

WELCOME TO TELEVISION: REGULATING ALCOHOL MARKETING ON TELEVISION IN AUSTRALIA TO PROTECT THE HEALTH OF MINORS FROM HARM

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ABSTRACT

Television content is now available whenever and wherever viewers want it through free to air commercial television, catch-up television, video on demand services whether subscription or free, and social media platforms such as Facebook and TikTok. Through digital technology, viewers can watch television content on a screen in their homes, on their computers, tablets or mobile phones. Alcohol marketing is pervasive in television, with young people's exposure to such marketing being causally connected to harms such as early initiation to drinking and heavy drinking practices. The World Health Organization recommends that countries ban or place comprehensive restrictions on alcohol marketing. Australia has failed to heed this recommendation. This article reviews the regulation of alcohol marketing in Australia from the perspective of its capacity to protect minors from exposure to the marketing. Australia's regulation of alcohol marketing is weak, fragmented and outdated, with rules that favour the interests of the alcohol, media and sporting industries and do not protect the public's health, particularly that of children and young people.

I INTRODUCTION

The television landscape has changed dramatically in the last 65 years in Australia. Television only arrived in Australia in 1956.¹ Since then, we have moved from having one television channel available to viewers in the major cities to a situation where people can now watch 'content whenever they want it, wherever they are and on whatever device they want to use'.² Television is mainly delivered via digital technology and can be seen on the traditional commercial broadcasting services, such as free to air channels or their catch-up services; broadcast subscription services like Foxtel; subscription video on demand services such as Netflix and Disney+; and social media platforms like Facebook, TikTok and YouTube. People can view content on a traditional television in their homes, or on their computer, tablet or mobile phone wherever they are.³

Central to the business model for television from its advent in Australia to the current day is the sale of advertising opportunities by broadcasting services and digital platforms. One of the consumer commodities that is heavily marketed is alcohol. In 2019, USD7.6 billion was spent on the marketing of alcohol in the 12 key markets (including Australia) that together make up

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¹ 'Good Evening and Welcome to Television', *National Film and Sound Archive* (Web Page) <https://www.naa.gov.au/sites/default/files/2020-05/fs-115-introducing-television-to-australia-1956.pdf>.

² 'Our History', *Free TV Australia* (Web Page) <https://www.freetv.com.au/who-we-are/our-history/>.

³ 'Online & On Demand 2017: Trends in Australian Online Viewing Habits', *Screen Australia* (Web Page) https://www.screenaustralia.gov.au/getmedia/f06697b8-07be-4a27-aa8b-bc3ad365238c/OnlineOnDemand_2017.pdf.

73% of the global spend on alcohol advertising.⁴ Almost half of this was television advertising and just under 25% was in digital media.⁵ Yet, there is considerable concern amongst public health authorities at the national and global level about the impacts that such marketing has on alcohol consumption and harm, particularly amongst young people. Accordingly, the World Health Organization advises that national governments institute, as one of their top three measures to reduce harms from alcohol, ‘bans and comprehensive restrictions on alcohol advertising, sponsorship and promotion [because they] are impactful and cost-effective measures.’⁶

This article critiques Australia’s regulation of alcohol marketing on television to determine whether it has followed WHO’s recommendation and implement ‘bans’ or ‘comprehensive restrictions’ for the purpose of protecting minors from exposure to alcohol marketing. Although alcohol marketing arguably impacts the entire population, including by its shaping of social norms around drinking,⁷ the focus on minors in this article for several reasons. Firstly, there is very concerning evidence that the alcohol industry targets minors in its marketing.⁸ Secondly, the evidence base about the effects of alcohol marketing concentrates on minors and shows a causal connection between exposure to alcohol marketing and harmful drinking by minors. Although youth drinking has declined in Australia, there are still considerable levels of under-age drinking.⁹ Third, the harms associated with under-age drinking are particularly grave. In addition to the usual harms, alcohol also affect the developing brains more severely, creating ‘problems with memory, planning and organisation, impulse control, and mood regulation.’¹⁰ Fourth, from an ethical perspective, society has a special responsibility for the protection of minors because of their more limited agency and special vulnerability arising from their age and their reduced capacity to critically assess the veracity and intentions of marketing claims. The harm principle, whereby individuals may and should be left to their own devices as long as they are not harming others, does not apply to government intervention in respect of minors.¹¹

Whilst these factors justify a precautionary approach to the regulation of alcohol marketing, Australia does not have a ban on alcohol marketing in any media, nor does it have restrictions

⁴ ‘Business Intelligence: Alcohol Beer and Spirits’ (Zenith, undated). Available at: <<https://movendi.ngo/wp-content/uploads/2021/05/Business-Intelligence-Alcohol-Beer-and-Spirits.pdf>>

⁵ Ibid.

⁶ World Health Organization, ‘WHO Launches SAFER, A New Alcohol Control Initiative’ (Media Release, 18 September 2018) < <https://www.who.int/news/item/28-09-2018-who-launches-safer-alcohol-control-initiative-to-prevent-and-reduce-alcohol-related-death-and-disability>>.

⁷ James Nicholls, ‘Everyday, Everywhere: Alcohol Marketing and Social Media — Current Trends’ (2012) 47 *Alcohol and Alcoholism* 486, 490; Sally Casswell, ‘Alcohol Brands in Young Peoples’ Everyday Lives: New Developments in Marketing’ (2004) 39 *Alcohol and Alcoholism* 471, 473.

⁸ Gerard Hastings, ‘“They’ll Drink Bucket Loads of the Stuff”: An Analysis of Internal Alcohol Industry Advertising Documents’ (Alcohol Education and Research Council, 2009) 9–16.

