



ABAC Adjudication Panel Determination No 164/23

Product: Pepperjack Shiraz
Company: Treasury Wine Estates
Media: Cinema
Date of decision: 30 October 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 6 October 2023 in relation to an advertisement for Pepperjack Shiraz (“the product”) by Treasury Wine Estates (“the Company”), which was seen prior to the screening of Paw Patrol at Hoyts Carousel Cinema WA on 5 October 2023.
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 6 October 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 placement of the marketing.

The Marketing Placement

10. The complaint relates to the placement of an advertisement for the product prior to the screening of Paw Patrol at Hoyts Carousel Cinema on 5 October 2023 at 1:07pm.

Complaint

11. The complainant objects to the marketing as it was shown prior to a movie aimed at children.

The ABAC Code

12. A [new ABAC Responsible Alcohol Marketing Code](#) commenced on 1 August 2023. The complaint raises an issue under Part 4 of the Code - Placement standards. The standard contained in Part 4 (c) has a delayed commencement date of 1 January 2024. As a result the complaint will be considered against the [previous Code](#) in relation to issue under Part 4 (c) and otherwise under the new Code in line with transitional arrangements for the introduction of the new Code.

Previous Code

13. Part 3 (b) of the previous Code provides that a Marketing Communication must NOT:

...

- (iv) be directed at Minors through a breach of any of the Placement Rules.

...

14. Part 6 of the previous Code provides that:

Placement Rules means:

...

- (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).

...

New Code

15. Part 4 of the new Code provides that:

- (a) An Alcohol Marketing Communication must comply with code provisions regulating the placement of Alcohol marketing and an Alcohol Alternative Marketing Communication must comply with code provisions regulating the placement of Alcohol Alternative marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy).
- (b) Available Age Restriction Controls must be applied to exclude Minors from viewing an Alcohol Marketing Communication and an Alcohol Alternative Marketing Communication.
- (c) ... [Commencement date of 1 January 2024]
- (d) An Alcohol Marketing Communication and an Alcohol Alternative Marketing Communication must not be placed with programs or content primarily aimed at Minors. An Alcohol Marketing Communication and an Alcohol Alternative Marketing Communication must not be delivered directly to:
 - (i) a Minor by hand (except where the communication primarily relates to a matter unrelated to alcohol, for example, a shop receipt or a dining voucher);
 - (ii) a Minor by electronic direct mail (except where the mail is sent to a Minor due to a Minor providing an incorrect date of birth or age); or
 - (iii) any person that has sought removal from the marketer's mailing list.

15. Part 6 of the new 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.

The Company Response

16. The Company responded to the complaint by letter emailed on 20 October 2023. Its primary comments were:

- Thank you for giving Treasury Wine Estates (TWE) the opportunity to respond to the ABAC complaint reference number 164/23 dated 6 October 2023, which relates to the placement of an alcohol advertisement for Pepperjack Mid Strength Shiraz (the Advertisement) prior to a screening of the Paw Patrol movie at Hoyts Carousel Cinema in Western Australia on 5 October 2023 at 1.07pm (the Complaint).
- TWE is committed to the ABAC Scheme and takes its obligations to responsibly promote its products very seriously. For the reasons set out below, TWE regrettably submits there is likely to have been a 'no fault' breach by TWE of Part 3(b)(iv) of the ABAC Responsible Alcohol Marketing Code (ABAC Code).
- However, TWE has since taken remedial action together with Hoyts and accordingly, requests that the Complaint be dismissed by the Panel.
- For completeness, we understand that this particular complaint is being considered against the previous ABAC Code (last updated in 2017) in line with ABAC's transitional agreements. TWE will accept the Panel's decision in relation to this complaint.

Complaint

- The consumer complaint states: 'Pepperjack mid strength Shiraz being sampled by a handful of people during a kids movie. I was at the movies with 5 grandchildren, this ad was shown before the Paw Patrol Movie. Very impressionable 4,5,5,7,12 year olds'.
- TWE has been asked to consider whether the Advertisement raises issues under Part 3(b)(iv) of the ABAC Code, which prohibits an alcohol advertisement from being directed at minors through a breach of the "Placement Rules" as defined in Part 6 of the Code.

