



ABAC Adjudication Panel Determination Nos. 155/20 & 156/20

Products: Dan Murphy's, Jim Beam and Squires
Companies: Endeavour Drinks, Beam Suntory and Lion
Media: TV - Free to Air
Date of decision: 26 November 2020
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") concerns free to air television marketing during Channel 7's broadcast of the AFL Grand Final on 24 October 2020. It arises from two complaints referencing television advertisements for the following products:
 - Jim Beam placed, by Beam Suntory;
 - Dan Murphy's, placed by Endeavour Drinks; and
 - Squires Beer, placed by Lion.

Beam Suntory, Endeavour Drinks and Lion are collectively referred to in this determination as "the Companies".

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 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 meeting 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 complaints raise concerns under the ABAC Code and accordingly are within the Panel's jurisdiction.

The Complaint Timeline

7. The complaints were both received on 26 October 2020.
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 complaints were completed in this timeframe

Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was obtained for the content of the marketing communications (Beam Suntory – Approval Number 18647; Endeavour Drinks – Approval Number 18749; Lion – Approval Number 18298).

The Placement

10. The complaints relate to the placement of television commercials on Channel 7 during the live broadcast of the AFL Grand Final on 24 October 2020.

The Complaints

11. The complainants object to the placement of the marketing for the following reasons:
- *I am very upset that I was unable to watch the AFL grand final with my family because of the constant bombardment of these commercials. My children...laughing at alcohol commercials not supposed to be targeted at children is extremely worrying.*
 - *Young children should not be exposed to alcohol advertising.*

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (iv) be directed at Minors through a breach of any of the Placement Rules.

Part 6 of the ABAC Code provides:

Placement Rules means:

- (i) A Marketing Communication must comply with codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy).
- (ii) A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.
- (iii) If a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, a Marketing Communication may only be placed where the audience is reasonably expected to comprise at least 75% Adults (based on reliable, up-to-date audience composition data, if such data is available).
- (iv) A Marketing Communication must not be placed with programs or content primarily aimed at Minors.

Responses from the Companies

13. The principal points made by the Companies are below.
14. Each of the Companies has provided data showing the number and percentage of AFL Grand Final viewers who were under 18 years of age. Endeavour Drinks has provided the sum of unique viewers who saw at least one minute of the AFL Grand Final. Beam Suntory and Lion have provided the average number of people or homes who were watching the AFL Grand Final each minute. For this reason, the viewing numbers provided by Endeavour differ from those provided by Beam Suntory and Lion.

Response from Beam Suntory

15. Beam Suntory responded to the complaints by email dated 6 November 2020. The principal points made by Beam Suntory were:
 - The Jim Beam placed asset 3.30" Eugene JBWDS - BEA0034302 was approved under ABAC Application No 398/20 and Approval No 18647 on 28th August 2020.
 - It is our belief that we have acted within the guidelines for the responsible marketing of alcohol and complied with all alcohol marketing codes, by ensuring the programming placement (Live Sport) was within the placement code of practise, met audience composition requirements of +75% vs 18+ and was not positioned before or after classified programming (C or P).
 - The AFL Grand Final live telecast comprised of more than 86% of adults 18+ which is above the 75% guideline as per ABAC responsible alcohol marketing code

(Source: Page 4: <http://www.abac.org.au/wp-content/uploads/2019/06/ABAC-Responsible-Alcohol-Marketing-Code-21-June-2019.pdf>)

- The following shows viewing numbers for the AFL Grand Final broadcast by Channel 7 on Saturday 24 October:

Time	Market	Projection (Total People)	Projection (P 18+)	Percentage audience 18+
19:00:00 – 21:47:59	Metro 5 Cap City	2,978,955	2,593,048	87%
19:00:00 – 21:47:59	Sydney	412,698	368,209	89%
19:00:00 – 21:47:59	Melbourne	1,583,257	1,356,779	86%
19:00:00 – 21:47:59	Brisbane	382,651	342,839	90%
19:00:00 – 21:47:59	Adelaide	265,144	233,207	88%
19:00:00 – 21:47:59	Perth	335,206	292,014	87%

(Source: OzTAM Avg Audience, 1900-2218. Data Overnight. Date Saturday 24th October.)