⁹ Australian Institute of Health and Welfare, *National Drug Strategy Household Survey 2019: Detailed Findings* (Drug Statistics Series No. 32, 2019) 21 < <https://www.aihw.gov.au/reports/illicit-use-of-drugs/national-drug-strategy-household-survey-2019/contents/summary>> (‘Household Survey’).

¹⁰ ‘Alcohol and Young People: Drinking Patterns and Harms’ (McCusker Centre for Action on Youth and Alcohol, August 2017) 4.

¹¹ John Stuart Mill, *On Liberty and Other Essays* (Oxford University Press, 1998) 91.

that are effective to minimise the exposure of minors to alcohol marketing. Australia leaves most of the regulatory effort to the alcohol, broadcasting and digital media industries and their efforts in governing themselves have fallen well short of best practice. Some media (such as catch-up television, streaming services and social media platforms) are subject to no media-specific regulation. The industries have also created wide carve-outs for alcohol marketing during commercial, free to air broadcasts relating to sport. Beyond that, they have adopted the least effective model for marketing regulation which is to focus on the content of the advertising as opposed to its placement or volume. Australia has created a ‘welcoming’ environment for alcohol marketing on television.¹²

I start the analysis in this article by describing the alcohol marketing techniques used in television (Part II), the evidence on the exposure of minors to such marketing (Part III) and the evidence that exposure to alcohol marketing is causally connected to harmful drinking practices by minors (Part IV). In Part V, I critique the alcohol marketing regulation that exists in Australia for its capacity to protect minors from exposure. In Part VI, I conclude and offer some recommendations for the way forward for the regulation of alcohol marketing in Australia.

II ALCOHOL MARKETING ON TELEVISION IN AUSTRALIA

The ways in which alcohol is marketed has changed considerably. In the past, the ‘advertising’ of alcohol generally meant the promotion of an alcohol product in a separate advertising space, such as a paid commercial during a break in a television program.¹³ This form of advertising is used, but now many commercial actors, including alcohol companies, ‘embed’ advertising into content on television, weaving the alcohol company brand into the substance of the television program. Advertisers refer to this practice as ‘content integration’.¹⁴ It sometimes entails the placement of the company’s product in natural settings in the broadcast, such as where bottles of beer appear in ‘drinking’ scenes in a television program or a film.¹⁵ In sporting broadcasts, this often takes the form of sponsors’ names being placed on the hoardings or on player uniforms, or being mentioned by commentators. A study by VicHealth asserts that there was an average of 8.1 minutes of in-game alcohol advertising compared to 1.8 minutes of in-break advertising for broadcasts of Australian Football League games in 2010.¹⁶

¹² National Film and Sound Archive, (n 1). ‘Good evening... and welcome to television’ were the first words spoken on television in Australia by Mr Bruce Gyngell.

¹³ Chris Hackley, *Advertising & Promotion An Integrated Marketing Communications Approach* (SAGE Publications Ltd, 2nd ed, 2010) 9–10.

¹⁴ See ABAC Complaints Determination No 96 of 2012, 11 February 2013 [20] <<http://www.abac.org.au/wp-content/uploads/2013/04/96-12-Determination-VB-11-February-2013.pdf>>.

¹⁵ Renske Koordeman et al, ‘Effects of Alcohol Portrayals in Movies on Actual Alcohol Consumption: An Observational Experimental Study’ (2011) 106 *Addiction* 547, 550–3.

¹⁶ ‘Alcohol and Junk Food Advertising and Promotion through Sport: Research Highlights, Preventing Harm from Alcohol’ (Victorian Health Promotion Foundation, March 2014) 3.

Furthermore, most promotional campaigns now multiple interconnected and reinforcing techniques, which combine multiple promotional channels.¹⁷ This is what is called an ‘integrated marketing communication’.¹⁸ The same advertising content is seen across television media (whether a viewer is watching a free to air television channel or streaming content on subscription video on demand service), but this material is further disseminated and reinforced through posts on social media platforms, user engagement with those posts (such as users liking or sharing the content or their own content), and, now, e-commerce with ‘click-through’ opportunities for immediate purchase of the promoted product.¹⁹ Social media influencers are commonly used for alcohol marketing.²⁰

The amount the alcohol industry spends on marketing in Australia is difficult to state accurately. Although Nielsen produces figures, these are only available on payment of a considerable fee. The National Preventative Health Taskforce (‘NPHT’) had access to some Nielsen data when producing its report in 2009, which estimated that the total spend on above-the-line (television, radio, print, cinema) alcohol advertising in 2007 was AUD\$128 million,²¹ with over 68% of this spending done by the top 10 advertisers (by amount spent) and the remaining approximately 30% spent by all other advertisers.²² An even higher level of spend on alcohol advertising was reported by White et al in 2015. The authors suggest that, in 2007, the alcohol advertising spend in Australia was in fact AUD\$285 million,²³ significantly higher than the figure reported by the NPHT, seemingly because of the inclusion of additional forms of advertising by alcohol retailers which were not part of the NPHT reporting. But none of these figures includes spending on most below-the-line promotional channels, especially sponsorships and digital media. In terms of sponsorships — which are often reflected in alcohol marketing on television — one estimate is that the alcohol industry provides AUD\$57 million in sponsorship to Australian sports annually, which is 7.4% of Australian sports’ annual sponsorship income.²⁴ It is believed that a recent sponsorship deal between Cricket Australia and Carlton & United Breweries is worth AUD\$65 million over five years alone.²⁵

¹⁷ Hackley, (n 13) 10–11.

¹⁸ Paul Harrison and Michaela Jackson, ‘Integrated Marketing Communications and Power Imbalance: The Strategic Nature of Marketing to Children and Adolescents by Food and Beverage Companies’ in J D Williams et al (eds), *Advances in Communication Research to Reduce Childhood Obesity* (Springer Science and Business Media, 2013) 37–8.

