



ABAC Adjudication Panel Determination No 65/24

Product: Tooheys
Company: Lion – Beer, Spirits & Wine Pty Ltd
Media: Television
Date of decision: 21 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 18 April 2024 in relation to placement of an alcohol advertisement for Tooheys (“the Product”) during “Everybody Loves Raymond”, when watched on Channel 9Go on 17 April 2024 at 6:26pm.
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 18 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 not obtained for placement of the marketing.

The Marketing

10. The complaint relates to a placement of an advertisement for Tooheys during "Everybody Loves Raymond", when watched on Channel 9Go on 17 April 2024 at 6:26pm.

Complaint

11. The complainant objects to the marketing as follows:
 - *On the 17-04-24 @1826 hours I was watching "Everybody Loves Raymond" on the 9Go channel when the ad for Tooheys beer with the jingle "I feel like a tooheys or two" came on.*
 - *I double checked and saw that those ads were allowed between 1200-1500 hours on weekdays and after 2030 hours at night.*
 - *This programme is rated "G" so there's a good chance children would be watching this.*
 - *With all the things children are exposed to in daily life and online I firmly believe that alcohol ads should stick to their allotted time slots.*
 - *I think it won't send them bankrupt if they are forced to wait until after 2030 hours to show the ads. This seems a blatant disregard of what they're supposed to do in my opinion.*
12. In response to an inquiry as to the technology used to access 9Go, the complainant advised:
 - *The household has a 'new' TV which is connected to the internet via a modem.*
 - *9Go was an option amongst other 9 Network channels provided once the '9' option is selected from the TV menu.*

- *The complainant did not specifically log on to watch Everyone Loves Raymond*

The ABAC Code

13. 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

14. The Company responded to the complaint by letter emailed on 1 May 2024. Its primary comments were:
 - We refer to your letter dated 22 April 2024 (Letter) in relation to a complaint received by ABAC about a Tooheys TVC (Advertisement) being broadcast during Everybody Loves Raymond (Program) on Channel 9Go at 6.26pm on 17 April 2024.
 - Thank you for raising this complaint and providing the opportunity for us to respond to the concerns of 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 following reasons, and with respect to the complainant, we submit that there has been no breach of Part 4 of the ABAC Code by Lion and the Complaint should be dismissed by the ABAC Panel:
 - (a) the Program is a sitcom from the late 1990s and early 2000s that focuses on themes including family relationships, responsibility and conflicts. These are not themes that are relatable to or targeted at minors, and given the show’s age, the majority of the show’s audience is likely to consist of adults. For these reasons, we do not consider that the Program is primary aimed at minors nor that the audience would be reasonably expected to be comprised of less than 80% adults;
 - (b) UM, Lion’s media agency have provided the following expected viewer data for the Program:

| | | | | | | | | | | |
|------------------------|---|---|---------------------|--|--------------|-------|--------------|-------|--------------|---------|
| Standard eTAM Report : | New File* | | | | | | | | | |
| Period : | 17/04/2024 | | | | | | | | | |
| Data Types : | Projection (Total People), Projection (P 18+), Reach % (Total People), Reach % (P 18+), Profile % (Total People), (More...) | | | | | | | | | |
| Options : | With Guests, Viewing > 1mins C, Consolidated 7(Last Consolidated 23/04/2024) | | | | | | | | | |
| Data Source : | Regional Panel plus Subscription | | | | | | | | | |
| Markets : | Queensland, Nthrn NSW, Sthrn NSW, Victoria, Tasmania | | | | | | | | | |
| Info : | R&F Apply Weighting to Seconds Viewed: ON | | | | | | | | | |
| | | | | | Projection | | Reach % | | Profile % | |
| | | | | | Total People | P 18+ | Total People | P 18+ | Total People | P 18+ |
| Sthrn NSW | EVERYBODY LOVES RAYMOND -EV | 1 | 18:00:04 - 18:29:17 | | 1,621 | 1,621 | 0.29 | 0.37 | 100.00% | 100.00% |
| | EVERYBODY LOVES RAYMOND -EV TX1 | 1 | 18:29:18 - 18:58:39 | | 3,107 | 2,917 | 0.43 | 0.44 | 100.00% | 93.88% |

- (c) we requested that UM investigate this Complaint and they have advised as follows:
 - (i) if the complainant was viewing free-to-air television, Channel Metro and WIN did not allocate any spots for the Advertisement prior to 8.30pm during the week commencing 14 April 2024;
 - (ii) if the complainant was using Channel 9’s video on demand (BVOD) service, the following additional measures are applied for Lion’s purchased BVOD advertising from 12.00pm to 12.00am:
 - deterministic targeting of P18+; and
 - exclusion of all children’s and G-rated content (except sport); and

