



ABAC Adjudication Panel Determination No 70/22

Product: The Kraken Black Spiced Rum
Company: Proximo
Media: Digital TV - BVOD
Date of decision: 29 September 2022
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 The Kraken Black Spiced Rum (“the Product”) by Proximo (“the Company”). It arises from a complaint received on 5 September 2022, alleging that the television advertisement was seen on 10 Play between episodes of children’s program, Blaze and The Monster Machines (“Blaze”).
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 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 5 September 2022.
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 obtained for the content of the marketing communication (Approval Number 1888).

The Marketing Placement

10. The complaint relates to Digital TV advertising for the Product, which was seen on 10 Play between episodes of the children's program, Blaze and The Monster Machines ("Blaze").

The Complaint

11. The complainant objects to the marketing as follows:
 - *Between episodes of the children's TV show "Blaze" there are adverts playing for alcohol. The advert which keeps repeating is advertising spiced rum. As a result, I have a child asking for spiced rum. I telephoned channel 10, they advised me as it is out of hours I cannot speak to anyone.*
 - *This occurred between 5pm and 6pm during on demand use of the 10play app. This did not occur, for example, during a major sports broadcast when alcohol is likely to be discussed.*

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:

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 Response

15. The Company was advised of the complaint on 15 September 2022 and responded on the same day to advise that:
 - The tech team at 10 has looked into this and informed us that the set-up was compliant, however, a tech error could have been made on their part. Unfortunately, they don't know for sure but nonetheless, they are making sure it won't happen again.

16. The Company made a further response by email on 21 September 2022. The principal points made by the Company were:
 - Thank you for inviting us to provide comments for the Panel's consideration. Proximo takes our obligations to responsibly promote our brands seriously and maintains internal and external processes to help ensure compliance with the ABAC code. We also take all reasonable steps to ensure that the placement of our marketing communications meets the standards set out in the ABAC code.
 - Proximo regularly uses the Alcohol Advertising Pre-vetting Approval service and did so on this occasion. Approval Reference Number is 1888 – Application Number 110-2022.
 - Proximo's brief to Channel 10 included clear communication that The Kraken is an alcohol brand that required age restrictions and the brief highlighted that the demographic was P25+
 - As soon as ABAC made Proximo aware of complaint 70/22, Proximo paused all advertising through the Channel 10 network so that Channel 10 could extensively investigate the matter.
 - Channel 10 have confirmed they use age-restriction controls to ensure Minors do not view alcohol advertising. Children's programs are excluded from alcohol advertising. The exclusions were set up for The Kraken advertising however an error occurred where the controls were not set up in relation to Channel 10's 'premium pause' product. This resulted in the advertisement being served. As soon as Channel 10 became aware of the technical error, the exclusion block was applied.
 - Channel 10 have communicated to Proximo that they have reviewed their operational processes to ensure that the children's exclusion block is always

applied to all advertising. They have also updated their staff training plan to highlight the advertising restrictions training module that all new staff members must complete and reinforced the Premium Pause product setup process to all existing team members.

- In this instance, we submit that complaint 70/22 should be deemed a no-fault breach by the ABAC Panel.

The Panel's View

Introduction

17. In early September 2022 between 5 pm and 6 pm, the complainant and their child were accessing programming via the Broadcast Video by Demand (BVOD) service 10 Play. 10 Play enables registered viewers to select from a wide range of programs offered by the 10 Network and watch the selected program at a time convenient to the viewer. The program selected was the children's orientated show 'Blaze and the Monster Machines'.
18. The complainant became concerned when repeated advertisements for the alcohol product Kraken Black Spiced Rum were shown with the program. The complainant's concern was not with the content of the advertisement as such, but that an ad for alcohol of any kind was being placed by the 10 Network with a children's program.
19. It is readily accepted by Proximo, the producer of Kraken Black Spiced Rum, that it was completely inappropriate for its ad to be shown with the program and that the ABAC Placement Rules have been breached by this occurring. The issue therefore for the Panel is:
 - as a formal determination, which of the Placement Rules have been breached; and
 - whether the circumstances of how the ad came to be shown with Blaze justify the making of a 'no-fault' finding on behalf of the company.

The Placement Rules

20. The ABAC Placement Rules seek to have alcohol marketing directed toward 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).
21. 10 Play is a platform that requires an account holder to register to access the digital channels and on-demand programs 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 the 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.
 22. 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 a 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 a much greater impact in excluding minors from being served alcohol marketing.
 23. Placement Rule 3 requires that 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. The Company has not provided ratings data for Blaze, presumably because it can be reasonably assumed that the 75% adult threshold would be breached.
 24. 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. Blaze is a computer-animated interactive children's television series with a focus on teaching science, technology, engineering, and mathematics (STEM) that is rated 'G' and categorised as 'Kids' programming. It is evident that the placement of the ad with Blaze is a breach of Rule 4.

25. Accordingly, the Panel finds that the placement of the ad with the program has breached Placement Rules 3 and 4.

A No-Fault Breach?

26. The Company contended that while the breach has occurred, a no-fault finding should be made. A no-fault finding does not diminish that a breach has occurred and must be rectified and that the complainant's concerns have been fully vindicated. But it does recognise that an alcohol marketer has acted to meet its ABAC obligations but due to circumstances outside its reasonable control, a breach happened. In this case, the Company explained:
- Proximo's brief to Channel 10 included clear instructions that its ad was for an alcohol product and that age restriction controls were to be applied. Further, the brief highlighted that the target demographic for viewing the ad was P25+; and
 - Channel 10 advised that while age-restriction controls were applied, an error occurred where the controls to ensure the ad was not shown with a children's program were not set up in relation to Channel 10's 'premium pause' product. This resulted in the advertisement being served.
27. In these circumstances, the Panel believes a no-fault finding is appropriate as:
- the Company gave proper instructions to the 10 Network that, if followed, would not have had the ad shown with Blaze; and
 - the 10 Network accepts that it made an error that resulted in the ad being served with the program. It has advised changes to train staff have been instigated to avoid a repeat of the problem.
28. The complaint is upheld and a no-fault finding is made.