



ABAC Adjudication Panel Determination No 134/23

Product: Good Tides Seltzer
Company: Carlton & United Breweries
Media: Subscription TV
Date of decision: 6 September 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 14 August 2023 in relation to marketing for Good Tides Seltzer (“the Product”) by Carlton & United Breweries (“the Company”).
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:
 - 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;

- 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 14 August 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 the marketing (Approval Number 6160).

The Marketing

10. The complaint relates to both the content of the marketing having strong or evident appeal to minors and the placement of the marketing on Kayo TV, during an AFL match.

<p>We open on a view of some Good Tides, from inside the fridge. We see that Darcy Moore is looking into the fridge. He stares at the can, then reaches in.</p> <p>Darcy: <i>"What if I had a seltzer... in winter?"</i></p>	
<p>He takes a sip. A newspaper spins in front of us, stopping so we can read the headline: SELTZER IN WINTER? Darcy's summer beverage baffles.</p>	
<p>We see Darcy in a scarf and wintry clothes out on the street, with a few reporters rushing up to interview him.</p> <p>Reporter: <i>Darcy, is it true? Are you drinking seltzers in winter?</i></p> <p>Darcy: <i>Uh... yeah.</i></p> <p>Reporter: <i>But it's winter.</i></p>	

We cut to an episode of an AFL chat show, AFL360, where the panel are in a heated discussion.

P1: What's happening in Darcy Moore's head?

P2: Ah – it's baffling Gerrard. What season does he think he's in?



The ad cuts to Darcy standing outside in the dark. A security guard throws his bag out at him, speaking sternly: "It's winter!"



The ad cuts back to a shot of Darcy's face, but back in the living room. He opens a can of Good Tides.

The camera then pans to Kate Hore (who plays for Melbourne AFL club), also sitting on the couch, holding a can of Good Tides.

Kate: "Good Tides. Good choice!"

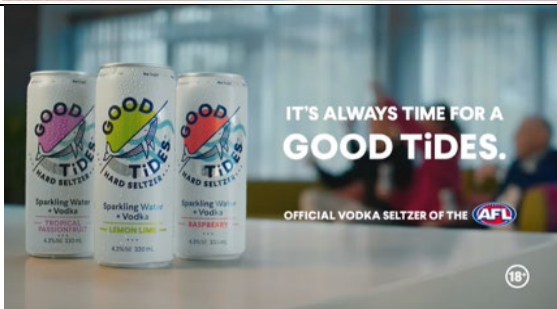


The camera then pans to a host of AFL 360 also sitting on the couch holding a can of Good Tides.

Man: "I think you're onto something here Darce."



The ad concludes with a shot of three cans of Good Tides.



Complaint

11. The complainant objects to the marketing as follows:

- *My issue is with the alcoholic product being promoted during an AFL game at a time when children will be watching. Darcy Moore is a champion and so young people will look up to him.*

The ABAC Code

12. A new ABAC Responsible Alcohol Marketing Code commenced on 1 August 2023. As the Company has advised that the complaint relates to a marketing communication that has been continuously in the market prior to 31 July 2023 the complaint will be considered under the previous Code.

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

- (b)(i) have Strong or Evident Appeal to Minors;
- (b)(iv) be directed at Minors through a breach of any of the Placement Rules.

14. 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).

Strong or Evident Appeal to Minors means:

- i. likely to appeal strongly to Minors;
- ii. specifically targeted at Minors;
- iii. having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
- iv. using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; or
- v. using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors

The Company Response

15. The Company responded to the complaint by letter emailed on 25 August 2023. Its primary comments were:

Alcohol Advertising Pre-vetting Service Approval

- The alcohol marketing communication referred to in the complaint received Alcohol Advertising Pre-vetting Service Approval. Approval was sought under Application No. 436-2023 and granted on 2 June 2023, with Approval No. 6160.