- (iii) based on this information, they do not believe the Advertisement was displayed during the Program and that there has been any breach of media industry codes that regulate alcohol marketing, including but not limited to the Commercial Television Industry Code of Practice.
- Notwithstanding this, if an error has occurred, we respectfully submit that the programming of the Advertisement on free-to-air television or via BVOD services is beyond Lion's reasonable control and 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 and background

15. On 17 April 2024 the complainant was watching the 9 Network subsidiary channel 9Go which was broadcasting an episode of the American sitcom series 'Everyone Loves Raymond'. According to the complainant at 6-26 pm an ad for Tooheys beer was aired. This surprised the complainant who believed alcohol ads were not to be screened on TV prior to 8-30 pm. Further it was noted Everyone Loves Raymond is a show likely to have children watching. The complainant essentially contends that an alcohol ad should not have appeared with the show at 6-30 pm in the evening.
16. The complainant's understanding that there are time of day restrictions applying to alcohol ads shown on TV is correct. However, behind this apparently straightforward proposition is a considerable degree of complexity that relates to the varied technologies by which TV content is now distributed in Australia. This means it is not entirely straightforward if the placement of an alcohol ad with the show is a breach of time of day restrictions.
17. By way of brief explanation, TV came to Australia in 1956. Over the next decades the number of TV stations slowly expanded, with three commercial networks and two public networks, namely the ABC and SBS. And during this period extending up to the 1990's the rules about alcohol ads and screening times were developed and embodied into a code of practice called the Commercial Television Industry Code of Practice (CTICP).
18. In the 1990's the environment for TV became a bit more varied with the introduction of new technology for transmitting content such as satellites and coaxial cables. This firstly permitted subscription TV options (Foxtel and its predecessors) and then by the early 2000's digital TV commenced enabling the Networks to offer subsidiary channels. This further expanded with internet

based technology permitting the kaleidoscope of entertainment options extending from the 'traditional' TV channels, to the subsidiary channels of the Networks, to subscription TV, to multiple streaming services ie Netflix and similar, and social media channels like YouTube.

19. While the CTICP contained time of day restrictions for airing alcohol ads, the codes applying to the other and newer forms of content did not. In part this was because the time of day proxy of endeavouring to limit the likely number of minors being exposed to alcohol ads became less meaningful. For instance, the technology permitted Broadcast Video on Demand (BVOD) which means the viewer can choose when they want to watch a program and hence the schedule of programs at a set time was no longer the only option.
20. For its part, the ABAC Scheme came into operation in 1998 and until 2017 it was a content only code of practice. What this meant was that the Code standards of good marketing practice for alcohol went to the content of marketing and not to the placement of the marketing. For instance, the Code said the messaging within an alcohol ad could not do things like suggest you needed alcohol to be successful in life or depict alcohol use with a dangerous activity like driving a car. The Code however didn't attempt to stipulate where an alcohol marketer might place an item of marketing e.g. on TV or on a billboard or over the internet.
21. This changed in 2017 with the introduction of the ABAC Placement Standards. The standards have the policy aim that alcohol marketing be directed towards adults and to the extent reasonably possible away from minors. The standards approach this goal by creating a series of obligations on alcohol marketers related to the technical capacity of various transmission mediums to target the potential audience of an item of marketing.
22. In 2017, the time of day restrictions for TV alcohol ads were still in place, but as mentioned the utility of the restrictions was being challenged by the diversity of the TV and entertainment environment and the fact the same time of day restrictions found in the CTICP for 'traditional' free to air TV were not applying to internet delivered TV content.
23. Faced with this reality, the ABAC Placement Standards did not rely only on time of day restrictions to seek to protect children from being exposed to alcohol marketing. Rather the standards still incorporated the requirement to meet the CTICP, but went further to require:
 - the use of age restrictions controls to exclude minors being served with alcohol marketing where this was possible eg social media platforms like Instagram - Part 4 (b); and

- not permitting alcohol marketing to be placed with programs where it was reasonably expected that the audience of minors would exceed 20% of the total audience - Part 4 (c); and
- irrespective of the likely audience, alcohol ads cannot be placed with programs or content primarily aimed at minors - Part 4 (d).

