



ABAC Adjudication Panel Determination No 108/24

Product: Heineken
Company: Lion Beer Australia
Media: TV - Subscription
Date of decision: 25 August 2024
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 15 July 2024 in relation to a video advertisement for Heineken (“the product”) by Lion Beer Australia (“the Company”) accessed on the streaming service Amazon Prime.
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 are within the Panel’s jurisdiction.

The Complaints Timelines

7. The complaint was received on 15 July 2024.
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 sought for the marketing.

The Marketing Communication



10. The complaint relates to an video advertisement for Heineken beer, which can be viewed at the following link, and a brief description is provided below:

<https://www.youtube.com/watch?v=FaJPhj3ZU9E>

<p>The Beatles song "Drive my Car" plays throughout.</p> <p>The ad commences with footage of a person in a car outside a bar and uses superimposed text to identify the person as Max Verstappen, Double F1 World Champion.</p> <p>We see Max Verstappen (MV) enter the bar.</p>		
<p>We see a group of five people (including MV) sitting around a table, and there are green beer bottles in front of them.</p> <p>Person 1 (P1) throws a key on the table and says:</p>		

<p><i>"So, who's driving tonight then?"</i></p>		
<p>The camera focuses on Person 2 (P2) who says:</p> <p><i>"Hmmm – who's the best driver?"</i></p> <p>Everyone at the table looks at MV who picks up the key and says:</p> <p><i>"Alright then"</i></p>		
<p>We see people from the bar in the back of a car, which we are then shown is being driven by MV.</p> <p>MV's map shows he is an hour to his destination.</p>		
<p>We see the group in the bar again, with the keys again being passed to MV, as someone says:</p> <p><i>"Guess who's driving"</i>.</p> <p>Again everyone looks at MV.</p>		
<p>We see the group in a car with "L" plates, which is being driven by MV.</p> <p>A group of people on a bus are waving, presumably because they have recognised MV.</p>		

<p>MV being the nominated driver is shown another two times.</p>		
<p>A third time, P2 puts her key on the table and says: <i>"Guess who's driving".</i></p>		
<p>We see MV take a drink from a green beer bottle and shrug.</p> <p>Another person in the group picks up the key.</p> <p>The following words are superimposed: <i>"The best driver is the one who is not drinking."</i></p>		
<p>As the group is getting into the car, they look back into the bar, and see MV holding a bottle of Heineken 0.0 – zero alcohol.</p>		
<p>We see a close up of the zero alcohol Heineken being held by MV, and the words "Unless it's" are superimposed next to the bottle.</p>		
<p>We then see MV drive up next to them at a crossing and wave.</p>		

<p>MV is faster accelerating over the crossing, and the following words are superimposed:</p> <p>“When you drive, never drink”.</p> <p>“Heineken. For a fresher world.”</p>		
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The Complaint

11. The complainant objects to the marketing as follows:

- *They show a LEARNER driver driving drunk people home.*
- *A learner driver needs a sober non drinking passenger not an intoxicated drunk passenger as they are still learning to drive.*
- *Having a drunk passenger is giving misleading info to a learner driver that it's ok to drive.*

The ABAC Code

12. Part 2 of the ABAC Code provides that:

- (a) Parts 3 and 4 of the Code APPLY to all Alcohol Marketing Communications.

Part 5 of the Code APPLIES to all Alcohol Alternative Marketing Communications.

13. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:

- (a)(ii) show (visibly, audibly or by direct implication), encourage, or treat as amusing, rapid Alcohol consumption, misuse or abuse of Alcohol or other irresponsible or offensive behaviour that is related to the consumption or presence of Alcohol;
- (d) show (visibly, audibly or by direct implication) the consumption of Alcohol before or during any activity that, for safety reasons, requires a high degree of alertness or physical coordination,

such as the control of a motor vehicle, boat or machinery or swimming.

14. Part 5 of the Code provides that:

- (a) An Alcohol Alternative Marketing Communication must comply with Parts 3 (b) and 4 of the Code.
- (b) An Alcohol Alternative Marketing Communication must also comply with Parts 3 (a), (c) and (d) of the Code if it:
 - (i) fails to clearly and prominently identify the product as an Alcohol Alternative; or
 - (ii) (also promotes an Alcohol product (beyond a common brand name) or Alcohol use.

15. Part 6 of the ABAC Code provides that a No Fault Breach is:

A breach of this Code that is reasonably unforeseeable by or outside the reasonable control of a marketer or their agency will be classified as a no fault breach.

16. Part 8 of the ABAC Code contains the following definitions:

Alcohol Alternative Marketing Communication means a marketing communication for an Alcohol Alternative, in any media, generated by, for, or within the reasonable control of an Alcohol Alternative producer, distributor or retailer, that has a discernible and direct link to Australia, apart from the exceptions listed in Part 2(b).