- The Commercial Television Industry Code of Practice for alcohol advertisers permits Jim Beam TVCs to run within sport programs and live sporting events. Alcohol brands can be broadcast during sports programs at any time on the weekends from 6pm Friday as per below:
 - (a) as an accompaniment to a Sports Program on a Weekend or a Public Holiday; and
 - (b) as an accompaniment to the broadcast of a Live Sporting Event broadcast simultaneously across more than one licence area, if one of subclauses (a) or (b) is satisfied for:
 - (i) the licence area in which the Live Sporting Event being broadcast is held, for an event taking place in Australia;
 - (ii) the majority of metropolitan licence areas in which the Live Sporting Event is shown, for an event taking place overseas.

(Source: Page 7 https://www.freetv.com.au/wp-content/uploads/2019/07/Free_TV_Commercial_Television_Industry_Code_of_Practice_2018.pdf)

- Minor means a person who is under 18 years of age and the AFL Grand Final is live sports program that is not principally directed to minors in its programming format, and further supported by audience figures as more than 86% of the total viewing audience represents adults 18+. The AFL Grand Final live broadcast did not appear immediately before or after any C or P classified programs as such Jim Beam adhered to all ACMA guidelines for responsible placement of alcohol ads.

(Source: <https://www.acma.gov.au/ads-alcohol-tobacco-or-therapeutic-goods>)

Response from Endeavour Drinks

16. Endeavour Drinks responded to the complaints by emailed letter dated 4 November 2020. The principal points made by Endeavour Drinks were:

- It is Dan Murphy's aim to be Australia's most responsible retailer of alcoholic beverages. This is highlighted by the fact that Dan Murphy's formalised its status as a signatory to the Alcohol Beverages Advertising Code (the Code) Scheme in 2013 and it prepares all its advertising in accordance with the Code. When required (as is the case with the Ads), Dan Murphy's seeks pre-

vetting approval for advertising materials prior to broadcasting those materials to ensure compliance with the Code.

- Furthermore, Dan Murphy's maintains strict internal and external processes in addition to those required by the Code. As part of our community charter 'Our Community, Our Commitment', Dan Murphy's has in place a range of industry-leading initiatives to ensure that minors are not served alcohol and to encourage responsible drinking practices. These include:
 - A. ID25 (ask for ID from anyone who looks under 25 years of age);
 - B. Don't Buy It For Them (stopping secondary supply to minors);
 - C. Our Intoxication Policy (refusal of service to anyone who may be intoxicated); and
 - D. Staff training that exceeds legal requirements, including 'Don't Guess, Just Ask', team talkers, regular refresher and reminder courses, and implementation of the award-winning training program 'Safe'.
- The processes outlined in the paragraph above provide Dan Murphy's with a compliance framework to ensure that it serves customers in accordance with its obligations under the various applicable laws.
- The Ads received Alcohol Advertising Pre-vetting Service Approval on 1 October 2020 under Application Number 507/20.
- Dan Murphy's disagrees with the allegation that the Ads are directed at minors through a breach of any of the placement rules and, therefore, rejects the allegation that the Ads are in breach of Part 3(b)(iv) of the Code.
- Please find enclosed detailed overview of the audience composition for the AFL Grand Final telecast confirming that the AFL Grand Final audience is reasonably expected to comprise at least 75% adults/persons who are legally permitted to purchase alcoholic beverages in Australia. The data shows that the vast majority of the viewers is aged 18 and over at all times during the AFL Grand Final telecast.

SEVEN'S AFL: GRAND FINAL: RICHMOND V GEELONG			P 10-17	P 18+	TOTAL
Sydney	1	19:30:00 - 22:17:59	30,754	764,040	794,794
Melbourne	1	19:30:00 - 22:17:59	139,622	1,833,214	1,972,836
Brisbane	1	18:30:00 - 21:17:59	27,081	679,056	706,137
Adelaide	1	19:00:00 - 21:47:59	18,620	366,596	385,216
Perth	1	16:30:00 - 19:17:59	18,610	475,120	493,730
		TOTAL	234,687	4,118,026	4,352,713
		%	5%	95%	100%

- Dan Murphy's submits:
 - a) The Ads are not created to appeal to minors as Dan Murphy's uses a formal setting and advanced language that is directed towards adults. The Ads do not directly market or promote the sale of alcoholic beverages. The Ads only market or promote Dan Murphy's 2 hour delivery service.
 - b) The AFL Grand Final is also not a program, or displays content, that is primarily aimed at minors. The program is a national sports event showing adult professional sportsmen performing the Grand Final game of Australian Football. The time of broadcasting the Ads was at 7:30pm at which time generally an adult audience is watching television. Based on the supporting data provided by the broadcaster, 95% of the audience that viewed the AFL Grand Final were individuals who were aged 18 years or older (refer to the data provided above).

