



ABAC Adjudication Panel Determination No 80/24

Product: Tooheys
Company: Lion Beer Australia
Media: TV On Demand
Date of decision: 12 June 2024
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 23 May 2024 in relation to television advertising for the Tooheys product via 7Plus, seen when watching the News with their children at about 6:45pm.
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 23 May 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 7Plus, during the Channel 7 News.

Complaint

11. The complainant objects to the marketing as follows:
 - *"I feel like a Tooheys" being sung during the last minutes of a footy game appeared during the news on channel 7 at 6:45pm on 22nd May, which I was watching with my 3 children aged 11, 14 and 16.*

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. The Company responded to the complaint by letter by email on 7 June 2024. Its primary comments were:
- We refer to your letter dated 29 May 2024 (Letter) in relation to a complaint received by ABAC about a Tooheys TVC (Advertisement) being broadcast during a news program (Program) on the 7Plus video on demand service (BVOD).
 - 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:
 - the Program:
 - reports on Australian and global current affairs;
 - covers a range of topics including politics, economics, social issues, sports and entertainment among others; and
 - presents this information in a factual and relatively neutral manner.
 - For these reasons, we respectfully submit that the Program is not a program or content primarily aimed at minors.
 - UM, Lion's media agency have confirmed the following regarding the Program's viewership:
 - free-to-air – based on eTAMS data for May 2024, the average reach is currently comprised of 99% over the 18 years of age:

Standard eTAM Report : New File*

Period : 22/05/2024
 Data Types : Projection (P 18+), Projection (Total People), Reach % (P 18+), Reach % (Total People), Profile % (P 18+), (M
 Options : With Guests, Viewing > 1mins C, Consolidated 7(Last Consolidated 28/05/2024)
 Data Source : Regional Panel plus Subscription
 Day Part Set File : 18:00 - 20:00 SMTWTFs*
 Markets : Queensland, Nthrn NSW, Sthrn NSW, Victoria, Tasmania, All RTV
 Media Filters : FTA, STV, Other
 Info : R&F Apply Weighting to Seconds Viewed: ON

				000'		
				P 18+	Total People	P 18+ / Total People (%)
Queensland	SEVEN NEWS	2	18:29:00 - 19:00:29	102,193	104,498	98%
Nthrn NSW	SEVEN NEWS	1	17:59:30 - 19:00:29	86,329	87,108	99%
Sthrn NSW	SEVEN NEWS	1	17:59:30 - 19:00:29	67,281	69,379	97%
Victoria	SEVEN NEWS	1	17:59:30 - 19:00:29	79,197	90,325	88%
Tasmania	SEVEN NEWS	1	17:59:30 - 19:00:29	65,190	65,504	100%

- BVOD – based on OzTAM data for January to May 2024, the average reach is currently comprised of 97% over the 18 years of age:

Seven News Hour 2024		
OzTAM Demo	% of total Live mins	% of total VOD mins
C00-04	1%	1%
C05-12	1%	1%
C13-17	1%	1%
F18-24	3%	2%
F25-39	13%	11%
F40-54	17%	16%
F55-64	12%	9%
F65+	10%	6%
M18-24	2%	2%
M25-39	9%	11%
M40-54	14%	23%
M55-64	9%	10%
M65+	9%	7%

- Further, UM have advised as follows:
 - 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

- they do not believe that displaying the Advertisement during the Program has breached media industry codes that regulate alcohol marketing, including but not limited to the Commercial Television Industry Code of Practice.
- We respectfully submit that the programming of the Advertisement on 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

14. On 22 May 2024 the complainant was watching the Channel 7 News when at 6:45 pm an ad for Tooheys beer was aired. This concerned the complainant who was watching the news with children. The complainant essentially believes that alcohol ads should not be shown at that time of the early evening.
15. The complainant was watching the News 'live' and thought there were time of day restrictions applying to alcohol ads shown on TV. While this understanding is partially correct, there is a considerable complexity to the rules regarding advertising on TV that relate 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 6 pm News is a breach of time of day restrictions.
16. By way of brief explanation, since the 1990's the means by which TV programs could be accessed expanded through 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.
17. The time of day restrictions on alcohol ads date from the earlier period of TV transmissions which required the use of a TV aerial to receive the programs. The rules applying to this technology are contained in the Commercial

Television Industry Code of Practice (CTICP) and these rules do not generally permit alcohol ads in the late afternoon/early evening prior to 8:30 pm.

18. These time of day restrictions however were not repeated in the newer codes applying to the other technologies by which TV programs could be received. 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.
19. 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.
20. 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.
21. 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.
22. 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

23. The question is whether the screening of the ad with the News on Channel 7 at 6:45 pm breaches the ABAC Placement Standards. And this issue rests on the technology used by the complainant to receive the News program.
24. The complainant was watching the News 'live', but this can be done in two ways. It could be done by a linear broadcast needing an aerial to be received. Alternatively, the program could be 'live streamed' over the internet and accessed via the 7Plus app. The complainant was contacted and advised it was most likely the News was watched via the internet and the 7Plus app.
25. The first placement standard requires that the CTICP requirements be met. 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) with the 6 pm News. In other words, the Company is claiming it was complying with the requirements of the CTICP.
26. 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.
27. What can be different however is the ads being seen. A program being live streamed and received via the 7Plus 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.
28. The second placement standard requires that alcohol marketers apply available age restrictions controls to exclude minors. To use the 7Plus app, someone in the household must initially open an account. This in turn requires the giving of a date of birth. If the 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.

29. 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.
30. 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 the 7 News on 22 May achieved an audience of almost exclusively adults across both 'live' viewing and subsequent 'catch up' TV. This means this standard has not been breached.
31. The fourth standard is that alcohol ads cannot be placed with programs or content primarily aimed at minors. While older minors should have an interest in current affairs and no doubt some individual news stories have appeal to minors, taken as whole the nightly news broadcast is a program that is self evidently aimed towards an adult audience. Hence this standard has not been breached.
32. As none of the Code placement standards have been breached, the complaint is dismissed.