raises Part 3 (b)(iv) of the Code and the ABAC Placement Rules;
 - the commercial features young people - this raises Part 3 (b)(iii) of the Code; and
 - the content of the commercial appeals to children, due to showing young people skateboarding and rollerblading - this raises Part 3 (b)(i) of the Code.

The Placement Rules

18. The complainant's first concern is that the White Claw Hard Seltzer advertisement was seen while watching 'Sunrise'. Sunrise is the Seven Network's breakfast show which is broadcast on free to air television between the hours of 6:00am and 9:00am each weekday. The complainant watched Sunrise via 7plus, which is an online streaming service for watching Channel 7 TV shows, either by live streaming or on demand (catch up).
19. Overall regulatory responsibility for communications in Australia rests with the federal government. The national regulatory agency is the Australian Communications and Media Authority (ACMA). ACMA has approved a range of industry codes of practice with one code being the Commercial Television Industry Code of Practice (CTICP). The CTICP regulates free to air television with provisions going to the time of day in which alcohol ads can be broadcast. For current purposes, the CTICP does not permit alcohol ads between 6:00am and 9:00am or 6:30pm and 7:30pm. So, if the ad viewed by the complainant had been accessed via the primary free to air Network 7, this would be in breach of the CTICP.

20. The ABAC contains a series of Placement Rules which aim to have alcohol advertising directed towards adults and away from minors. Rule 1 adopts applicable media industry codes including the CTICP. This means a breach of the CTICP is also a breach of the ABAC. It is at this point that the differences in the platforms and channels used to transmit content come into play. As the CTICP only applies to traditional free to air linear television broadcasts, the time restrictions in that code for alcohol advertising have no application to digital television accessed via 7plus. This is the case even if the programs are accessed via live streaming over the app at the same time the programs are being broadcast on free to air television.
21. The transmission of content via digital channels enables the insertion of digital ads. This means the advertising seen on a digital channel is different or at least potentially different from that seen on free to air television even when the digital content is live streamed as opposed to being watched later through Broadcast Video on Demand (BVOD) e.g., catch-up TV. The net outcome is that a person can be watching Sunrise at 7:00am via free to air television and not be served with an alcohol ad while their neighbour might be watching the same program via a digital transmission on 7plus and be served with an alcohol ad and both outcomes be consistent with the operation of the CTICP.
22. Beyond the requirement to comply with media codes such as the CTICP, the ABAC Placement Rules impose other obligations on alcohol marketers namely:
- that available age restriction controls be utilised to exclude minors (Rule 2);
 - if there are no age restriction controls, then an alcohol ad can only be placed where the audience is reasonably expected to comprise at least 75% adults (Rule 3); and
 - alcohol ads must not be placed with programs or content primarily aimed at minors (Rule 4).
23. The Company has explained that
- 7plus, is an age-gated channel, with an audience of at least 75% adults, according to data provided by the network.
 - BVOD advertising spots are purchased based on audience data, rather than program. It only purchases spots on programs with clear data to demonstrate the advertising will not be shown during BVOD with an adult audience of less than 75%.
24. The Panel has previously accepted, in determination 201/20 ([click here](#)) that more than 75% of Sunrise viewers are adults and that it is not a program, and does not have content, primarily aimed at minors. The Panel is not aware of any material

changes made to Sunrise's content and/or format since the prior determination which would call for this conclusion to be re-examined and maintains its view that Rules 3 and 4 are not breached by advertising alcohol during Sunrise.

25. Rule 2 requires that 'available age restriction controls' be utilised. There is no uniformity in the capacity of different platforms to exclude minors e.g., how Instagram works is different from a BVOD platform such as 7plus, and in this case the platforms allow targeting to over 18 years and the option that alcohol ads will not be served if a program is live streamed, and no identified user has been logged on. This means that the complainant or another adult in the household must have been the registered user of the platform.
26. It should be noted that the Placement Rules are not designed to limit alcohol marketing towards vulnerable adults such as the complainant's partner. They are designed to exclude or at least limit the exposure of under 18 year olds to alcohol marketing.
27. Drawing all this together, there has been no breach of the ABAC Placement Rules as:
 - there are no time-of-day restrictions on alcohol advertising in conjunction with programs accessed via digital TV app 7plus - this is even the case with live streamed programs with digitally inserted advertising;
 - the Company applied available age restriction controls so that alcohol ads were served only to households where there was an adult registered user of the apps;
 - recent viewership data for Sunrise indicates that it is reasonable to expect that its audience would exceed 75% adults; and
 - Sunrise cannot be fairly said to be a program aimed primarily at minors.

