



ABAC Adjudication Panel Determination No 5/23

Products: Bundaberg Alcoholic Ginger Beer
Companies: Diageo
Media: TV – Subscription
Date of decision: 18 February 2023
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 6 January 2023 and concerns a television commercial for Bundaberg Alcoholic Ginger Beer (“the product”) by Diageo (“the Company”). The marketing was seen prior to 12:00pm, including at 11:30am, 11:00am and 10:30am on Foxtel Channel 501.
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 6 January 2023.
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 Clearance

9. The quasi-regulatory system for alcohol beverage marketing features an 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 advertising of the product but not for its placement.

The Marketing Communication

10. The complaint relates to television commercials for Bundaberg Alcoholic Ginger Beer, seen while watching broadcasts on the subscription service Foxtel 501.

The Complaint

11. The complainant objects to the marketing as follows:
 - *Bundaberg Alcoholic Ginger Beer was being advertised prior to 12pm at various junctures including 11.30am, 11.00am and 10.30am on Foxtel channel 501.*
 - *My children are watching this, and it is not appropriate to be advertising alcohol at these times.*

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:

(b)(iv) be directed at Minors through a breach of any of the Placement Rules.

13. Part 6 of the ABAC Code provides that:

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.
- (v) A Marketing Communication must not be sent to a Minor via electronic direct mail (except where the mail is sent to a Minor due to a Minor providing an incorrect date of birth or age).

14. The Australian Subscription Television Code of Practice provides:

6.1(a) ...Licensees must ensure advertisements promoting goods or services defined in the:

- Weight Management Code of Practice;
- Therapeutic Goods Advertising Code; and
- Alcohol Beverages Advertising Code,

comply with those Codes.

6.5 The Licensee must take into account the intellectual and emotional maturity of the intended audience of the channel when scheduling advertisements in the following categories:

- Advertising of Alcoholic Beverages
- ...

The Company Response

15. The Company responded to the complaint by letter emailed on 30 January 2023. The principal comments made by the Company were:

- Thank you for inviting us to provide comments for the Panel's consideration in determining this complaint. We wish to confirm our longstanding support and commitment to upholding the ABAC Responsible Alcohol Marketing Code (ABAC), as well as our best-practice global marketing standards, the Diageo Marketing Code (DMC) and Diageo Digital Code.

Diageo Marketing Code (DMC) and Diageo Digital Code

- The DMC supports our approach to innovative marketing, while at the same time ensuring we stay true to our core values and pro-actively market responsibly to adults. At the heart of the DMC, is our commitment to ensuring all our activities depict and encourage only

responsible moderate drinking, and never target those who are younger than the legal purchase age (LPA) for alcohol.

- Compliance with the DMC is mandatory for all employees of Diageo, our subsidiaries, and joint ventures where Diageo has a controlling interest. It also applies to third parties engaged by Diageo who help market our brands. DMC review and sign-off must be included at each key stage of the innovation process and archived on our online approval tool, the Diageo Content Hub. The DMC applies to all activities intended to market our beverage brands, including the Bundaberg Rum Ginger Beer advertisement referred to in the Complaint.
- In addition, our Diageo Digital Code ensures that we have the right governance, risk and compliance structure necessary to safeguard our reputation and leadership in the digital space. As part of the Diageo Digital Code, at a global level, we work with digital partners to tackle current and emerging digital challenges. In 2018, we built and implemented an industry-leading approach to digital marketing, called the Trusted Marketplace, which amongst other elements ensures compliance by digital publishers with our 75% LPA+ control.

Placement

- In partnership with our media agency, Foundation, we have conducted a thorough review into our advertising activities for Bundaberg Alcoholic Ginger Beer. The placement of Diageo advertisements with Foxtel takes into consideration the following control:

Avoiding programs 'primarily aimed at minors':

- Diageo does not purchase media space where our advertisements are placed next to or within programs that are primarily aimed at children or minors. This would not only breach ABAC, but the DMC and Diageo Digital Code.
- Foxtel Channel 501 is a Fox Sport channel, showing only sports-related programming. These are not programs or content primarily aimed at Minors.

