



## **ABAC Adjudication Panel Determination No 57/24**

**Products:** Suntory -196 and Archie Rose Distilling  
**Company:** Beam Suntory and Archie Rose Distilling  
**Media:** Shopping Centre Sign  
**Date of decision:** 15 May 2024  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Professor Richard Mattick  
Ms Debra Richards

### **Introduction**

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 9 April 2024 in relation to advertising by Beam Suntory and Archie Rose Distilling products on a shopping centre electronic sign.
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 9 April 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

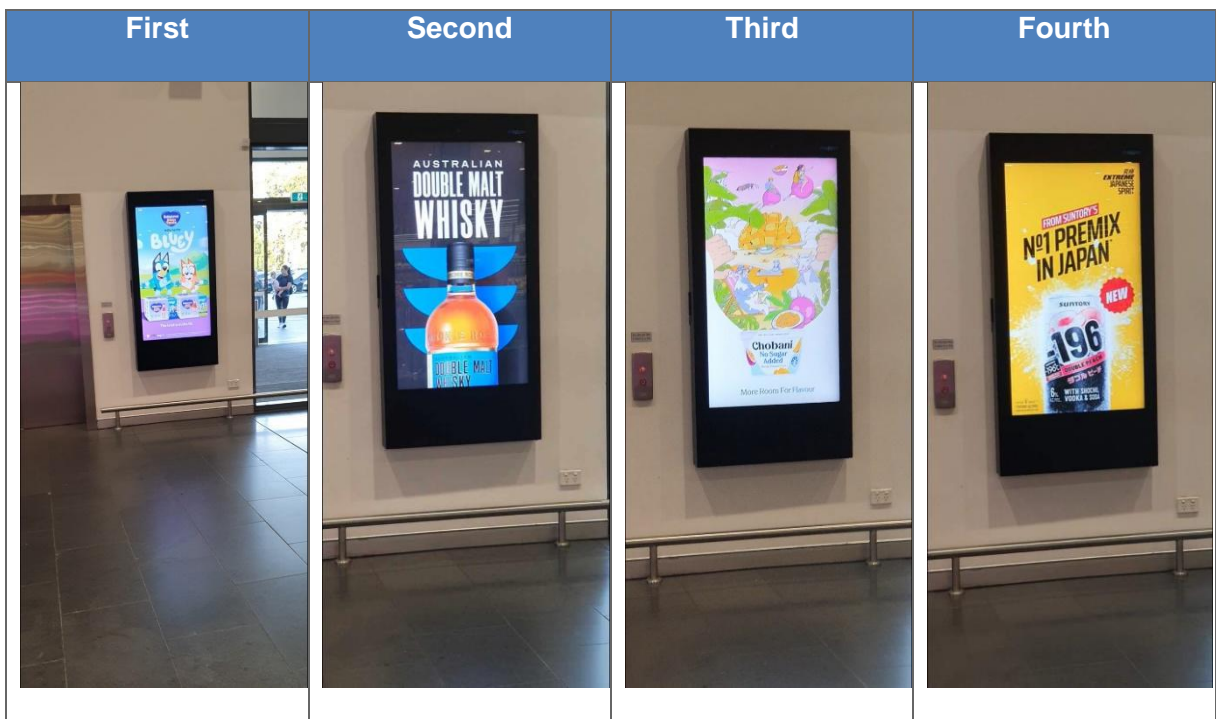
materials and advice and the availability of Panel members to convene and decide the issue. The complaint was completed in this timeframe.

### Pre-vetting Advice

9. A component of the ABAC Scheme is an advice service by which an alcohol marketer can obtain an independent opinion of a proposed alcohol marketing communication against the ABAC standards prior to public release. Pre-vetting advice is separate from the complaint process and does not bind the Panel but represents best practice on behalf of alcohol marketers. Pre-vetting advice was obtained for the content of the two alcohol ads but not for the placement of the marketing on the shopping centre electronic sign.

### The Marketing

10. The complaint relates to the order of advertising shown on a shopping centre electronic sign:



### Complaint

11. The complainant objects to the marketing as follows:
  - *Advertising of alcohol in a local shopping mall on a video screen type advertising panel.*

- *Before the alcohol (Archie Rose Distilling) there were large pictures of Bluey characters, this being enticing to children.*
- *Immediately following the ad (for Archie Rose Distilling) was a Chobani yogurt ad with bright colours and enticing for people under 18, this was then followed by another alcohol ad (Suntory -196)*

## **The ABAC Code**

12. Part 4 of the 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) If a digital, television, radio, cinema or broadcast print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, an Alcohol Marketing Communication and an Alcohol Alternative Marketing Communication may only be placed where the audience is reasonably expected to comprise at least 80% Adults (based on reliable, up-to-date Australian audience composition or social media follower data, if such data is available).
- (d) An Alcohol Marketing Communication and an Alcohol Alternative Marketing Communication must not be placed with programs or content primarily aimed at Minors.