¹⁹ Nicholas Carah and Sven Brodmerkel, ‘Alcohol Marketing in the Era of Digital Media Platforms’ (2021) 82 *Journal of Studies on Alcohol and Drugs* 18; Brady Robards et al. ‘The Social Media & Unhealthy Marketing Project Final Report’ (Monash University & The University of Queensland with VicHealth, 2023).

²⁰ See, eg, Hendriks Hanneke, ‘Picture Me Drinking: Alcohol-Related Posts by Instagram Influencers Popular Among Adolescents and Young Adults’ (2020) 10 *Frontiers in Psychology* 1.

²¹ ‘Australia: The Healthiest Country by 2020. Technical Report 3: Preventing Alcohol-related harm in Australia: A Window of Opportunity’ (National Preventative Health Taskforce Alcohol Working Group, 2009) 33.

²² Ibid 34.

²³ Victoria White et al, ‘How Has Alcohol Advertising in Traditional and Online Media in Australia Changed? Trends in Advertising Expenditure 1997–2011’ (2015) 34 *Drug and Alcohol Review* 521, 524.

²⁴ Connor Wright, ‘Report Examines the Impact of Sport Sponsorship in Australia and New Zealand’, *Sports Business Insider*, 13 June 2013.

²⁵ Amy Corderoy, ‘Health Groups Hit Out as Cricket Chiefs Bat for Alcohol Ads’, *Sydney Morning Herald* (online), 15 October 2013 <<http://www.smh.com.au/sport/cricket/health-groups-hit-out-as-cricket-chiefs-bat-for-alcohol-ads-20131014-2viv4.html>>.

III THE EXPOSURE OF MINORS TO ALCOHOL MARKETING ON TELEVISION IN AUSTRALIA

The evidence suggests that there is significant exposure of minors to alcohol marketing on commercial television in Australia. This evidence has mainly focussed on free to air, commercial television and therefore greatly underrepresents the level of exposure of minors via the multitude of opportunities for watching television, including the subscription television and free video-on-demand content via social media.

In a 2011 Australian study asking participants to *recall* their exposure to alcohol marketing, Jones and Magee found that the majority of the surveyed 1,113 Australian 12–17 year old adolescents recalled seeing alcohol advertising, with television being the media with the highest exposure levels (94% of respondents).²⁶ Using television scheduling and audience data, several other studies have found high levels of exposure of minors to alcohol marketing in programming in which minors make up a considerable part of the audience. In 2009, a study by Fielder et al considered exposure to alcohol advertising of audiences in metropolitan commercial television markets in the five main capital cities on the states on the Australian mainland.²⁷ Fielder et al found that, during the 11-month period of the study, underage teens (aged 13–17 years) were exposed to almost as much alcohol advertising as young adults (aged 18–24 years). They also found that children (aged 0–12 years) were exposed to half as much alcohol advertising as young adults (aged 18–24 years).²⁸ In 2009, an Australian government-commissioned study also found that, in Melbourne, four of the top thirty brands on commercial television (by spend on alcohol advertising) generated the same or greater ‘exposure’ with 13–17 year olds compared with those aged 18–29 years. Three of these four brands were for beer.²⁹

There have been two studies relating to alcohol marketing and *sports programming*, motivated in part by the view that this type of program is very attractive to minors. A study by Carr et al of television broadcasts of sports programs found that, in 2012, broadcasts of sporting matches in metropolitan television markets in Australia attracted a cumulative viewing audience of 26.9 million minors (which was similar to the audience of 18–29 year olds).³⁰ Furthermore, these

²⁶ Sandra C Jones and Christopher A Magee, ‘Exposure to Alcohol Advertising and Alcohol Consumption among Australian Adults’ (2011) 46 *Alcohol and Alcoholism* 630, 632.

²⁷ Lynda Fielder, Robert Donovan and Robyn Ouschan, ‘Exposure of Children and Adolescents to Alcohol Advertising on Australian Metropolitan Free-to-air Television’ (2009) 104 *Addiction* 1157, 1160. This study used Target Audience Rating Points (‘TARPs’) generated by OzTam (the official source of television audience measurement in Australia) to determine exposure levels. The TARP is calculated from the number of target audience individuals exposed to the advertisement as a proportion of the total target audience, multiplied by 100: at 1159.

²⁸ Fielder et al, (27). See also Matthew V Winter, Robert J Duncan and Lynda J Fielder, ‘Exposure of Children and Adolescents to Alcohol Advertising on Television in Australia’ (2008) 69 *Journal of Studies on Alcohol and Drugs* 676.

²⁹ Victorian Department of Human Services, *Alcohol Beverage Advertising in Mainstream Australian Media 2005 to 2007: Expenditure and Exposure* (April 2009) 13. This study also used TARPS as the measure of exposure.

³⁰ Sherilene Carr et al, ‘Child and Adolescent Exposure to Alcohol Advertising in Australia’s Major Televised Sports’ (2016) 35 *Drug and Alcohol Review* 406, 408.

sports broadcasts produced 50.9 million ‘exposures’³¹ of minors to alcohol advertisements, which again approximated the exposure of young adults.³² Although many more minors were watching sporting broadcasts (and probably seeing the associated alcohol advertising) between 6am and 8.29pm than between 8.30pm and 11.59pm, the study also found that the ‘exposure’ of minors to alcohol advertising peaked between 8.30pm and 10pm,³³ because of the large number of alcohol advertisements shown during the broadcast period from 8.30pm–10pm. A 2012 study by O’Brien et al found that most alcohol advertisements were shown during the period 8.30pm–11.59pm and were shown during non-sport programming (2460 alcohol ads in sport v 15269 alcohol ads in non-sport).³⁴ Overall, 25% of alcohol advertising was shown during sports TV.³⁵ But of those alcohol advertisements shown during the day, the majority was during sports programming (2811 alcohol ads in sport v 424 alcohol ads in non-sport)³⁶ and the majority of viewers during the day were minors.³⁷

In 2012, Pettigrew and colleagues found that teenagers were exposed to as much alcohol marketing as adults on commercial television.³⁸ In 2017, White et al found that exposure to television alcohol advertising among young people in Australia had declined after 2005 but, by 2011, was still over half that of adult viewers.³⁹

The seven studies discussed here suggest that minors are exposed to alcohol marketing on commercial television in Australia at levels that far exceed what is ‘tolerable’. Although they counted ‘exposures’ using different methods, the studies suggest that whilst alcohol marketing may not be placed in programs *primarily* directed at a child audience, it is being placed in programming which is attracting a sizeable under-age audience.