- Dan Murphy's further submits that the Ads comply with codes regulating the placement of alcohol marketing, and, in particular, the Commercial Television Industry Code of Practice 2015 (Commercial Television Industry Code of Practice). The Commercial Television Industry Code of Practice regulates broadcast content of commercial free-to-air television according to current community standards.

- As the AFL Grand Final is a Sports Program within the meaning of the Commercial Television Industry Code of Practice, Part 6.2.1(b) of the Commercial Television Industry Code of Practice permits Dan Murphy's to broadcast the Ads during the AFL Grand Final on Saturday 23 October 2020.
- Alternatively, as the AFL Grand Final is a Live Sporting Event in Australia and is broadcasted simultaneously across more than one licence area, Part 6.2.1(c) of the Commercial Television Industry Code of Practice permits Dan Murphy's to broadcast the Ads during the AFL Grand Final on Saturday 23 October 2020.
- In the event the Panel is of the opinion that the above paragraphs display an incorrect application of the Commercial Television Industry Code of Practice, Dan Murphy's submits that the Ads are not a "Commercial for Alcoholic Drinks" within the meaning of the Commercial for Alcoholic Drinks as the Ads do not directly promote an Alcoholic Drink (as defined in the Commercial Television Industry Code of Practice) for Dan Murphy's but merely promote the 2 hour delivery service that Dan Murphy's offers to its customers. In such circumstances, the Commercial Television Industry Code of Practice does not provide for any advertising restrictions on the Ads.
- For the reasons outlined above, Dan Murphy's believes that the Ads do not breach the relevant Part of the Code and requests the Panel to dismiss the Complaint.

Response from Lion

17. Lion responded to the complaints by emailed letter dated 3 November 2020. The principal points made by Lion were:
 - We reiterate our commitment to the ABAC Scheme and take our obligations to responsibly promote our products very seriously. However, for the reasons set out below, and with respect to the complainant, we submit that there has been no breach by Lion – Beer, Spirits & Wine Pty Ltd ("Lion") of Part 3(b)(iv) of the ABAC Code and complaint 155/20 should be dismissed by the ABAC Panel.
 - The Advertisement referred to in the complaint received Alcohol Advertising Pre-Vetting Service Approval for its content (ABAC Approval Number 18298).

- Part 3 (b)(iv) of the ABAC Code prohibits marketing communications from being directed at minors through a breach of the Placement Rules. We refer the ABAC Panel to parts (i) and (iii) of definition of 'Placement Rules' set out in Section 6 of the ABAC Code, and confirm that the broadcast of the Advertisements:
 - complied at all times with the alcohol provisions in the Commercial Television Industry Code of Practice (the "**CTICP**"); and
 - appeared during programs that have a higher proportion of adults in their audience (at least 75%) than the proportion in the general population.
- The placement of the Advertisement during the broadcast of the 2020 AFL Grand Final did not breach the CTICP as the Advertisements appeared in timeslots expressly permitted by the CTICP. Section 6.2.1 of the CTICP provides that commercials for alcoholic drinks may be broadcast only during specified times which are:
 - a) In the "M" and "MA15+" classification zones (except between 5.00 am and 6.00 am, and 7.30 pm and 8.30 pm);
 - b) as an accompaniment to a Sports Program on a weekend or a public holiday; and
 - c) as an accompaniment to the broadcast of a Live Sporting Event broadcast across more than one licence area if, relevantly, the licence area in which the Live Sporting Event being broadcast is held for an event taking place in Australia.
- The Advertisement featured during the 2020 AFL Grand Final on Channel 7, which was played locally in Australia and broadcast live-to-air by Channel 7 across more than one licence area. The broadcast of the Advertisement therefore complied with the set out in Section 6.2.1(c) of the CTICP.
- In addition, Lion takes all reasonable steps to ensure our alcohol marketing is directed to adults and does not appear in media where children and young people make up a significant proportion of the audience. Before booking spots on television for the advertisement of our alcoholic beverages, Lion's internal policy mandates that the program must have an audience profile of at least 80% of people who are 18 years or older.

- Live ratings for the 2018, 2019 and 2020 AFL Grand Finals indicate that approximately 87 per cent of viewers watching the AFL Grand Final were over the age of 18. We attach audience composition data provided by OzTAM Pty Limited (“OzTAM”) to support this. As the Panel will be aware, OzTAM is an independent company owned by Australia’s major commercial television broadcasters (the Seven Network, Nine Network and Network 10) to provide reliable and up-to-date data to the industry, including data to help us understand viewer behaviour (including demographics).