Alcohol Advertising Pre-vetting Service Approval

- There are a few ads for Bundaberg Rum Ginger Beer, all of which received ABAC pre-vetting approval. The first alcohol marketing communications were submitted to the pre-vetting service for final approval on 3rd November 2022, with approval received on 3rd November 2022 (ABAC Approval 4140). The additional marketing communications were submitted to pre-vetting service for final approval on 22nd November 2022, with approval received on 22nd November 2022 (ABAC Approval 4376).

Available Age Restriction controls

- Foxtel Channel 501 is subscription television. For this media platform, age restriction controls capable of excluding minors from the audience are not available. In this instance, exposure to minors is minimised by ensuring that the Foxtel Channel 501 has an average audience of at least 75% adult.

Applicable ratings data

- The marketing communication went to air on Foxtel Channel 501 (Foxtel Cricket) during the Australia vs South Africa Third Test on Day 1. This program is a live sporting match with 96% of the audience over the age of 18. (Data Source: Foxtel eTAM Report 29/12/2022-5/1/2023).

Standard eTAM Report	Program Profile*	
Period	29/12/2022 - 5/01/2023	
Data Types	Projection, (0-17), (18+), (Total People)	
Options	With Guests, Viewing > 1mins C, Consolidated 7(Last Consolidated 15/01/2023), All Minutes	
Data Source	National Panel	
Day Part Set File	10:30 - 12:30 SMTWTFS*	
Markets	Metro 5 Cap City	
Info	R&F Apply Weighting to Seconds Viewed: ON	
Station	Demographic	Projection
FOX CRICKET (Metro 5 Cap City)	0-17	2,748
FOX CRICKET (Metro 5 Cap City)	18+	58,338
FOX CRICKET (Metro 5 Cap City)	Total People	61,086

Responsibility toward Minors

- Programs shown on Foxtel Channel 501 between 10:30am and 12:30pm in the week up to and including 5 January 2023 did not include content primarily aimed at Minors, nor have content primarily aimed at minors. The programming of content was all sporting matches (all cricket related) with the programming schedule shared below.

Spot Sales Area	Programme/Category
FOX CRICKET	AUSTRALIA PRE GAME 2022/23 CRICKET
FOX CRICKET	AUSTRALIA PRE GAME 2022/23 CRICKET
FOX CRICKET	AUSTRALIA V SOUTH AFRICA 2022/23 TEST
FOX CRICKET	AUSTRALIA INNINGS BREAK 2022/23 CRICKET
FOX CRICKET	AUSTRALIA INNINGS BREAK 2022/23 CRICKET
FOX CRICKET	AUSTRALIA TEA BREAK 2022/23 CRICKET
FOX CRICKET	AUSTRALIA TEA BREAK 2022/23 CRICKET
FOX SP503	PAKISTAN V NEW ZEALAND 2022/23 TEST
FOX CRICKET	AUSTRALIA V SOUTH AFRICA 2022/23 TEST
FOX CRICKET	AUSTRALIA V SOUTH AFRICA 2022/23 TEST
FOX CRICKET	AUSTRALIA V SOUTH AFRICA 2022/23 TEST
FOX CRICKET	TEST CRICKET DAILY 2022
FOX CRICKET	TEST CRICKET DAILY 2022
FOX CRICKET	AUSTRALIA PRE GAME 2022/23 CRICKET

Spot Sales Area	Programme/Category
FOX CRICKET	AUSTRALIA PRE GAME 2022/23 CRICKET
FOX CRICKET	AUSTRALIA INNINGS BREAK 2022/23 CRICKET
FOX CRICKET	AUSTRALIA INNINGS BREAK 2022/23 CRICKET
FOX CRICKET	AUSTRALIA INNINGS BREAK 2022/23 CRICKET
FOX CRICKET	AUSTRALIA V SOUTH AFRICA 2022/23 TEST
FOX CRICKET	AUSTRALIA TEA BREAK 2022/23 CRICKET
FOX SP503	NEW ZEALAND SUPER SMASH 2022/23 CRICKET
FOX CRICKET	AUSTRALIA V SOUTH AFRICA 2022/23 TEST
FOX CRICKET	AUSTRALIA V SOUTH AFRICA 2022/23 TEST
FOX CRICKET	AUSTRALIA INNINGS BREAK 2022/23 CRICKET
FOX CRICKET	AUSTRALIA INNINGS BREAK 2022/23 CRICKET
FOX CRICKET	AUSTRALIA V SOUTH AFRICA 2022/23 TEST
FOX CRICKET	AUSTRALIA TEA BREAK 2022/23 CRICKET
FOX CRICKET	AUSTRALIA TEA BREAK 2022/23 CRICKET
FOX CRICKET	AUSTRALIA V SOUTH AFRICA 2022/23 TEST
FOX CRICKET	AUSTRALIA V SOUTH AFRICA 2022/23 TEST

- We believe all due diligence has been taken to ensure adherence to the Code during the making and placement of this advertisement.