Alcohol Marketing Communication means a marketing communication for Alcohol, in any media, generated by, for, or within the reasonable control of an Alcohol producer, distributor or retailer, that has a discernible and direct link to Australia, apart from the exceptions listed in Part 2(b).

The Company's Response

17. The Company responded to the complaint by letter emailed on 31 July 2024. The principal comments made by the Company were:

- Thank you for raising this complaint and providing the opportunity for us to respond to the concerns of the complainant. Lion reiterates its commitment to the ABAC Scheme and that it takes its obligations to responsibly promote its products seriously.

Control Over Advertisement

- In relation to Lion's control over the Advertisement, we submit the following:
 - The Advertisement is a UK asset that was not intended for use in the Australian market. While the Advertisement is related to a Heineken product (which is distributed and manufactured by Lion in Australia), it was not approved by Lion nor was it placed by Lion or its media agency, UM.
- For these reasons, we submit the Advertisement wasn't within Lion's reasonable control:
 - UM have confirmed that Amazon Ads completed a global advertising test that unintentionally caused the Heineken UK asset to be shown during Amazon Prime Video playback in Australia; and
 - Lion was not aware that the Advertisement would be shown on Amazon Prime Video.

Contents of the Advertisement

- In relation to the substance of the Advertisement, we submit as follows:
 - While Max Verstappen is clearly not a learner driver and the L plates may have been inadvertently left on the car, a reasonable consumer is likely to understand that the advertisement to be depicting irresponsible behaviour (Part 3 (a) (ii)), namely supervising a learner under the influence of alcohol. Further, we note this isn't permissible under Australian state and territory laws; and
 - for the same reason, it is accepted that the advertisement breaches Part 3 (d) of the Code.
- Lion would not have run the advertisement if it were within its control for these reasons. We respectfully submit that any finding against Lion based on this Complaint should be a no-fault breach under Part 6 of the ABAC Code.

- 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 its compliance.

The Panel's View

Introduction

18. This determination relates to a complaint received about a video advertisement for Heineken 0.0 seen on the streaming service Amazon Prime. Heineken 0.0 is a zero alcohol beer and the ad seeks to draw out the distinction between a beer with alcohol and the zero alcohol product by depicting several apparent 'drink driving' scenarios featuring the Formula One World Champion Max Verstappen.
19. The basic storyline of the ad is showing Mr Verstappen out with friends on several nights where the group are drinking, and Max Verstappen becomes the 'designated driver' not drinking alcohol who then has to drive his friends home. On the third or fourth night the group comes together, Max turns the tables on his friends by apparently drinking alcohol, so another person is obliged to be the designated driver only to reveal he has been drinking the zero alcohol Heineken 0.0.
20. The complaint raises a few unusual aspects. Firstly, the Company explains that the ad is not a marketing communication created in Australia nor intended by Lion as the Australian producer of Heineken to be screened in Australia. It was shown on Amazon Prime without the Company's prior knowledge. This occurred because of 'global testing' of the ad created by the UK producer of Heineken.
21. The Company goes on to state that the ad would not have been used in Australia by it, as it accepts that the ad does not meet the ABAC standards. This is because a reasonable person viewing the ad would probably understand that it was suggesting that it is okay that a learner driver is supervised by someone who has been drinking alcohol. The Company submits the unusual circumstances justify the making of a 'no-fault' breach finding.
22. These circumstances require to make the following assessments:
 - is the ad within the scope of the ABAC Scheme;
 - if so, does the ad breach the ABAC standards; and
 - if there is a breach, should a no fault finding be made.

Is the ad within the scope of the ABAC Scheme

23. Alcohol is a global product and media platforms such as Amazon Prime are equally global in their reach. In contrast, the ABAC scheme is limited in its reach to marketing which is linked to Australia. This is reflected in the Code which describes its application to a 'marketing communication for alcohol, in any media, generated by, for, or within the reasonable control of an alcohol producer, distributor or retailer, that has a discernible and direct link to Australia'.
24. On occasion the ABAC Schemes receives complaints about a marketing item which is accessed in Australia over a global digital platform such as Instagram but the marketing does not fall within the ambit of the Scheme. This is because the marketing item does not have a discernible and direct link to Australia such as:
 - the media platform account being under the control of an Australian alcohol marketer; or
 - the product being marketed being available for sale in Australia from an Australian retailer; or
 - the marketing communication being under the control of an international entity and there is a discernible and direct link to Australia so there is an Australian entity to which the ABAC obligations can attach.
25. The Company has advised that the ad was not created by it but rather was created in the UK. Further it states it did not know the ad was screened on Amazon Prime until it received the complaint. Hence it contends the Company does not have reasonable control over the ad so as to be held responsible for its content.
26. It can be accepted that the ad was not created in Australia and it was not marketed on Amazon Prime by the Company as a distinct corporate entity. That said, the Company has the rights to the Heineken brand in Australia and it has responsibility for Heineken ads placed on Australian media and entertainment platforms.
27. The Panel believes the ad does fall within the ambit of the ABAC Scheme and there is a discernible link to the Company as the Australian entity with control over the branding and positioning of Heineken. A breakdown in communication between global corporate entities is not grounds of itself to take an item of marketing beyond the scope of the ABAC standards.