³¹ In the study, rather than using TARPS as in the Fielder et al study, ‘exposures’ were calculated as the number of viewers per broadcast multiplied by the number of alcohol advertisements per broadcast: *ibid* 407.

³² *Ibid* 408.

³³ *Ibid*.

³⁴ *Ibid* 3.

³⁵ *Ibid* 5. In another recent study, it was found that 49.5% of alcohol advertising was in sports broadcasts compared to other broadcasts: ‘Alcohol and Junk Food Advertising and Promotion through Sport: Research Highlights, Preventing Harm from Alcohol’ (Victorian Health Promotion Foundation, March 2014) 2.

³⁶ Kerry S O’Brien et al, ‘Alcohol Advertising in Sport and Non-sport TV in Australia, During Children’s Viewing Times’ (2015) 10 *PLoS ONE* e0134889, 3.

³⁷ *Ibid*.

³⁸ Simone Pettigrew et al, ‘The Extent and Nature of Alcohol Advertising on Australian Television’ (2012) 31 *Drug and Alcohol Review* 797, 800.

³⁹ Victoria White et al, ‘Adolescents’ Exposure to Paid Alcohol Advertising on Television and Their Alcohol Use: Exploring Associations During a 13-year Period’ (2017) 112 *Addiction* 1742, 1746.

IV THE EFFECTS ON MINORS OF EXPOSURE TO ALCOHOL MARKETING ON TELEVISION

A A CAUSAL CONNECTION BETWEEN EXPOSURE TO MARKETING AND DRINKING IN MINORS

The social science research suggests that there is a causal connection between the exposure of minors to alcohol marketing and their use of alcohol. Most recently, Sargent and Babor concluded, in a summary of findings from eleven narrative and systematic reviews, that ‘there is persuasive evidence that exposure to alcohol marketing is one cause of drinking onset during adolescence and also one cause of binge drinking’.⁴⁰ Sargent and Babor’s review applied the well-known Bradford Hill criteria of causality to reach their conclusion that the association between marketing exposure and youth drinking is causal.⁴¹ Underpinning Sargent and Babor’s finding of causality are tens of studies (using different study designs), including systematic reviews, with findings of an association between alcohol exposure and alcohol use by minors, that cumulatively now support a finding of causality.⁴² For example, in 2009, Smith and Foxcroft concluded, from their review of seven longitudinal studies, that ‘the data from these studies suggest that exposure to alcohol advertising in young people influences their subsequent drinking behaviour.’⁴³ In 2009, Anderson et al reached a similar conclusion to Smith and Foxcroft from their review of thirteen longitudinal studies (which included the seven studies reviewed by Smith and Foxcroft plus six later studies).⁴⁴ In 2016, David Jernigan and colleagues conducted a systematic review of new longitudinal studies that have emerged since the systematic reviews by Smith and Foxcroft and Anderson et al in 2009.⁴⁵ Jernigan et al stated their findings slightly less emphatically than this, by concluding that ‘all [of the studies they reviewed] found positive associations between exposure to marketing and some measure

⁴⁰ James D Sargent and Thomas F Babor, ‘The Relationship Between Exposure to Alcohol Marketing and Underage Drinking is Causal’ (2020) Supplement 19 *Journal of Studies on Alcohol and Drugs* 113, 120.

⁴¹ Ibid 114.

⁴² Earlier review studies included Petra Meier et al, ‘Independent Review of the Effects of Alcohol Pricing and Promotion, Part A: Systematic Reviews’ (University of Sheffield, September 2008); Peter Anderson et al, ‘Impact of Alcohol Advertising and Media Exposure on Adolescent Alcohol Use: A Systematic Review of Longitudinal Studies’ (2009) 44 *Alcohol and Alcoholism* 229, 230.; Leslie A Smith and David R Foxcroft, ‘The Effect of Alcohol Advertising, Marketing and Portrayal on Drinking Behaviour in Young People: Systematic Review of Prospective Cohort Studies’ (2009) 9:51 *BMC Public Health*; ‘Does Marketing Communication Impact on the Volume and Patterns of Alcohol Consumption of Alcoholic Beverages, Especially by Young People? A Review of Longitudinal Scientific Opinion of the Science Group’ (European Alcohol and Health Forum, 2009); David Jernigan et al, ‘Alcohol Marketing and Youth Alcohol Consumption: A Systematic Review of Longitudinal Studies Published Since 2008’ (2016) 112 (Supplement) *Addiction* 7; Kaidy Stautz et al, ‘Immediate Effects of Alcohol Marketing Communications and Media Portrayal on Consumption and Cognition: A Systematic Review and Meta-analysis of Experimental Studies’ (2016) 16 *BMC Public Health* 465, 478–9; Stephanie Scott et al, ‘Does Industry-Driven Alcohol Marketing Influence Adolescent Drinking Behaviour? A Systematic Review’ (2017) 52 *Alcohol and Alcoholism* 84. A further systematic review study looked specifically at digital advertising and behaviours among young people: Himanshu Gupta et al, ‘A Systematic Review of the Impact of Exposure to Internet-Based Alcohol-Related Content on Young People’s Alcohol Use Behaviours’ (2016) 51 *Alcohol and Alcoholism* 763.