Responsibility toward Minors

- The TV ad does not breach Part 3 (b)(i) of the Code by having Strong or Evident Appeal to Minors by featuring Darcy Moore.
- Darcy Moore is a 27-year-old AFL player with the Collingwood Football Club. The ABAC Panel has previously found, e.g. in [Determination 162/21](#), that “AFL ... is a sport with broad appeal across all age groups rather than appeal aimed primarily at minors,” and as such we do not accept that featuring Darcy Moore in an advertisement constitutes Strong or Evident Appeal to Minors as, consistent with Section 3(b)(i)(B) of the Code, he does not possess “a particular attractiveness for a Minor beyond the general attractiveness [he] has for an Adult”.
- The advertisement features Darcy Moore choosing to drink a Good Tides Hard Seltzer in the seemingly incongruent winter season and

facing increasing scrutiny of this decision from a variety of sources. Light RTDs are often perceived as 'summer' beverages by consumers; the advertisement is attempting to show that Good Tides can be enjoyed responsibly at all times of the year.

- The scenarios depicted, i.e. Moore choosing a can from the fridge, a newspaper headline 'Darcy's summer beverage baffles', a press pack accosting Moore outside his home, a discussion of Moore's decision taking place on an AFL 360-style panel show, a seemingly angry teammate affirming 'it's winter!' and Moore seated on his couch with his partner, are not inherently appealing to Minors.
- Comprehension of the ad and its humour depends on the viewer recognising that it is a light-hearted take on the experience of AFL players facing heavy press scrutiny with respect to seemingly trivial matters. This mature, satirical approach is highly unlikely to appeal to Minors.
- Available Age Restriction Controls were applied to exclude Minors from viewing the Alcohol Marketing Communication. The advertisement was digitally served to a logged-in Kayo user who has confirmed they are 18+ by providing their date of birth when setting up a Kayo account.
- Age restriction controls were available as the advertisement was digitally served to a logged-in Kayo user. We confirm they have been used in this instance.
- The Alcohol Marketing Communication was not placed with programs or content primarily aimed at Minors. As per ABAC Determination 162/21, we agree "AFL ... is a sport with broad appeal across all age groups rather than appeal aimed primarily at minors," and we note that notwithstanding the advertisement was shown on Kayo, the Commercial Television Industry Code of Practice (CTICP) allows that "A Commercial for Alcoholic Drinks may be broadcast ... as an accompaniment to the broadcast of a Live Sporting Event".
- Carlton & United Breweries is committed to ensuring our promotional and marketing material is always compliant with the ABAC Code. Our goal is for consumers to enjoy our products responsibly and in moderation, and to uphold community standards when it comes to the placement and content of our advertising.

The Panel's View

Introduction

16. This determination has arisen from a complaint about marketing for Good Tides Seltzer seen during an AFL match watched on Kayo Sports, an Australian subscription TV service. The concerns expressed are twofold. Firstly, it is contended that alcohol advertising should not be placed during an AFL game at a time when children will be watching. Secondly, the complainant argues that the alcohol advertisement itself will have strong or evident appeal to minors due to featuring Collingwood captain, Darcy Moore, who, it is claimed, children look up to.
17. The obligations in the ABAC in relation to minors are essentially twofold. Firstly, alcohol marketing in its messaging and content is not to be strongly appealing to minors (Content Standards). Secondly, alcohol marketing material, to the extent possible, is to be directed towards adults and away from minors (Placement Rules).