Have the ABAC Placement Standards been breached

24. The question is whether the screening of the ad with Everyone Loves Raymond on 9Go at 6-26 pm breaches the ABAC Placement Standards.
25. The first standard requires that the CTICP requirements be met. We know the complainant saw the ad at 6-26 pm while watching 9Go but the complainant is not certain how (by what technology) they were watching the program. Apparently, the complainant has a 'smart TV' which is connected to the internet via a modem. Most likely the complainant or someone in the family has signed up to the 9Now platform using an app. By doing this, all the 9 Network channels can be accessed, and this does not require separate logins each time the app is used. Once done, programs can be watched through the app via the internet and the station options will appear on the TV menu upon selecting the 9 Network icon.
26. For its part, the Company says no ads were screened on free to air TV (meaning 'traditional' TV accessed by a broadcast transmission and picked up by an aerial linked to the TV) prior to 8-30 pm during the week of 14 April. In other words, the Company is claiming it was complying with the requirements of the CTICP.
27. On the balance of probabilities, the Panel does not believe the Part 4 (a) standard has been breached. It is very easy for a person to be watching a TV channel with a newer smart TV and not be overly conscious of whether the program being seen is via the internet or by linear free to air transmission requiring a TV aerial. After all it's the same program being shown at the same time by either technology.
28. What can be different however is the ads being seen. A program being live streamed and received via the 9 app can have different ads than the same program being watched through the linear transmission. In the linear free to air transmission, there will be no alcohol ads prior to 8-30 pm consistent with the CTICP but on the digital service via the internet, alcohol ads can be shown. In this case, it's the other placement standards that seek to limit the likely audience of minors.
29. The second placement standard requires that alcohol marketers apply available age restrictions controls to exclude minors. To use the 9Now app, someone in the household must initially open an account. This in turn requires

the giving of a date of birth. Relatively few accounts in Australian households are in the name of under 18 year olds. But if an account is the name of a minor, alcohol ads will not be inserted in programs accessed using the app and that account. There is no information before the Panel which suggests that a minor with an account in the complainant's household has been served an alcohol ad.

30. The age restriction controls are quite effective when minors typically have an individual internet capable device like a smartphone or tablet. This is because the minor will have an account in their own name. The standard is less effective in the case of a family internet connected TV, because the account will generally be in the name of a parent or other adult and the family co-view shows rather than the one on one viewing that occurs with a phone or tablet.
31. The third placement standard relates to the reasonably expected audience of an alcohol marketing communication and provides that marketing is not to be placed if the audience is expected to be less than 80% adults. For TV programs, accurate audience data is obtained through the ratings system. The data supplied by the Company showed Everybody Loves Raymond achieved an audience of almost 94% adults on 9Go on 17 April.
32. The fourth standard is that alcohol ads cannot be placed with programs or content primarily aimed at minors. Everybody Loves Raymond is a situation comedy based on the life experiences of the extended Barone family. The Barone's are an Italian-American family living on Long Island in the United States. Much of the show's storyline concerns the interactions of Ray Barone and his wife Debra and Ray's mother, father and brother, all of whom live next door to each other.
33. The complainant believed the show has a 'G' TV rating whereas in fact it has the higher 'PG' rating which recommends parental guidance. The program relates to family and relationship themes and while it's not a show that is unsuitable for children, it could not be fairly described as being primarily directed at minors. The show is directed at adults.

Conclusion

34. The Panel accepts that the complainant has raised a genuine point of concern and it is fully understandable given the long history of time of day restrictions on traditional free to air TV for alcohol ads, that it would be thought an ad would not be seen at around 6-30 pm. As explained, the rules now applying to TV advertising are more nuanced and are linked to the technology used to convey programming.
35. As a result, the requirements in the ABAC standards go beyond time of day proxies for the potential audience of minors of alcohol ads and impose requirements based on the technical capacity of some mediums to exclude

minors from the ads altogether and where this is not possible, audience benchmarks of ads only being with programs with overwhelmingly adult viewers ie the 80% adult benchmark. A further requirement goes to the nature of the accompanying program and avoiding programs primarily aimed at minors.

36. In the current case, it seems likely the Tooheys ad was not aired with traditional free to air transmission accessed using a TV aerial and certainly the Company asserts it was not shown on linear free to air TV prior to 8-30 pm. In this situation, it's most likely the complainant saw the ad transmitted over the internet via the 9 app on their TV.
37. In any event, the 9Go screening of Everyone Loves Raymond on 17 April 2024 attracted a 94% adult audience. Further the theme of the program is more directed towards adults than minors.
38. The complaint is dismissed.