



ABAC Adjudication Panel Determination No 22/23

Product: Brewery Duty
Company: Lion - Beer Spirits & Wine Pty Ltd
Media: TV – Digital
Date of decision: 9 March 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Jeanne Strachan

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 30 January 2023 and concerns a television commercial for Brewery Duty by Lion. The marketing was accessed via the 7Plus app with the program “Home & Away”.
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 the 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 30 January 2023.
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 marketing.

The Marketing Communication

10. The complaint relates to a commercial for Brewery Duty by Lion, seen while watching "Home & Away" on 7Plus.

The Complaint

11. The complainant objects to the marketing as follows:
 - *[Home & Away] is directed at children and teens and there was a gambling ad then an alcohol one.*
 - *Gambling and alcohol advertising should never be on programs made for under 18 viewers and they should do better.*

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 16 February 2023. The principal comments made by the Company were:

- Thank you for raising this complaint and providing the opportunity for us to respond to the issues raised by the complainant. Lion – Beer, Spirits & Wine Pty Ltd (Lion) reiterates its commitment to the ABAC Scheme and that it takes its obligations to responsibly promote its products seriously.
- For the reasons set out below, and with respect to the complainant, we submit that there has been no breach of Part 3(b)(iv) of the ABAC Code by Lion and the Complaint should be dismissed by the ABAC Panel.

AAPS Approval

- The marketing did not receive alcohol advertising pre-vetting approval. The concept of the Advertisement was submitted for review through the Alcohol Advertising Pre- Vetting Service (AAPS) and amended based on the advice that was received (AAPS Application No. 1076-2022).

Placement Rules

- For the following reasons, we do not consider that the placement of the Advertisement breaches 3(b)(iv) of the ABAC Code:
 - in order to set up a 7Plus account, users are required to provide their date of birth and Seven has confirmed that advertising on the platform is restricted based on the date of birth provided by users.
 - Advertising via 7Plus can only be purchased based on a target audience and not for specific content. On this basis, the content that is paired with advertising is not within Lion's control.
 - The following is an extract of Lion's purchase order for the target audience for the Advertisement (please note the user age range is between 18 to 55+):

Ad targeting

[Explore traffic data](#)

Inventory	✓ 7plus Video	▼
Customised targeting	Age - Logged in declared (y) is any of 55+ (1), 30-34 (4), 25-29 (3), 18-24 (2), 30-34 (8), 40-44 (6), 45-49 (7), 35-39 (5) AND seriesid (CMS) is none of eodm	▼
Geography	✓ Australia	▼
Inventory type	✓ In-stream video and audio	▼

- Seven have provided the following data for the audience that viewed the Program:

Home and Away	Linear		7Plus	
	Av AUD	Profile %	Av AUD	Profile %
C00-04	14,000	1.7	2,500	1
C05-12	22,000	2.7	4,000	1.6
C13-17	12,000	1.5	6,900	2.7
F18-24	15,000	1.9	23,600	9.1
F25-39	49,000	6.1	63,500	24.6
F40-54	109,000	13.6	51,900	20.1
F55-64	108,000	13.4	26,300	10.2
F65+	206,000	25.6	16,200	6.3
M18-24	9,000	1.1	7,200	2.8
M25-39	32,000	4	19,800	7.7
M40-54	63,000	7.8	19,100	7.4
M55-64	69,000	8.6	9,500	3.7
M65+	100,000	12.4	7,700	3
Total People	804,000	100	258,100	100

- we note the Program was classified as PG, which means it is not recommended for viewing by persons under the age of 15 without guidance from parents, teachers, or guardians. The Program is not classified as 'C' or 'P' under the Australian Communications and Media Authority (ACMA) content standards:
 - 'C' programming is made specifically for children of school age (under 15 years); and
 - 'P' programming is made specifically for preschool children (i.e. children who have not started school).

- Lion notes paragraph 36 of Determination 56/18, which indicates the ABAC Panel has historically found that Home & Away is not primarily aimed at minors. For these reasons, we submit that it is not primarily aimed at minors and does not contain content primarily aimed at minors.

- As a responsible marketer, Lion has demonstrated a long-standing commitment to upholding both the letter and spirit of the ABAC and AANA Codes. Lion maintains strict internal and external processes to help ensure this compliance.

The Panel's View

Introduction

15. Home & Away is a is an Australian television soap opera that follows the lives and interactions of the residents of Summer Bay, a fictional beachside town. It has aired since early 1988 and is currently shown on Channel 7 free-to-air television from Monday to Thursday at 7pm. In addition, it can also be watched via Broadcast Video on Demand (BVOD) on 7Plus, either 'live streamed' at the same time as the free-to-air broadcast, or at any other time at the choosing of the viewer with access to the 7Plus facility.

16. The complainant is concerned that alcohol advertising was inappropriately seen while watching Home & Away on 7Plus, as the program is directed towards children and teens.

ABAC Placement Rules

17. The point made by the complainant is not about the content of the advertisement but the placement of the alcohol ad with Home & Away. This brings into play the ABAC Placement Rules. The Rules have the policy aim that to the extent possible alcohol advertising should be directed towards adult audiences and away from minors.