Depiction of adults under 25 years old

28. The complainant's second concern is that the commercial features young people. This raises Part 3 (b)(iii) of the Code which provides that visually prominent adults under the age of 25 years may only appear in an alcohol ad if they are not paid models or actors, and the ad is in an age-restricted environment.
29. The Company has advised that all actors who appear in the advertisement are over the age of 25. Further the actors are not portrayed as minors, but do clearly appear to be adults engaging in activities which would be often undertaken by adults.

30. Accordingly, the Panel accepts that there has not been a breach of Part 3 (b)(iii) of the Code, noting that:
- the use of black and white footage makes it more difficult to precisely determine a person's age;
 - there is nothing to indicate that the people shown are under 25 years old;
 - some of the actors have facial hair and creases around their eyes, which are generally associated with older people;
 - the clothing, hairstyles, body language and stature of the people shown is also consistent with that of older people.

Normalised alcohol use and appeal to Minors

31. The complainant's third concern is that the advertisement depicts alcohol use with young people in a way that assumes 'it should be part of your everyday life - it shouldn't, that's how alcoholics start'. This in essence an argument that it is wrong to 'normalise' alcohol use to young people.
32. The ABAC has no standard which seeks to have marketing only depict alcohol use as occurring in exceptional circumstances. The Code, in Part 3 (a)(i) provides that marketing must not encourage alcohol consumption inconsistent with Australian Alcohol Guidelines. In relation to adults, the Guidelines state to reduce risk in alcohol use, a person should drink no more than 10 standard drinks in a week and no more than 4 standard drinks on any one day. There is nothing in the ad that suggests a consumption pattern inconsistent with the Guidelines is advocated.
33. In contrast, the Guidelines state that minors should not drink alcohol at all. This is also the law, which makes it unlawful to sell or serve alcohol to minors. Part 3 (b)(i) of the ABAC requires that a marketing communication must not have strong or evident appeal to minors. The complainant believes the scenes showing young people skateboarding and rollerblading is making alcohol appealing to minors.
34. The Company submits that the advertisement is consistent with ABAC standards arguing:
- it in no way advocates casual drinking in minors by showing an adult skateboarding leisurely in the opening frame, as this scene does not depict any consumption of the product in question.

- the average viewer would not interpret the skateboarding scene in the advertisement, or the advertisement as a whole, as having strong or evident appeal to minors.
35. The Panel has considered what factors might give rise to a strong or evident appeal to minors on previous occasions. While each marketing communication must always be assessed individually, some characteristics within marketing material which may make it strongly appealing to minors include:
- the use of bright, playful, and contrasting colours;
 - aspirational themes that appeal to minors wishing to feel older or fit into an older group;
 - illusion of a smooth transition from non-alcoholic to alcoholic beverages;
 - creation of a relatable environment by use of images and surroundings commonly frequented by minors;
 - depiction of activities or products typically undertaken or used by minors;
 - language and methods of expression used more by minors than adults;
 - inclusion of popular personalities of evident appeal to minors at the time of the marketing (personalities popular to the youth of previous generations will generally not have strong current appeal to minors);
 - style of humour relating to the stage of life of a minor (as opposed to humour more probably appealing to adults); and
 - use of a music genre and artists featuring in youth culture.
36. It should be noted that only some of these characteristics are likely to be present in a specific marketing communication and the presence of one or even more of the characteristics does not necessarily mean that the marketing item will have strong or evident appeal to minors. It is the overall impact of the marketing communication rather than an individual element which shapes how a reasonable person will understand the item.
37. Skateboarding is an activity which is relatable to minors and in certain circumstances an ad that featured skateboarding might be in breach of the strong appeal to minors standard. However, taking into consideration the overall content as a whole, the Panel does not believe the ad breaches the Part 3 (b) standard. It was noted:

- the ad is predominately in black and white, and therefore less eye-catching and engaging than an ad that uses bright, contrasting colours;
- the skateboarding scene is not the defining feature of the ad and in fact a skateboard is not actually seen but its use is implied;
- the characters shown are all adults aged 25 or more and are depicted as adults;
- the overall context of the ad establishes adults engaging in activities which culminate with a group of friends coming together where some moderate consumption of the product occurs;
- the laidback feel and messaging of the ad is probably more attractive to adults than minors; and
- the tone is adult and is not considered highly relatable to children or adolescents.

Concluding comment

38. In dismissing the complaint, the Panel accepts that it is understandable that the complainant was surprised to find the ad placed with the Sunrise program, given that the ad could not be shown with the program broadcast over linear free to air TV. There is an obvious incongruity between the time-of day alcohol advertising restrictions applying to traditional free to air linear TV and the lack of comparable restrictions for live streamed digital content which matches what is being shown on free to air TV.
39. The Panel recommends that the interplay between the different technologies be considered when the ABAC Placement Rules are next reviewed.