



ABAC Adjudication Panel Determination No 67/24

Products: Beam Suntory and Tradie Beer
Company: Beam Suntory and Tradie Brands
Media: Subscription TV - Kayo
Date of decision: 30 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 29 April 2024 in relation to television advertising by Beam Suntory and Tradie Beer products via Kayo TV, on Saturday 27th April 2024 at 5.11pm, before the start of the West Tigers vs Broncos NRL match.
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 29 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 advertising via Kayo TV, on Saturday 27th April 2024 at 5.11pm, before the start of the West Tigers vs Broncos NRL match.

Complaint

11. The complainant objects to the marketing as follows:
 - Kayo is bombarding with 5 of 6 ads advertising alcohol before the kick-off of the West Tigers vs Broncos NRL match at 5.11pm on 27 April 2024
 - My kids are watching, and they are influenced. They want to watch their sports idols but are pushed about alcohol and how it's a social and group fun thing. Don't agree.

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. Tradie Brands responded to the complaint by email on 30 April 2024. Its primary comment was:
- Advertising of beer is allowed during live sports so we don't agree with this complaint.
14. Beam Suntory responded to the complaint by email on 2 May 2024. Its primary comments were:
- Please find below our response to ABAC complaint 67/24 regarding advertising for Jim Beam via KAYO TV on Saturday 27th April 2024 at 5.11pm, before the start of the West Tigers vs Broncos NRL match.
 - Beam Suntory takes its adherence to the ABAC and responsible marketing code seriously. We are active members of the ABAC, utilizing the pre-vetting service and view of the code to ensure the execution of marketing and advertising materials in line with the spirit of the code and through the eyes of a reasonable person.
 - The advertising material was submitted and approved through ABAC on 2/05/2023 under approval number 5891.
 - We believe we have taken every measure to ensure full compliance of the ABAC Code and do not believe Part 4 of the Code has been breached.
 - Kayo is a subscription based streaming service that requires 100% of account holders to be over the age of 18. In order to set up an account a credit card is needed which requires the account owner to be 18+. It is up to the individual account owner to review and grant permission for minors to watch this platform.
 - Total viewership/audience figures exceed ABAC guidelines with 93% of Kayo viewers 18+, and only 7% of co-viewing audiences under 18.
 - The advert was aired during live sport which is an ABAC approved category.

- Further to every effort we have made to comply with the code, the advert was placed as part of a Sports Sponsorship package which is excluded from Parts 3 and 4 of the Code
- 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 is in line with the ABAC, responsible advertising and Beam Suntory marketing codes as viewed by a reasonable person.

The Panel's View

15. This determination arises from a complaint concerning alcohol ads placed before the Kayo Sports subscription TV broadcast of the Broncos v Tigers NRL match on 27 April 2024. The complainant noted that the game was being watched with children and it was inappropriate for minors to be exposed to alcohol.
16. The complaint brings into play the ABAC Placement Standards which have the policy aim that alcohol marketing should be directed towards adults and to the extent reasonably possible away from minors. The applicable standards for the broadcast of alcohol ads on TV are as follows:
 - placement provisions within media codes must be complied with - Part 4 (a);
 - available age restrictions controls to exclude minors must be applied - Part 4 (b);
 - if minors cannot be excluded, then alcohol marketing can only be placed where the reasonably expected audience is at least 80% adults - Part 4 (c);
 - alcohol ads cannot be placed with programs or content aimed primarily at minors - Part 4 (d).
17. Advertising on TV is regulated at the national level by a government body, the Australian Communications and Media Authority (ACMA). ACMA has approved several codes of practice applying to the different technologies by which TV content is transmitted. The Commercial Television Industry Code of Practice applies to what might be called 'traditional' TV i.e. the free to air networks and

transmissions requiring an aerial to be picked up and relayed to a TV. The Subscription Broadcast Television Codes of Practice applies to subscription services such as Kayo Sports that rely on cable, or satellite or broadband technology.

18. While the CTICP contains time of day restrictions for the airing of alcohol ads, there are no such restrictions in the Subscription Broadcast code. In any event, the CTICP permits alcohol advertising in conjunction with the broadcast of live sports. Accordingly there is no media code provision prohibiting alcohol ads to be shown with the NRL game and the Part 4 (a) standard has not been breached.
19. To access Kayo Sports, a customer must hold a subscription to Foxtel or another service and open an account. As noted by Beam Suntory in their response to the complaint, a subscription account must be held by an adult. This is relevant when assessing the age restriction control requirement standard in Part 4 (b). Digital providers such as Meta and Google and their social media platforms like Instagram have age restriction controls that enable alcohol marketers to exclude minors from being served with alcohol marketing communications. The same applies to digital TV platforms such 9Now or SBS On Demand.
20. While this exclusion capability can be effective when content is accessed on an individual level such as a person using their smartphone to access Facebook or another social media account, it is far less effective for TV. This is because while a TV subscription account might be held in the name of an adult, in most households a program will be co-viewed by a family and often children even though the account might be in the name of a parent or adult. Hence the fact that the alcohol ads are only going to an account held in an adult's name doesn't mean minors aren't watching.
21. That's when the standard in Part 4 (c) carries weight. This standard imposes the 80% adult audience benchmark for the program or content with which an alcohol ad can be placed. Its aim is to have alcohol ads most likely seen predominantly by adults and not minors. While it can sometimes be difficult to know what the audience make up will be for an item of marketing, the long-established TV ratings system provides good demographic breakdowns of TV programs.
22. Rugby League is obviously a major sport in Australia and it has followers across age groups including minors. That said, attendance at NRL games and viewership over TV does show it draws an overwhelmingly adult audience. In the case of the Broncos v Tigers game shown on Kayo Sports on 27 April, the ratings data shows the audience was 93% adults and hence the benchmark of 80% adults in the ABAC standard has not been breached.

23. The Part 4 (d) standard requires that alcohol ads not be placed with programs or content primarily directed at minors. While rugby league is followed by a proportion of minors particularly in NSW and Queensland, an NRL game broadcast cannot be regarded as primarily directed at minors.
24. Beam Suntory commented that its ad was placed as part of a 'sports sponsorship package'. The Code does have a limited carve out for sponsorship agreements and this does include sponsorship of sports teams or cultural events and the like. When it comes to marketing communications, the exclusion is confined to the direct manifestation of the sponsorship agreement such as the naming of a stadium or the placement of a brand name or logo on a football jumper. It would not be expected to cover TV ads which might flow from the existence of the sponsorship agreement. Marketing of this kind must still meet the ABAC standards.
25. The complaint is dismissed.