⁴³ Smith and Foxcroft, (n 42), 9.

⁴⁴ Anderson et al, (n 42), 229–43.

⁴⁵ Jernigan et al, (n 42).

of subsequent drinking behaviour and/or negative consequences of drinking’.⁴⁶ But they also found that evidence of an associative effect was stronger for the relationship between exposure to alcohol marketing and heavy drinking than for the relationship between the exposure to alcohol marketing and alcohol initiation.⁴⁷ Some of the strengths of the studies reviewed by Jernigan et al include the range of countries involved, the ages of the children studied (including those as young as 10 years), and the number of marketing media examined as the exposure variable (eg, internet, television, sports sponsorship).⁴⁸

The Australian research on the association between exposure of minors to alcohol marketing and harm is consistent with these international findings. For example, in 2017, White et al found that greater potential exposure to past-month total alcohol advertising increased the likelihood of adolescents drinking in the past month, drinking in the past week, and drinking in a risky manner.⁴⁹ Jones and Magee reached a similar conclusion in 2011,⁵⁰ although it should be noted that exposure to alcohol marketing on television was not found to be associated with drinking in some sub-groups of minors. For example, amongst males aged 16–17 years, those who reported having seen alcohol advertising on television were much *less* likely to be regular or recent drinkers.⁵¹ However, it is unlikely that exposure to alcohol marketing had a protective effect on this group. One possibility is that this group spent more time watching television than other cohorts, which both exposed them to more alcohol marketing but also meant they were not spending time in settings where they might consume alcohol (such as licensed venues or parties).

B EXPLANATIONS FOR THE CAUSAL RELATIONSHIP BETWEEN EXPOSURE AND CONSUMPTION IN MINORS

Recently, more research has been undertaken to understand ‘how’ alcohol marketing influences youth drinking patterns. It has been described as a ‘complex relationship’.⁵² It is certainly not a simple ‘see some alcohol marketing, consume alcohol’ equation. Recent studies have produced evidence that alcohol promotion affects intermediate variables, such as positive attitudes about alcohol,⁵³ which may ultimately affect consumption behaviours. Kyle Brown and colleagues found that alcohol advertising increased positive implicit attitudes towards alcohol and decreased negative implicit attitudes in heavier drinkers.⁵⁴ Austin, Chen and Grube

⁴⁶ Ibid 17.

⁴⁷ Ibid 16.

⁴⁸ Ibid 10–15.

⁴⁹ White et al, (n 42), 1746.

⁵⁰ Jones and Magee, (n 42), 632–4.

⁵¹ Ibid 634.

⁵² Stautz et al, (n 42), 466.

⁵³ Matthis Morgenstern et al, ‘Attitudes as Mediators of the Longitudinal Association between Alcohol Advertising and Youth Drinking’ (2011) 165 *Archives of Pediatrics and Adolescent Medicine* 610, 613–15.

⁵⁴ Kyle G Brown et al, ‘The Cognitive and Behavioural Impact of Alcohol Promoting and Alcohol Warning Advertisements: An Experimental Study’ (2015) 51 *Alcohol and Alcoholism* 354, 59. This finding was consistent with Renske Koordeman, Doeschka J Anschutz and Rutger Engels ‘Exposure to Alcohol Commercials in Movie

have argued that alcohol use following exposure to alcohol advertising depended on a person's liking of the portrayals of alcohol and their desire to emulate those portrayals (called 'identification'), which were, in turn, connected to liking of brands of alcohol and positive expectancies (or beliefs) about drinking.⁵⁵ Austin et al concluded from their study that 'interpretations of messages are at least as important as media exposure to adolescent alcohol use'.⁵⁶ Jackson and Bartholow argue that exposure to alcohol marketing 'influences a host of psychological processes, some operating at the individual or intrapersonal level (familiarity, attitude formation, evaluative conditioning, expectancies) and others at the social or interpersonal level (individual and group identification, social norms), and that changes in these processes affect the likelihood that adolescents will initiate and maintain alcohol involvement'.⁵⁷ Individual characteristics, including educational attainment, socio-economic status,⁵⁸ and drinking status,⁵⁹ will likely also influence responses to alcohol marketing.⁶⁰

C THE ALCOHOL INDUSTRY'S NEGATIVE RESPONSE TO THE PUBLIC HEALTH EVIDENCE

The public health evidence that alcohol marketing causes or is even associated with increased hazardous alcohol consumption practices by minors is vigorously contested by the alcohol industry. The industry's argument is multi-pronged.⁶¹ Firstly, it maintains that the purpose of its marketing is to shift consumers from one brand to another, especially from lower value brands to higher value ones.⁶² It repeatedly rejects the suggestion that its marketing is intended

Theatres Affects Actual Consumption in Young Adult High Weekly Drinkers: An Experimental Study' (2011) 20 *American Journal on Addictions* 285, 289–90.

⁵⁵ Erica Weintraub Austin, Meng-Jinn Chen and Joel W Grube, 'How Does Alcohol Advertising Influence Underage Drinking? The Role of Desirability, Identification and Skepticism' (2006) 38 *Journal of Adolescent Health* 376, 383–3. Recent research by Ross et al also showed an association between young people's choice of a brand of alcohol and their liking of the brand advertising, their identification with the brand and their perception of people in the media consuming the brand: see Craig S Ross et al, 'Selection of Branded Alcoholic Beverages by Underage Drinkers' (2015) 56 *Journal of Adolescent Health* 564, 566–570.

⁵⁶ Austin, Chen and Grube, (n 55), 382.

⁵⁷ Kristina M Jackson and Bruce D Bartholow, 'Psychological Processes Underlying Effects of Alcohol Marketing on Your Drinking' (2020) Supplement 19 *Journal of Studies on Alcohol and Drugs* 81, 89.