SEVEN'S AFL: GRAND FINAL: RICHMOND V GEELONG			
24/10/2020 - 19:00:00 to 21:47:59			
	Projection	Projection	Projection
	Total People	P 0-17	P 18+
Number	2,978,955	385,908	2,593,048
%	100.00%	12.95%	87.05%

- On the basis of these statistics, Lion does not believe the broadcast of these sporting events was primarily aimed at minors.
- As a responsible marketer, Lion takes the placement of its advertisements very seriously and 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 this compliance.

The Panel’s View

18. The AFL Grand Final is one of Australia's most significant annual sporting events. The 2020 Grand Final was held under extraordinary conditions with COVID 19 pandemic restrictions meaning the game was played at night in Brisbane instead of the afternoon at Melbourne Cricket Ground, with a much reduced in person attendance. Free to air television coverage of the game was carried over the 7 Network. During the broadcast of the pre-game and the game itself a range of alcohol companies screened advertising and this determination flows from two complaints concerning this advertising.
19. Both complaints raise concerns not directly about the content of the alcohol advertising but its frequency and a belief that it will be seen by many minors (under 18-year old's). These concerns enliven the ABAC Placement Rules which aim to have alcohol marketing directed towards adults and away from minors. With a broadcast medium such as free to air TV it is not possible to exclude under

18-year old's from watching a broadcast, so the rules seek to limit the exposure of advertising to minors through three stipulations on alcohol marketers namely:

- all applicable media codes applying to alcohol advertising must be complied with i.e. the Commercial Television Industry Code of Practice (CTICP) - Placement Rule 1;
- the advertisement may only be placed with programs where the audience is reasonably expected to comprise at least 75% adults - Placement Rule 3; and
- the advertisement must not be placed with programs or content primarily aimed at minors - Placement Rule 4.

20. The Panel has previously considered the issue of the placement of alcohol advertising in conjunction with the broadcast of an AFL Grand Final in Determination 119/18. Given the COVID restrictions and the changes to the Grand Final and its broadcast time it was considered prudent to look again at the issues, particularly in relation to the reasonably expected audience of the broadcast.
21. Placement Rule 1 has not been breached. This is because the CTICP, while generally restricting the broadcast of alcohol advertising to after 8:30pm, does expressly permit alcohol advertising in conjunction with the broadcast of a live sport event. Further, neither the CTICP nor any other media code imposes any restrictions on the frequency of alcohol advertising. There is some regulation by the Australian Communications and Media Authority (ACMA) on the ratio of advertising to program content overall, but this applies to advertising of all kinds and not specifically alcohol advertising. It is also noted in passing that ACMA has imposed some requirements regulating gambling advertisements on TV (gambling was mentioned in one of the complaints) but this question is beyond the scope of the ABAC which is confined solely to alcohol marketing.
22. Placement Rule 3 establishes the 75% adult audience benchmark for the placement of alcohol marketing. Information on the audience of TV programs is available through the ratings system. The Companies supplied audience data drawn from several sources and this data establishes that the Grand Final attracted a predominantly adult audience more than the 75% threshold. The differences in the data (adult viewership between 86% and 95%) reflect variations in how the audience numbers are averaged, but regardless of this it is evident the placement rule has not been breached.
23. Placement Rule 4 provides that irrespective of the actual audience, alcohol ads cannot be placed with content aimed primarily at minors. While AFL as a sport

and the Grand Final as the season's pinnacle event has appeal across age groups, including minors, the broadcast of the game cannot be said to be aimed primarily at minors.

24. Finally, Dan Murphy's in its response to the complaints made an argument that its advertising was not captured by the time restrictions in the CTICP as it did not fall within the definition of a "Commercial for Alcoholic Drinks" used in that code. This argument runs that the Dan Murphy's ads were promoting its home delivery service and not alcohol drinks as such. Irrespective of the merit of this argument in terms of the scope of the CTICP, it does not impact on the scope of the obligations in the ABAC. Under the ABAC, the Dan Murphy's ads are a "marketing communication" as they are retailer advertising by a retailer of alcohol beverages. Placement Rule 1 in effect incorporates into the ABAC the time restriction requirements of the CTICP. The rule does not narrow the meaning of what is an ABAC marketing communication.
25. The complaints are dismissed.