18. There are four rules which could be of relevance to the complaint namely:
- have media industry codes regulating placement been complied with - Rule 1;
 - does the media platform on which the ad appeared have age restriction controls to exclude minors, and if so, were they used - Rule 2
 - was the audience of the program with which the ad was placed in excess of 75% adult - Rule 3; and
 - can the program i.e. the Home & Away be regarded as being 'primarily aimed' at minors - Rule 4.
19. Home & Away was accessed by the complainant through a subscription to 7Plus and as a result the program was seen via a service with an adult's profile information. That said, it is of course a common practice in most households with children that streaming services will be held in an adult's name and programs will be commonly co-viewed by all family members including minors.
20. Rule 1 requires that all media codes applying to alcohol placement be complied with. The live free to air broadcast of Home & Away commenced at 7:00pm. The requirements in the Commercial Television Industry Code of Practice (CTICP) mean that it would not have been permitted for alcohol ads to be broadcast during the program when broadcast on linear free-to-air TV. This is not because of the nature of Home and Away as a program, but because alcohol ads generally cannot be screened prior to 8:30 pm.
21. Linear TV might be described as traditional TV, and covers the primary channels of 7, 9 and 10 as well as the public broadcasters of the ABC and SBS. Since the 2000's, linear TV has been supplemented with digital TV which has enabled each of the networks to have multiple channels in addition to their primary free to air channel. With smart TV's and smart devices such as tablets, it has been possible for a subscriber to join the services like 7Plus, and use this service to access all of the content available from the 7 Network at any time of day.
22. One consequence of digital technology is that the TV Networks can insert different ads into digital programming even when the one program is being broadcast 'live'. To put it simply, household A might be watching Home & Away on linear free to air at 7:00pm and not get an alcohol ad, while their neighbour in household B can be watching Home and Away at 7:00pm 'live streamed' over the 7Plus app and be served with an alcohol ad. It's the same program, at the same time, but with different ads.
23. There are no equivalent time of day restrictions applying to when alcohol ads can be shown on BVOD over 7Plus. As there are no time-of-day restrictions applying to alcohol ads inserted in BVOD, Rule 1 has not been breached.

24. Rule 2 requires that age restriction controls should be used when available. The complainant accessed the program via 7Plus and this service does have an age restriction capacity. This arises because 7Plus requires an account to be opened and the account holder to provide a date of birth. With this information, both the 7 Network and alcohol marketers can exclude account holders aged under 18 years old from being served alcohol ads. Lion confirmed this facility was used for their advertising.
25. It is fair to say that the impact of Placement Rule 2 is more meaningful when social media is accessed via internet-connected devices such as phones and tablets. This is because many people including minors have a personal device and personal social media accounts on platforms such as Instagram or YouTube. These platforms have quite effective age restriction controls to exclude minors from seeing alcohol marketing that rely not only on date of birth information but also analytic data on the patterns of an account holder's use of the platform.
26. In contrast, 7Plus has an age restriction capacity, but in practical terms the account will be held by an adult and the shows will be co-viewed by all people in the household including children. This means that Rule 2 has not been breached as Home & Away was accessed via an account held in an adult's name and not an account held by a minor.
27. Rule 3 goes to the audience of a program. It provides that an alcohol ad may only be placed where the audience is reasonably expected to comprise at least 75% adults. It is possible to assess the 'reasonably expected' audience of TV programs through the ratings system and Lion has supplied ratings data.
28. This data shows that the audience for Home & Away when broadcast initially on free to air TV and then subsequently accessed 'on demand' on 7Plus comfortably exceeds the 75% adult benchmark. On this basis, Placement Rule 3 has not been breached.
29. Rule 4 goes to the content of programs and raises the question of whether Home & Away can be said to be primarily aimed at under 18 year olds. Some factors to be considered in assessing this question include:
 - the actual audience composition of a program;
 - the subject matter of the program and whether the subject matter has themes likely to predominantly appeal to children or adolescents;
 - the use of familiar children's characters or the use of children and adolescents within the program;
 - the storyline and whether the complexity of the plot suggests its target audience is adult; and

- the use of language and the presence of adult themes such as violence and the portrayal of sexuality.
30. The Panel has previously considered Placement Rule 4 in relation to Home & Away in Determination 56/18, and there is no reason to believe that the nature and content of the program has materially changed since that time. The Panel remains of the view that placement of alcohol advertising with Home & Away would not breach Placement Rule 4 after considering that:
- since 2008 the program has had a PG rating and has dealt with themes which appeal across age groups;
 - characters within the show are depicted as aged from school aged children to middle aged adults;
 - while the show has appeal across age groups, it cannot be fairly characterised as being primarily aimed at minors; and
 - accordingly, Placement Rule 4 has not been breached.
31. Lion made the point that there was no conscious decision on their part to actually select the program for advertising as such. Rather marketers including alcohol companies place advertising to target an audience of specified demographic features and not exact programs or content. Reliance is placed on the television network to properly classify programs and match advertising to the marketer's desired audience.
32. Drawing all this together, there has not been a breach of the ABAC Placement Rules by showing alcohol ads with Home & Away given:
- the age restriction controls available on the 7Plus BVOD platform were utilised to exclude account holders who are minors from being served with alcohol ads;
 - the audience for Home & Away fell comfortably within the 75% adult requirement of the Placement Rules; and
 - while Home & Away has broad appeal it cannot be said to be primarily aimed at minors.
33. The complaint is dismissed.