Does the ad breach the ABAC Standards?

28. The concern of the complainant relates to that part of the ad which shows the group of friends in a car being driven by Max Verstappen in a car displaying a L plate on its dash. The complainant contends this shows a learner driver driving while being supervised by someone who is intoxicated. It is argued this is irresponsible and suggests such behaviour is ok.
29. On its face, this concern raises the ABAC standards that require that ads not:
 - show, encourage or treat as amusing irresponsible or offensive behaviour that is related to the use of alcohol - Part 3 (a)(ii); and
 - show the consumption of alcohol before or during any activity that for safety reasons, requires a high degree of alertness or physical coordination such as control of a motor vehicle - Part 3 (d).
30. Heineken 0.0 does not contain alcohol and hence is not an alcohol beverage as such. That said, the ABAC applies to the marketing of beverages with less than 0.5% alcohol by volume and which have the appearance and style commonly associated with alcohol and use alcohol descriptors such as beer. These products are called 'alcohol alternatives' in the Code.
31. Marketing for alcohol alternatives must comply with the standards in the Code that go towards responsibility towards minors (Part 3 (b) and Part 4) and all of the other Code standards apply if:
 - the marketing communication fails to clearly and prominently identify the product being marketed as an alcohol alternative; or
 - the marketing communication also promotes an alcohol product or alcohol use more generally
32. In this case, the video taken as a whole identifies the product being marketed as Heineken 0.0 and that this product is zero alcohol, although the ad could probably do more to explicitly establish this point. In any event the video clearly shows alcohol use more generally including some images of other alcoholic beers in the Heineken range. Accordingly, the video must meet all of the ABAC standards.
33. In assessing if a standard has been breached, the Panel adopts the standpoint of the probable understanding of the marketing communication by a reasonable person taking the content of the marketing material as a whole. Several points should be noted:

- a 'reasonable person' shares the values, opinions and life experiences found in the majority of the community;
 - if the message from a marketing item can be understood in several ways, the most likely interpretation is to be preferred over a possible but less likely understanding; and
 - the marketing is to be assessed in terms of its overall impact rather than extracting a sub-section of the material which is not representative of it as a whole.
34. The laws and regulations governing driving in Australia are found in State/Territory legislation, and while the provisions are mostly consistent there are differences between the jurisdictions. What is consistent is that learner drivers are to be supervised while driving by a person holding an open licence. Equally, it is an offence for the person supervising to have a blood alcohol level beyond the legal driving limit of 0.05%. The learner driver cannot have consumed alcohol so as to have any alcohol reading in their blood.
35. There are differences between jurisdictions as to whether it is permitted for a driver with an open licence to drive a vehicle displaying L plates. In most jurisdictions this is not permitted but it is not a traffic offence in NSW or South Australia.
36. Somewhat surprisingly, the Company did not contest that the ad breached the Part 3 (a) and (d) standards and it was accepted that the ad would be probably understood as showing a learner driver being supervised by a person who had been drinking alcohol. The Panel however believes that the ad would not be understood in this way.
37. The concept of the ad is a light-hearted portrayal of the friends taking advantage of the driving prowess of the Formula One World Champion. The group is behaving responsibly in so much as they plan in advance that one person in the group cannot consume alcohol because of the need to drive, and Max Verstappen is selected as the best driver so he does not consume alcohol.
38. The humour comes from Max having to leave his glamorous sports car and drive the very mundane vehicles - one with a 'baby on board' sign and the second with the L plate. In the Panel's view a reasonable person would likely understand:
- it is not acceptable for a driver to consume alcohol;
 - the person acting as 'designated driver' is Max Verstappen the World Champion as his identity is established by a super (text message) stating his

name and Formula One status on a freeze frame at the beginning of the video;

- Max Verstappen is clearly not a learner driver needing to be supervised and the L plate on the car is a prop for humour; and
 - the Heineken 0.0 product does not contain alcohol
39. The Panel does not believe a reasonable person would take the ad as suggesting that it is acceptable for a person supervising a learner driver to consume alcohol. And while a person with an open licence should not in most parts of Australia drive a vehicle displaying an L plate, it is not likely this will be the point a reasonable person will take from the ad.
40. Accordingly, the Panel finds the video is not in breach of the two ABAC standards and as a result it is not necessary to determine if the circumstances as to how the video came to be shown on Amazon Prime justify a no-fault finding.
41. The complaint is dismissed.