⁵⁸ Brown, (n 54), 355.

⁵⁹ Rutger Engels and Renske Koordeman, 'Do Alcohol Portrayals in Movies and Commercials Directly Affect Consumption?' (2011) 106 *Addiction* 472, 472–3.

⁶⁰ It seems likely that certain persons are more susceptible to the negative effects of alcohol advertising than others. For example, the study by O'Brien and Kypri found increased likelihood of hazardous drinking by sports people who received alcohol sponsorship: see Kerry S O'Brien and Kypros Kypri, 'Alcohol Industry Sponsorship and Hazardous Drinking Among Sportspeople' (2008) 103 *Addiction* 1961, 1963–5.

⁶¹ See generally Emily Savell, Gary Fooks and Anna B Gilmore, 'How Does the Alcohol Industry Attempt to Influence Marketing Regulations? A Systematic Review' (2016) 111 *Addiction* 18; Florentine Petronella Martino, 'Analysis of Alcohol Industry Submissions against Marketing Regulation' (2017) 12 *PLoS ONE* 1 e017566. For the framing of the debates by the media, see Anna Fogarty and Simon Chapman, 'Advocates, Interest Groups and Australian News Coverage of Alcohol Advertising Restrictions: Content and Framing Analysis' (2012) 12 *BMC Public Health* 727.

⁶² 'Position Paper: Alcohol Advertising, Promotion and Sports Sponsorship' (Brewers Association of Australia) 1.

to recruit new drinkers or to encourage people to drink more or to excess. It is adamant that it is not ‘intentionally targeting’ its alcohol advertising at minors.⁶³

Secondly, the alcohol industry argues that there is no credible evidence to demonstrate an association between alcohol advertising and consumption.⁶⁴ It goes so far as to say that ‘[g]lobally, virtually all research has found that marketing has no or very little effect on overall alcohol consumption.’⁶⁵ This position is not correct as outlined above. But the industry relies on several select econometric studies.⁶⁶ These studies have several limitations: they miss below-the-line advertising which is generally not included in reports on expenditure;⁶⁷ they focus on population-level consumption which may obscure changes in the levels of consumption in sub-populations, such as young people;⁶⁸ and they do not differentiate between marketing in different media, which matters because the redistribution of expenditure across different media (without increasing the total spend) might affect consumption.⁶⁹

Third, the industry offers up a range of alternative explanations for youth drinking, including parental and peer influence.⁷⁰ It does not suggest that these influences might work in combination with alcohol marketing. Rather, the existence of these influences purportedly exonerates alcohol marketing from *any* responsibility for youth consumption. This is a serious over-simplification of what has been described above about the complex relationship between marketing and behaviour.

V THE REGULATION OF ALCOHOL MARKETING ON TELEVISION IN AUSTRALIA

A A WEAK, FRAGMENTED AND OUTDATED REGULATORY LANDSCAPE

The system for regulating alcohol marketing in Australia is a complicated patchwork that is not effective in minimising the exposure of minors to alcohol marketing on television. In addition to the consumer law obligations not to make misleading or deceptive representations

⁶³ Ibid; ‘Diageo Australia’s Response to the Australian National Preventative Health Agency’s Issue Paper – Alcohol Advertising: The Effectiveness of Current Regulatory Codes in Addressing Community Concerns’ (Diageo Australia) 2. But there is scepticism as to the industry claim that it does not intentionally target children, especially since the revelation of alcohol industry documents which showed that the industry in the United Kingdom has conducted market research on 15 and 16 year olds to guide product development and has engaged in marketing activities on university campuses, even though some students will be under-age: see Hastings, (n 8), 9–10, 12–14.

⁶⁴ See, eg, Brewers, (n 62), 1.

⁶⁵ ‘Advertising, Marketing and Promotion’ (Alcohol Beverages Australia, Position Statement, 2018).

⁶⁶ See, eg, Alcohol Beverages Australia, Submission No 11 to Portfolio Committee No. 1 Premier and Finance, Parliament of New South Wales, *Inquiry into Alcoholic Beverages Advertising Prohibition Bill 2015*, 10 December 2017.

⁶⁷ Australian National Preventive Health Agency, *Alcohol Advertising: The Effectiveness of Regulatory Codes in Addressing Community Concern* (Draft Report, February 2014) 61.

⁶⁸ Ibid.

⁶⁹ Meier et al, (n 42), 82.

⁷⁰ See, eg, Alcohol Beverages Australia, Submission No 35 to the Commonwealth Department of Health, *Consultation on Draft National Alcohol Strategy 2018–2025*, 9 February 2018, 9–10.

in relation to good and services,⁷¹ there are many different schemes of regulation which cover advertising on television, some of which are specific to the medium and some of which apply to advertising or alcohol advertising in any media. The overall effect of these schemes is that alcohol marketing is permitted, except during certain prohibited programming and timeslots ('placement restrictions') and except if it contains certain prohibited content ('content restrictions'). The primary regulatory approach is industry self-regulation, with only limited government intervention and only a fragmented use of legislation.⁷² Although the alcohol industry claims that it is not a self-regulatory model but 'quasi-regulatory' approach which is being used,⁷³ these claims about terminology simply serve to obfuscate the fact that the alcohol industry largely sets and enforces the rules regarding its promotional activities on television.