The Panel's View

Introduction

16. This determination arises from a complaint about advertisements for Bundaberg Alcoholic Ginger Beer which were seen on Fox Cricket (Foxtel Channel 501), while children were watching.
17. Fox Cricket is an Australian subscription television channel available on Foxtel. It is dedicated to showing both domestic and international cricket matches (live and replays) as well as related cricket news and analysis.
18. While the complainant did not specify the date on which they saw the advertising, the Company has advised that advertising for the product went to air on Foxtel Channel 501 during the first day of the Australia vs South Africa Third Test on 4 January 2022.

ABAC Placement Rules

19. The complainant's concern about the advertising was not about the ad's content but rather that the advertising was placed at a time and with a program that children were watching. This concern enlivens the ABAC Placement Rules. The Rules have the policy aim that to the extent reasonably possible, alcohol marketing should be directed towards adults and away from minors.

20. There are four rules which could be of relevance to the complaint namely:
- have media industry codes regulating placement been complied with - Rule 1;
 - does the media platform on which the ad appeared have age restriction controls to exclude minors, and if so, were they used - Rule 2
 - was the audience of the program with which the ad was placed in excess of 75% adult - Rule 3; and
 - can the program i.e. the Pageant broadcast be regarded as being 'primarily aimed' at minors - Rule 4.
21. Unlike free to air television, the code of practice applying to subscription television – the Australian Subscription Television Code of Practice (ASTRA) – does not prescribe particular time zones when it is contended alcohol advertising is appropriate to be broadcast. Rather the ASTRA Code has a more general guideline which requires that the intellectual and emotional maturity of the intended audience be taken into account when scheduling alcohol advertisements.
22. The ASTRA Code also provides that advertisements promoting alcohol comply with the ABAC. The ABAC for its part, in placement rule 1, requires compliance with codes regulating the placement of alcohol marketing. This means the ABAC incorporates the relevant provisions of the ASTRA Code and the ASTRA Code requires compliance with the ABAC standards.
23. The net effect of the somewhat circular cross references between the two codes would appear to be as follows:
- there is no time-of-day restrictions as to when an alcohol advertisement might be broadcast on a Foxtel channel;
 - available age restriction controls for Foxtel be applied;
 - an advertisement cannot be shown with Foxtel programming having a likely audience of more than 25% under 18-year-olds; and
 - the content of the program with which the advertisement is shown must not be primarily aimed at minors nor can the program have intellectual and emotional attraction inappropriate for the airing of an alcohol ad.
24. This means that the broadcast of the ad prior to 12:00pm on Foxtel Channel 501 is not a breach of either code as there is no time-of-day restriction applying to subscription TV. It should be noted, that even if the cricket had been broadcast on free to air television, the media code applying to that

medium also permits alcohol advertising in conjunction with a live sports event irrespective of the time of day.

25. Rule 2 requires that age restriction controls should be used when available. Foxtel, unlike social media platforms like Instagram does not have age restriction controls available to an alcohol marketer. This means that Placement Rule 2 has not been breached.
26. Rule 3 goes to the audience of a program. It provides that an alcohol ad may only be placed where the audience is reasonably expected to comprise at least 75% adults. It is possible to assess the audience of TV programs through the ratings system and the Company has supplied ratings data. The Company has advised that the program comfortably exceeds the 75% adult benchmark, with 96% of the audience of the test match on Foxtel being adults.
27. Rule 4 goes to the content of the program with which the alcohol ad was placed. The question is whether a cricket test broadcast between Australia vs South Africa can be said to be primarily aimed at under 18-year-olds.
28. Clearly cricket is a national sport followed across age groups. But it can't be said that television broadcasts of cricket generally and test cricket in particular is primarily aimed at minors. The broadcasts aim to attract adult viewers, and this is confirmed by the ratings data.
29. The Company has met all of its obligations regarding the placement of its advertising on Foxtel Channel 501 and the complaint is dismissed.