## **The Company Response**

13. Beam Suntory responded to the complaint by email on 19 April 2024. Its primary comments were:

- Please find below our response to ABAC complaint 57/24 regarding the placement of a Suntory -196 advertisement seen on a shopping center billboard.
- Beam Suntory takes its adherence to the ABAC and responsible marketing code seriously and we are active members of the ABAC, utilizing the pre-

vetting service to ensure the execution of marketing and advertising materials in line with the spirit of the code.

- The key visual was approved by ABAC application no. 05724-2023 and approval no. 7262 dated 03.10.2023.
- Placement of this advertisement was within a shopping centre and in a location adjacent to a Woolworths and BWS – the audience in this environment is primarily adults.
- All content noted in the complaint was purchased and displayed as separate and distinct adverts on a loop, on a digital screen in a shopping centre environment - as a brand we do not have a say on which other advertisers choose the same media to advertise on and do not believe the creative and placement of other brands, products or services is sufficient to formulate a program or content that would be appealing to minors.
- The other content consisted of advertising for Chobani yoghurt and Bluey branded nappies both ads which we believe is not primarily aimed at minors; The content is aimed primarily at adults, who would likely purchase these products in the supermarket located adjacent to our screen.
- We therefore believe there has been no breach of the Code.
- We do not believe the other content displayed can be regarded as 'programs or content primarily aimed at Minors'
- As previously noted the screen in question is located in a small shopping centre in proximity to BWS and Woolworths stores and the ads were for Chobani yoghurt and Bluey branded nappies - The audience in this environment and for the content in the other adverts is primarily adults.
- We were not made aware that the marketing communication for Beam Suntory would be placed between ads for Bluey branded nappies and Chobani yoghurt at the time of placement.
- Both our media agency, PHD, and the vendor, Cartology, did not deem it necessary to inform us, as they and we do not believe the display of these adverts with the marketing in question constitutes a breach of the Code.
- The Cartology delivery team place each piece of advertising creative content into loops of 6 x 7 second adverts on screens, based on the volume of adverts and number of screens booked each week in shopping centres across the country - This is standard practice at Cartology and across the retail out-of-home industry.

- We believe the Bluey branded nappies advert is not primarily aimed at minors, the product and campaign creative is aimed at parents who would likely purchase the product in the supermarket which is located in proximity to our screens.
- The Chobani ad is for a yoghurt product, which is also not aimed at Minors.
- Please note Beam Suntory also has its own responsible marketing code which all marketing materials and activity must adhere to. Beam Suntory is committed to the highest standards of responsible marketing practices across product, consumer marketing and communications through our own responsible marketing code, the principles of drink smart® in addition to local advertising regulations and the ABAC code. Responsible marketing of our products is at the core of our commercial purpose, and our commitment to conducting our business the right way; We believe this advertisement has been placed in line with these codes.

14. Archie Road Distilling responded to the complaint by email on 19 April 2024. Its primary comments were:

- The marketing referred to in the complaint was submitted for Alcohol Advertising Pre-Vetting Service Approval and was approved (7170).
- According to Cartology (media provider who placed the artwork), the 'other content' displayed with the marketing in question is not primarily aimed at minors. The 'other content' consisted of advertising for Chobani yoghurt and Bluey branded nappies. All content was displayed as separate and distinct adverts on a loop, on a digital screen in a shopping centre environment. The content is aimed primarily at adults, who would likely purchase these products in the supermarket located adjacent to our screen. While we (Archie Rose) would aim to not have our ads placed in rotation with any content that may appeal to minors, we do agree with Cartology that there has been no breach of the Code.
- Cartology does not believe the other content displayed can be regarded as 'programs or content primarily aimed at Minors' (see detail on content displayed above): "We display single advertisements, in a loop of 6 slots. Each advert is displayed separately for 7 seconds. The screen in question is located in a small shopping centre in proximity to BWS and Woolworths stores. The audience in this environment is primarily adults."
- Response from Cartology in relation to whether Archie Rose Distilling was aware that the marketing communication for its product would be placed between ads for Bluey branded nappies and Chobani yoghurt: "Archie Rose was not made aware of this fact, nor did Cartology deem it necessary to inform them, as we do not believe the display of these adverts with the

marketing in question constitutes a breach of the Code. The Cartology delivery team places each piece of advertising creative content into loops of 6 x 7 second adverts on our screens, based on the volume of adverts and number of screens booked each week in shopping centres across the country. This is standard practice at Cartology and across the retail out-of-home industry."