There is an inequality in the regulation of alcohol marketing on television related to the media or platform by which the television is delivered. It is the case that alcohol marketing *in any media* is subject to industry regulation through the ABAC Responsible Alcohol Marketing Code (Part V.B) and the codes made by the Australian Association of National Advertisers (Part V.C). However, beyond that, additional regulation only applies where the marketing is via a broadcasting service covered by the *Broadcasting Services Act 1992* (Cth) ('the Act') (Part V.D). The Act then further differentiates between broadcasting services. The Act imposes the greatest restrictions (albeit still very limited) are on free to air or 'commercial television' broadcasting services. But streaming/video on demand services and the internet-delivered multi-channels of the broadcasting companies are not governed by the Act and are therefore not subject to the Act's rules on alcohol marketing. They are also not subject to any other legislation that curtails their use of alcohol marketing. The only regulation of alcohol marketing in these media come via the ABAC Responsible Alcohol Marketing Code and the AANA codes. The overall effect is that there almost no or very few protections of consumers in respect of these newer media services, including in relation to alcohol marketing. This fragmentation of consumer protection regulation across media platforms reflects the outdated nature of Australia's media regulation and is admittedly not specific to alcohol marketing.⁷⁴ It started in the early 2000s when the government made a policy decision to protect content delivered over the internet from the general media requirements,⁷⁵ with the original rationale being to stimulate the internet industry in Australia.⁷⁶ This justification no longer applies but bringing all media onto under a common regulatory framework is providing challenging for government, with the effect that the new media largely escapes regulation and minors are potentially exposed to significant alcohol marketing through these avenues.

⁷¹ See *Competition and Consumer Act 2010* (Cth) ss 6, 7, 131, 140B and Schedule 2.

⁷² This is a regulatory approach that the industry had been successful in having the government accept in Australia for pregnancy and alcohol warning labels until recently: see Paula O'Brien, 'Warning Labels about Alcohol Consumption and Pregnancy: Moving from Industry Self-regulation to Law' (2020) 27 *Journal of Law and Medicine* 259.

⁷³ 'The ABAC Scheme Ltd Annual Report 2012' (The ABAC Scheme Ltd, 2012) 1.

⁷⁴ Australian Competition and Consumer Commission, *Digital Platforms Inquiry – Final Report* (June 2019) 199-204.

⁷⁵ *Broadcasting Services ("Broadcasting Service" Definition – Exclusion) Determination 2022* (Cth).

⁷⁶ Australian Government, *The Broadcasting Service Exclusion Determination Consultation Paper* (August 2022) 10-11.

This Part critiques the different regulatory schemes that apply to alcohol marketing on television and focuses on the *specific rules on minors and alcohol marketing*. This focus on rules specific to minors does not take away from the fact that other ‘general’ rules – such as not depicting drinking and driving – are important in ensuring that the population (including minors) develops an appropriate understanding about the risks of alcohol consumption and its acceptable uses. However, the situation in Australia is that contrary to the WHO’s recommendation, there are few general constraints on alcohol marketing on television, most (but not all) of those focus on exposure of minors, and none of them adequately protects minors from exposure as the regulatory schemes turn on weak prescriptions and allow wide exceptions.

B ABAC RESPONSIBLE ALCOHOL MARKETING CODE

The ABAC Code regulates alcohol marketing in many media in Australia, including television,⁷⁷ but does so very poorly.⁷⁸ It is the centrepiece of an alcohol industry self-regulatory scheme (‘the ABAC Scheme’), which commenced in 1998 and which has been administered since that time through an entity, The ABAC Scheme Ltd.⁷⁹ The ABAC Scheme describes itself as ‘an initiative in quasi-regulation administered by industry and supported by government’.⁸⁰ In 2004, the Ministerial Council on Drug Strategy warned the industry that if it failed to implement recommended changes to the ABAC Code then government regulation would then be considered.⁸¹ However, there appear to have been no more recent threats — at least on the public record — by government about the Scheme. The three ABAC Scheme company directors are representatives from peak bodies for different alcohol segments, being the Brewers Association of Australia (‘Brewers Association’), Spirits & Cocktails Australia (‘SCA’), and the Winemakers Federation of Australia (‘WFA’).⁸² Other alcohol producers and retailers may also apply to become ‘members’ of the ABAC Scheme.⁸³ There is a separate Management Committee. The company directors make up three of the six members of the

⁷⁷ ‘ABAC Responsible Alcohol Marketing Code’ (ABAC Scheme Ltd, 26 February 2021).

⁷⁸ See Belinda Reeve, ‘Regulation of Alcohol Advertising in Australia: Does the ABAC Scheme Adequately Protect Young People from Marketing of Alcoholic Beverages?’ (2018) 18 *Queensland University of Technology Law Review* 96.

⁷⁹ There had been earlier iterations of the ABAC Scheme: see Gail Pearson, ‘Disbanding an Effective System for Self Regulation of Advertising: Beyond the Media Council of Australia’ (1999) 22 *Journal of Consumer Policy* 331, 335–9.

⁸⁰ ‘Guidance Notes – ABAC Responsible Alcohol Marketing Code’ (The ABAC Scheme Limited, as of 26 February 2020).

⁸¹ National Committee for the Review of Alcohol Advertising, *Review of the Self-Regulatory System for Alcohol Advertising* (Report to the Ministerial Council of Drug Strategy, August 2003) vii; Ministerial Council on Drug Strategy, ‘Joint Communiqué’ (Media Release, 1 August 2003). There have, over the years, been recommendations to government that further intervention is warranted if the industry does not improve the operation of the ABAC Scheme: see, eg, Australian National Preventive Health Agency, *Alcohol Advertising: The Effectiveness of Current Regulatory Codes in Addressing Community Concern* (Draft Report, February 2014) 9 and 94. None of these recommendations has converted to public threats by the government, although changes in the ABAC Scheme over time may be attributable to these recommendations or to government placing further pressure on the industry behind closed doors.

⁸² Australian Securities and Investment Commission, ‘Current Company Extract: The ABAC Scheme Ltd’ (23 October 2018) 1.

⁸³ The ABAC Scheme Ltd, *Signatories to the Scheme* <<http://www.abac.org.au/about/signatories/>>.