TWE, Hoyts and Val Morgan

- TWE and The Hoyts Corporation Pty Limited (Hoyts) entered into a Sponsorship Agreement dated 2 February 2022, which governs the onscreen arrangements between TWE and Hoyts (Agreement).
- The Agreement outlines TWE is responsible for providing the advertisement, Hoyts are responsible for facilitating the production of the advertisement, and Val Morgan is responsible for placing the advertisement in the pre-show line up across both Hoyts' mainstream and Lux cinema sessions.
- TWE partners with Hoyts to provide advertisements predominantly for the Lux cinemas and environment, as the audience for the Lux offering is comprised of a higher percentage of adults than the mainstream cinema sessions, which are targeted at a broader audience. Hoyts has advised that the Lux Offering and environment has audiences which comprise of over 90% adults. Hoyts has confirmed that:
 - Internal guidelines are followed which aim to schedule alcohol advertising in a responsible fashion;
 - Alcohol advertising is scheduled with movie titles where the audience is reasonably expected to comprise at least 80% of people aged 18 years or over; and
 - Film classification is taken into account and alcohol advertising will not be scheduled with 'G', 'PG' and 'M' films appealing to minors.

The ABAC Code and Placement Rules

- As the Panel is aware, 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".
- Further to the above, under Part 6 of the ABAC Code, Placement Rules (in part) is defined as meaning:
 - (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 Alcohol Guidelines);
 - (ii) if a media platform on which a Marketing Communication appears has age restriction controls available, the Marketer

must utilise those age restriction controls to exclude Minors from viewing the Marketing Communication;

- (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); and
- (iv) a Marketing Communication must not be placed with programs or content primarily aimed at Minors.

- As there is no specific code that purports to guide or regulate the placement of alcohol advertising with cinema screened movies (unlike free to air television), there was no breach of part (i) of the Placement Rules.
- Further, there is no specific age restriction control to exclude minors in cinema screened movies, which means there was no breach of (ii) of the Placement Rules.
- Although TWE does not have access to exact audience composition data for the Paw Patrol movie, Hoyts has confirmed that based on known ticket sales, the audience comprised 39% children and 61% adults.
- TWE acknowledges that as the 2023 movie is a PG rated animated film about cartoon dogs with superpowers, the expected audience does not meet the requirement to be at least 75% adults.
- TWE further acknowledges that the movie is likely to be 'primarily aimed' at minors. Accordingly, TWE agrees that the screening of our Pepperjack advertisement before the Paw Patrol movie was a likely breach of parts (iii) and (iv) of the Placement Rules.

Response to ABAC questions

- TWE's response to the specific questions raised by the Panel is as follows:
 - The placement of a marketing communication for the Product prior to a broadcast of Paw Patrol at the Hoyts Carousel cinema on 5 October 2023 was likely in breach of Part 3(b)(iv) of the Code as the audience could reasonably be expected to comprise less than 75% Adults and Paw Patrol is a movie that is likely to be regarded as primarily aimed at minors.
 - Based on historical ticket sales, Hoyts expect that the audience composition for the Paw Patrol movie would be approximately 61%

adults (over the age of 18 years). The balance of the audience is likely to be children under the age of 18 years.

No fault breach

- In accordance with part 4 of the ABAC Code, TWE requests the ABAC Panel consider the breach that occurred as a no fault breach, as the breach was outside of TWE's reasonable control.
- TWE in no way proposes to diminish the fact that the breach occurred or that the complainant did not raise valid concerns, however, TWE did not have control over the placement of the Advertisement before the Paw Patrol movie.
- For the following reasons, it is TWE's view that a no fault breach should be determined:
 - In this case, the 'fault' arose due to the incorrect placement and categorisation of the Paw Patrol movie by Hoyts and Val Morgan, as being content suitable for alcohol advertising.
 - Upon learning of the breach, TWE raised serious concerns about the breach with Hoyts directly and were advised as follows:
 - Hoyts can confirm there has been an oversight on Hoyts' behalf, where the employee responsible for programming the pre-show advertising neglected to select "Hoyts Lux", which meant the Advertisement was programmed into the mainstream cinema instead of Hoyts Lux.
 - the Advertisement was intended for Hoyts Lux and surrounding environments, which has audiences that comprise over 90% adults;
 - the Advertisement had run in the mainstream pre-show programme from Thursday 5 October 2023 to Thursday 12 October 2023, when the breach was brought to Hoyts' attention and immediately resolved;
 - Hoyts have now rectified the programming rules so that the Advertisement will only appear within the Hoyts Lux environment. As an extra precautionary measure, Hoyts have confirmed that the Advertisement will only appear prior to content that is rated MA or above (as determined by the Australian Classification Board); and
 - Hoyts have further included an additional requirement that any future TWE advertising on mainstream cinemas will only

appear prior to content that is rated MA or R (as determined by the Australian Classification Board).