- Response from Cartology in relation to whether the ad for Bluey branded nappies would be regarded as content primarily aimed at minors: "We believe the Bluey branded nappies advert is not primarily aimed at minors. The product and campaign creative is aimed at parents who would likely purchase the product in the supermarket which is located in proximity to our screens. The Chobani ad is for a yoghurt product, which is also not aimed at Minors."
- Overall, we will continue to work closely with our media agency and providers to ensure we meet best practices across our advertising.

## **The Panel's View**

### **Introduction**

15. On or about 9 April 2024 the complainant was in the mall of the North Kellyville Square Shopping Centre in Sydney when their attention was drawn to an electronic sign that was screening a series of ads for various products. The complainant noted that the ads in sequence were as follows:
  - 'Bluey' Sleepy Nights Pants (a type of disposable nappy);
  - Archie Rose Distilling Whiskey;
  - Chobani Yogurt; and
  - Suntory -196 Double Peach RTD.
16. The complainant was concerned by the ads for the alcohol products. Not by the content of the ads so much, but that the ads were positioned between the ads for the Bluey nappies and the brightly coloured Chobani yogurt. It was contended that it was irresponsible to place alcohol ads between other ads for products that would be enticing to minors.
17. This concern enlivens the ABAC Placement Standards. The policy aim of the standards is for alcohol marketing to be directed towards adults and to the extent reasonably possible away from minors. Different types of media offer varying abilities to marketers to target the audience demographics to which a product is directed. For instance, digital media such as Facebook and

Instagram enable refined targeting based on age, location and interests. Accordingly, it is possible to seek to exclude minors being served with alcohol ads carried over those platforms.

18. In contrast, broadcast mediums such as TV, radio and cinema offer far less ability to exclude minors from seeing a program/movie being shown. Equally outdoor installations like a billboard alongside a road or an electronic sign positioned within a shopping centre do not afford an ability to control the potential audience of the material placed on the billboard or sign.
19. In the case of these mediums, the ABAC standards adopt other approaches to limit the potential audience of minors seeing alcohol advertising carried over these mediums. This includes limiting the time of day alcohol ads might be shown on free to air linear TV or not permitting alcohol ads to be placed on billboards located within 150 metres of a school.
20. Further the standards also contain provisions going to the reasonably expected audience of a program broadcast or transmitted with which an alcohol ad is placed. For instance, it is not permitted to place an ad on TV (whether free to air or carried over a streaming service) if the expected audience of the program is over 20% minors. Further, irrespective of the actual audience, an alcohol ad cannot be placed with programs or content primarily aimed at minors.
21. The Placement Standards were introduced into the Code in 2017 and complaints raising the standards have generally involved the placement of alcohol ads within broadcast media programs. The point raised by the complaint is a novel one, as to date, the Panel has not been asked to consider the placement of an alcohol ad within the sequencing of ads of various product types. The balance of this determination looks at each of the placement standards and considers if the standard is potentially applicable to the circumstances outlined by the complainant, and if so whether the standard has been breached.

### **The Placement Standards - do they apply to the sequencing of ads**

22. The Placement Standards are contained in Part 4 of the Code. The standard in Part 4 (a) requires that alcohol marketing communications must comply with code provisions regulating the placement of alcohol marketing published by Australian media industry bodies. In effect this means the rules applying to free to air TV and outdoor installations. This standard is not applicable in the current case.
23. The standard in Part 4 (b) requires that available age restriction controls must be applied to exclude minors from viewing an alcohol marketing communication. As mentioned, digital platforms have a capacity to exclude minors from viewing ads, but this capacity is not available to billboards or electronic signs.



24. The Part 4 (c) standard applies if a 'digital, TV, radio, cinema or a broadcast print media platform' does not have age restriction controls and provides that an alcohol marketing communication may only be placed where the audience is reasonably expected to comprise at least 80% adults. A billboard or sign is not captured by this standard.
25. The standard that does apply to the current circumstances is contained in Part 4 (d). This standard provides that an alcohol marketing communication must not be placed with programs or content primarily aimed at minors. The threshold issue that arises is whether the placement of an alcohol ad within a sequence of ads can be fairly regarded as falling within the intended notion of 'programs or content'.
26. In response to the complaint, both alcohol companies explained the background to their ad appearing on the electronic sign at the Kellyville Shopping Centre. It was submitted:
- that the alcohol ads were placed by Cartology, a media agency within the Woolworths group, and the sign upon which the ads appeared was located near Woolworths and BWS stores within the shopping centre;
  - Cartology placed 6 ads in sequence on the sign at the time it was seen by the complainant. Each ad was displayed for 7 seconds;
  - the alcohol companies did not seek their ads to be placed between the Bluey nappies' ad or the yogurt ad. Further neither company was aware of the other products that would be added to the sequence of advertised products to appear on the sign;
  - both companies contended that a sequence of ads cannot be regarded as 'program or content' within the intended meaning of the ABAC standard. Further, both argued that neither Bluey nappies or Chobani yogurt ads are primarily directed towards minors. It is argued that the ads are directed towards adults, and in the case of the nappies, the parents of young children and not the children themselves.
27. Previous examples of the Panel considering the Part 4 (d) standard have almost always concerned ads inserted into programming like a TV show, or the ads shown before the screening of a movie at the cinema. Possibly the nearest case previously considered was Determination 13/19 which dealt with supermarket advertising catalogues from Coles and Woolworths both containing ads for their supermarkets and their respective alcohol retailers Liquorland and BWS. One of the arguments considered was whether it was irresponsible to permit both general grocery items and alcohol products to be in the single advertising catalogue.