Strong or Evident Appeal to Minors- using public figures in alcohol marketing

18. The complainant contends that the advertisement will have strong or evident appeal to minors due to featuring Darcy Moore, a sports person 'who children will look up to'. This argument raises the potential impact of the inclusion of public figures in alcohol marketing and when this might cause a marketing communication to have strong appeal to minors.
19. There is no doubt that Darcy Moore is a well known AFL player. He has played for Collingwood since 2015 and this year was appointed team captain at age 27. Further Collingwood has enjoyed a very successful season and this success has increased the media exposure of Mr Moore as a leading player and team captain.
20. Unlike the equivalent alcohol marketing code in New Zealand, the ABAC does not directly deal with the potential of well known individuals in alcohol marketing to create strong appeal of the marketing communication to minors. In New Zealand, the Alcohol Advertising and Promotion Code provides in rule 1 (b) that the content of alcohol advertising and promotion must target adults. Guidance to the rule is that it is assessed by a combination of 'timing, placement and content' of an advertisement'.
21. While it is not prohibited to show 'individuals, groups or teams' including cultural and sporting heroes, icons, celebrities and social media influencers that 'are currently popular with or have particular appeal to minors' this can only occur if the ad is placed in adult restricted media. The New Zealand code notes that alcohol advertisers might provide consumer research as to current popularity or particular appeal of a person to minors.
22. In contrast, the ABAC provides Part 3 (b)(i) that strong or evident appeal to minors might be breached if a marketing communication:

- specifically targets minors;
- has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; and
- uses imagery, designs, motifs, animations, or cartoon characters that are likely to appeal strongly to minors or create confusion with confectionery or soft drink.

23. The Panel has considered the Part 3 (b) standard on many past occasions. While each marketing communication must always be assessed individually, some characteristics within marketing material which may make it strongly appealing to minors include:

- the use of bright, playful, and contrasting colours;
- aspirational themes that appeal to minors wishing to feel older or fit into an older group;
- the illusion of a smooth transition from non-alcoholic to alcoholic beverages;
- creation of a relatable environment by use of images and surroundings commonly frequented by minors;
- depiction of activities or products typically undertaken or used by minors;
- language and methods of expression used more by minors than adults;
- inclusion of popular personalities of evident appeal to minors at the time of the marketing (personalities popular to the youth of previous generations will generally not have strong current appeal to minors);
- style of humour relating to the stage of life of a minor (as opposed to humour more probably appealing to adults); and
- use of a music genre and artists featuring in youth culture.

24. It should be noted that only some of these characteristics are likely to be present in a specific marketing communication and the presence of one or even more of the characteristics does not necessarily mean that the marketing item will have strong or evident appeal to minors. It is the overall impact of the marketing communication rather than an individual element that shapes how a reasonable person will understand the item.

25. In its response to the complaint, the Company advised that:

- featuring Collinwood captain Darcy Moore in an advertisement does not constitute strong or evident appeal to minors as he does not possess ‘a

particular attractiveness for a minor beyond the general attractiveness [he] has for an adult’;

- the scenarios depicted are not inherently appealing to minors; and
- the mature, satirical approach is highly unlikely to appeal to minors.

26. In assessing if a Code standard has been breached, the Panel adopts the standpoint of the probable understanding of the marketing item by a reasonable person. This means the attitudes, values and life experiences shared by most members of the community is the benchmark. If a marketing communication can be interpreted in several ways, the most probable understanding is to be preferred over a possible but less likely interpretation.
27. AFL is one of Australia’s national sports and Collingwood enjoys a large supporter base. While at the junior level AFL has lower levels of participation than soccer and basketball, it is played extensively by minors. As a leading player Darcy Moore will be recognised by minors who follow AFL and he will be a respected figure amongst minors who are Collingwood supporters.
28. The inclusion of public figures - be they sportspersons, entertainers, or other celebrities - in alcohol marketing will have a potential to draw the attention of minors. It will be a case by case assessment if a particular individual will have a particular attractiveness and strong appeal to minors. Some factors might include:
- the age of the individual with generally younger persons being likely more relatable than older adults; and
 - the basis of the person’s celebrity/public standing - for instance a gamer/influencer might resonate more strongly with minors than say a test cricketer.
29. Further, the nature of the marketing communication and how the public figure is depicted will be important in assessing the probable appeal of the advertisement to minors. For instance, showing a popular musician performing draws directly on the basis of the person’s renown and may be more impactful than say the musician at a dinner table with friends.
30. In the current case, Mr Moore is not shown playing AFL but the ad establishes him as an AFL player. His actions are the subject of a mock commentary on the AFL 360 TV show. The ad is satirical and pokes fun at the way sport is analysed by media commentators and experts.
31. On balance, the Panel does not believe that the Part 3 (b)(i) standard has been breached. In reaching this conclusion the Panel considered the following:

- Darcy Moore would be recognised by both adults and minors who follow AFL and he would be particularly liked by supporters of the Collingwood team;
- Mr Moore is aged 27 and is clearly portrayed in an adult setting;
- the content of the ad is light-hearted but the humour is satirical and adult focussed and pokes fun at the media/expert commentary of sport; and
- overall, the reasonable person would conclude that the ad is direct towards adults, any appeal to minors would be incidental rather than strong or evident.

The Placement Rules

32. The complainant also expressed concern that the ad was shown on Kayo Sports during an AFL match while children would be watching. This concern enlivens the ABAC Placement Rules.
33. The ABAC Placement Rules seek to have alcohol marketing directed toward adults and to the extent possible away from minors. The rules consist of five separate, but interrelated obligations imposed on alcohol marketers:
- Rule 1 - the placement of marketing must comply with codes published by the Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy);
 - Rule 2 - available age restriction controls are used by the marketer to exclude minors from viewing alcohol marketing;
 - Rule 3 - if a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding minors, then alcohol marketing may only be placed where the audience is reasonably expected to comprise 75% adults;
 - Rule 4 - irrespective of the utilisation of available age restriction controls and the expected audience, alcohol marketing must not be placed with programs or content primarily aimed at minors; and
 - Rule 5 – a marketing communication must not be sent to a minor via electronic direct mail.
34. Working through the Placement Rules, and applying them to the specific circumstances of this complaint, it is clear that:
- The advertising was seen on Kayo Sports, a subscription TV streaming service. This means that the Commercial Television Industry Code of Practice does not apply as that Code covers only free to air TV and not

subscription services. Equally alcohol marketing is permitted when shown with live sports broadcasts irrespective of the time of day of the broadcast. Hence Placement Rule 1 has not been breached; and

- The marketing was not sent via electronic direct mail, therefore Placement Rule 5 is not relevant.

35. Placement Rule 2 requires the use of Available Age Restriction Controls, the Code definition of which refers to ‘age restriction, targeting or affirmation technologies...’ In this regard the Company has advised that:

- available Age Restriction Controls were applied to exclude Minors from viewing the Alcohol Marketing Communication; and
- the advertisement was digitally served to a logged-in Kayo user who has confirmed they are 18+ by providing their date of birth when setting up a Kayo account.

36. While age restriction controls are effective when social media platforms are used on individual devices, the effectiveness of the controls is much diminished when it is likely a program will be co-viewed such as when watching TV in a household with adults and children. This is irrespective if the program is served free to air or via a streaming service.

37. Placement Rule 3 requires that alcohol marketing only be placed with programs reasonably expected to have at a 75% adult audience. The Panel has considered alcohol ads shown with broadcast AFL games on previous occasions and the ratings data demonstrates the audience for AFL games is predominately adult and well in excess of the 75% benchmark.

38. Placement Rule 4 requires that irrespective of the utilisation of available age restriction controls, alcohol marketing must not be placed with programs or content primarily aimed at minors. The Panel has previously considered the question of whether AFL coverage is primarily aimed at minors in Determination 75/18 and found that:

While AFL is a popular Australian sport followed across the country and popular in all age groups, the Panel does not believe a broadcast of an AFL game can be characterised as being primarily aimed at minors. Under 18 year olds will watch AFL (a much smaller broadcast audience than over 18 years old) but AFL on television has a general appeal and tending towards an older focus as opposed to being primarily aimed at under 18 year olds

39. Accordingly the complaint is dismissed on both the ABAC content standard and Placement Rules.