- TWE does not have any control in monitoring or administering the appropriate placement of our advertisements in cinemas, as this is solely owned, operated and controlled by Hoyts. It can only advise Hoyts of responsible alcohol advertising and provide guidelines, such as the ABAC Code, for Hoyts to refer to.
- TWE relies on Hoyts and Val Morgan to consider the film name, audience, and classification (which in this case was a 'PG' classification by the Australian Classification Board) and ensure the Advertisement is not scheduled prior to movies with an audience composition of less than 75% adults or that have primary appeal to minors.

Conclusion

- As a responsible marketer, TWE demonstrates a long-standing commitment to upholding both the letter and the spirit of the ABAC Code, including by actively engaging in the pre vetting process regularly. TWE also maintains strict internal and external processes, including internal guidelines (in the form of a Responsible Marketing Handbook and Guidelines which specifically refer to the Code) to assist our marketing and communication teams to develop marketing campaigns that strictly adhere to the requirements of the Code. These teams are also trained regularly on the responsible marketing of alcohol.

The Panel's View

17. On 5 October 2023, the complainant took their grandchildren to see the movie 'Paw Patrol' at the Hoyts cinema complex in Cannington Western Australia. Paw Patrol is a Canadian computer-animated children's television series that focuses on a young boy named Ryder who leads a crew of search and rescue dogs that call themselves the Paw Patrol. In addition to the TV series, two Paw Patrol movies have also been released in cinemas, including the one seen by the complainant and family.
18. The movie was scheduled for the early afternoon and as part of the usual pre-show advertising, an ad for Pepperjack Shiraz was screened. The complainant believed it was completely inappropriate that an alcohol ad be shown with a children's movie and hence the complaint was made.
19. For its part, the Company accepts that the ad should not have been shown before the movie. It advised that the reasonably expected audience for Paw Patrol is about 40% minors and 60% adults and that the content of the movie is primarily aimed at minors. It can be surmised that a large proportion of the

adults seeing Paw Patrol, like the complainant, were parents/grandparents taking their children to see the movie.

20. Quite clearly the screening of the ad has breached two of the ABAC Placement standards. These standards have the policy aim of directing alcohol marketing towards adults and to the extent reasonably possible, away from minors. The screening of the ad breaches the previous Code Placement Rule 3 as the expected audience of minors exceeds 25%. Further Paw Patrol is a children's movie and this breaches new Code clause 4 (d).
21. The only question is how the breach arose and whether the Company is entitled to a 'no fault' ruling. A no fault ruling does not diminish that the breach has occurred, and that the complainant's concern has been fully vindicated. It merely recognises that the Company took all reasonable steps to ensure it met its obligations, but a problem arose outside of its control that led to the breach.
22. In this regard the Company submitted that:
 - TWE partners with Hoyts to provide advertisements predominantly for the Lux cinema environment, as the audience for the Lux offering is a higher percentage of adults than the mainstream cinema sessions, which are targeted at a broader audience. Hoyts has advised that the Lux Offering and environment has audiences which comprise over 90% adults.
 - TWE does not have any control in monitoring or administering the appropriate placement of their advertisements in cinemas. It can only advise Hoyts of responsible alcohol advertising and provide guidelines, such as the ABAC Code, for Hoyts to refer to. TWE relies on Hoyts and Val Morgan to consider the film name, audience, and classification (which in this case was a 'PG' classification by the Australian Classification Board) and ensure the Advertisement is not scheduled prior to movies with an audience composition of less than 75% adults or that have primary appeal to minors.
 - In this case, the 'fault' arose due to the incorrect placement and categorisation of the Paw Patrol movie by Hoyts and Val Morgan, as being content suitable for alcohol advertising.
 - Upon learning of the breach, TWE raised serious concerns about the breach with Hoyts directly and were advised as follows:
 - the employee responsible for programming the pre-show advertising neglected to select "Hoyts Lux", which meant the Advertisement was programmed into the mainstream cinema instead of Hoyts Lux;

- the Advertisement was intended for Hoyts Lux and surrounding environments, which has audiences that comprise over 90% adults; and
 - the breach was immediately resolved when brought to Hoyts' attention.
 - Hoyts have further included an additional requirement that any future TWE advertising on mainstream cinemas will only appear prior to content that is rated MA or R (as determined by the Australian Classification Board).
23. The Panel is satisfied that the Company took steps to have its ad only shown with movies expected to have a 90% adult audience. The fault arose due to human failure on behalf of Hoyts not selecting the 'Hoyts Lux' setting. The Company has instigated an additional safeguard of having its ads only shown with MA and R rated movies. Based on this information a 'no fault' finding is made.
24. The complaint is upheld and a no fault finding made.