28. The Panel noted that while alcohol is not just another product and its use and marketing is subject to additional regulatory requirements over and above that applying to general products, it is a lawful product for adults to consume and the Panel had no mandate to prohibit ads for alcohol being placed alongside ads for household products as a matter of principle. Rather the Panel had the more narrow task to assess if the catalogue breached any of the specific ABAC standards.
29. On the question of the applicable standards, the Panel believed that the placement of alcohol ads within the catalogue did not breach the placement standards finding:
- the available data strongly indicated that the overwhelming readership of supermarket catalogues were adult consumers and not minors; and
  - a supermarket catalogue is not primarily aimed at minors, but it is rather directed at those responsible for household purchases, and while this won't be exclusively adults it will be overwhelmingly adults and not minors.
30. So, while the Panel found that the placement of the alcohol ads within the supermarket catalogue did not breach the placement standards, it did accept that the standards were capable of applying to the catalogue. A similar conclusion was reached in Determination 109/22 regarding the listing of alcohol products alongside various foodstuffs available to be ordered from the website of UberEats.
31. These earlier decisions however did not consider the specific point raised by the complainant, that it is irresponsible to sequence an alcohol ad between ads for other products that are contended to be strongly appealing to minors. This is because the minor's attention would have been drawn by the content of the unrelated but proximate ads.
32. Bluey is an animation series following a family of blue heeler dogs navigating life's adventures. The show is an international hit and is widely popular with young children. It is a program that can be fairly regarded as being primarily directed towards minors. This means it would be a breach of the ABAC to place an alcohol ad within or immediately before a screening of an episode of Bluey.
33. Given the popularity with children of Bluey the program, the complainant's point about the ad on the sign for the Bluey nappies (which has images of Bluey characters) attracting the attention of children is valid. This is the case even if the ad itself is directed towards parents of children as the potential purchasers of the nappies and not children as such.
34. That said, the Panel does not believe Part 4 (d) of the Code can be fairly interpreted as capturing the sequencing of ads for other products as 'programs

or content' within the intended meaning of the standard. The standard has to be read within the context of Part 4 of the Code as a whole, and the clear intent of placement standards is to create a cascading series of inter-related obligations on alcohol marketers. In this series, the Part 4 (c) standard imposes the 80% adult benchmark for the expected audience of a program with which an ad is placed, whereas the Part 4 (d) standard says irrespective of the audience, the program with which the ad is placed cannot be primarily directed at minors.

35. The focus of the standard is hence on the parent program within which an ad is placed. It was not envisaged that the standard would impose a test on the target of another non-alcohol product ad which might also be inserted into the same program that the alcohol ad was placed. While the Panel applies the Code with a 'spirit and intent' approach, the Panel is not the author of the ABAC and it cannot create a new obligation when a fair reading of the Code does not permit the existence of the obligation.

## **Conclusion**

36. The Panel acknowledges that the complainant has raised a genuine concern about alcohol ads appearing on an electronic sign between other ads that might attract the attention of minors. That said, the Panel does not believe the ABAC standards impose an obligation on alcohol marketers to assess the likely appeal to children of non-alcohol ads with which an alcohol ad might be sequenced. This is because the other ads cannot be regarded as 'programs or content' within the meaning of those terms in Part 4 (d) of the Code.
37. Rather the intent of the standard is to impose an obligation on alcohol marketers to assess the programs and content with which their ad might be placed eg the TV show the ad might be inserted into, or the social media channel content with which the ad is placed.
38. Given that this question has not previously been considered, the Panel draws the attention of the ABAC Management Committee to the case for reflection as to whether the Code standards are operating as intended. It is the Management Committee that has responsibility for the content of the Code standards.
39. The complaint is dismissed.