Management Committee. There is also a representative from the Communications Council Ltd and an independent chair. The Commonwealth Assistant Secretary with responsibility for alcohol and health (or his or her delegate) is the sixth member of the Management Committee.⁸⁴ The Management Committee sets the rules for alcohol marketing, and oversees a pre-vetting scheme⁸⁵ and a complaints mechanism (including an adjudication panel) to foster compliance with the ABAC Code.⁸⁶

The ABAC Code sets content and placement rules for ‘all marketing communications in Australia...’.⁸⁷ Despite the seemingly broad coverage of the ABAC Code, it does not, in fact, apply to all alcohol marketing, including ‘sponsorship’.⁸⁸ The exclusion of sponsorships is a major gap in the ABAC Code in terms of controlling alcohol marketing on television. Other gaps include that the rules of the Code only to its members. The lead industry organisations, Brewers Association, SCA and WFA are members. In turn, their members are bound by the ABAC Code. A number of other companies have signed up, including the major supermarket chains, Coles and Woolworths.⁸⁹ But alcohol marketing is generated by companies other than the members of the ABAC Scheme.

The standards under the ABAC Code mainly focus on the content of advertisements.⁹⁰ Thematically, the standards can be grouped under two broad headings: (1) responsible portrayals of the consumption of alcohol (which relate to the general population including minors); and (2) responsibility towards minors. The standards do not prescribe the permitted forms of alcohol marketing. But, recently, the standards have been amended to impose some restrictions on the placement of advertisements.⁹¹ Marketers are exhorted in various ABAC Scheme documents to comply with the ‘spirit and intent’ of the ABAC Code.⁹² Whether a marketing communication complies with a particular content standard is ‘to be assessed in terms of the probable understanding of the Marketing Communication by a reasonable person to whom the material is likely to be communicated and taking its content as a whole.’⁹³ The ‘values, opinions and life experiences common in a majority of the community is the benchmark’ for the ‘reasonable person’ test.⁹⁴

⁸⁴ ‘Rules and Procedures’ (The ABAC Scheme Limited) [1.1.5].

⁸⁵ Ibid [5]. However, such pre-vetting mechanisms are potentially very important to averting the exposure of the public to non-compliant marketing material. Once material is published, the harm is potentially done, and no complaint or adverse finding against the advertiser is going to ‘undo’ the wrongful exposure.

⁸⁶ Ibid [3]–[4].

⁸⁷ ABAC Code, (n 77), s 2(a).

⁸⁸ Ibid s 2(b)(v) and s 6 (definition of ‘sponsorship’).

⁸⁹ ABAC Signatories, (n 83).

⁹⁰ Some of the content standards in the ABAC Code find parallels in the state and territory liquor licensing legislation which also restricts alcohol marketing by licence-holders, but which tends to be limited, in its application, to on-premises marketing (such as inside a bar): see, eg, *Liquor Control Reform Act 1998* (Vic) ss 115A; Victorian Commission for Gambling and Liquor Regulation, *Guidelines for Responsible Liquor Advertising and Promotions* (August 2013).

⁹¹ The ABAC Scheme Ltd, ‘New Restrictions on Placement of Alcohol Marketing’ (Media Release, 19 July 2017).

⁹² ABAC Code, (n 77), preamble; ABAC Guidance Notes, (n 80), note 1.

⁹³ ABAC Guidance Notes, (n 80), note 5.

⁹⁴ Ibid.

There are three specific standards related to responsibility to minors. The first standard is a prohibition on marketing communications that have ‘strong or evident appeal to minors’.⁹⁵ The ‘strong or evident’ appeal provision is potentially important in controlling the *content* of alcohol marketing to ensure it does not contribute to children being interested in, and having positive associations, attitudes and expectancies towards, alcohol. In 2014, a definition of ‘strong or evident appeal to minors’ was added to the ABAC Code that limited the scope of the rule and has been interpreted very narrowly by the ABAC Adjudication Body to allow for marketing with ‘incidental or residual appeal to minors’.⁹⁶ The definition in the ABAC Code states says that ‘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 confectionery or soft drinks; or (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by minors.’⁹⁷

Marketing that ‘appeals’ to minors (but not strongly), is ‘attractive’ to them (but not more attractive to them than it is to adults) or is targeted at them (but not specifically) is permitted under the ABAC Code.⁹⁸ Recent investigations by the Foundation for Alcohol Research and Education has shown the ABAC Adjudication Panel to allow alcohol advertising that includes features shown to be appealing to minors, including the use of colourful and cartoon-like imagery commonly seen in children’s media content; references to skateboarding; and the Bundy Bear character.⁹⁹

The second standard is a set of placement restrictions directed to the protection of minors.¹⁰⁰ Introduced in the ABAC Code in 2017, these require the use of age restriction controls if they are available,¹⁰¹ and if they are not, then alcohol marketing must only be placed where the audience is reasonably expected to comprise at least 75% adults.¹⁰² It is noteworthy that the 75% rule only applies where age-gating is not available. However, age-gating has been shown to be ineffective for alcohol websites.¹⁰³ The 75% level of adult audience members is likely to result in a large number of children being exposed to alcohol marketing.

⁹⁵ ABAC Code, (n 77), s 3(b)(i); s 6 (definition of ‘strong or evident appeal to minors’).

⁹⁶ ABAC Complaints Panel, Determination No 5–7, 13, 14, 23, 25–31 of 2013, 14 March 2013 [57] <<http://www.abac.org.au/adjudication/5-713142325-31-2013-final-determination-liquorland-14-march-2013/>>.

⁹⁷ ABAC Code, (n 77), s 6 (definition of ‘strong or evident appeal to minors’).

⁹⁸ See, eg, ABAC Adjudication Panel, Determination No 97 of 2015, 22 September 2015 <<http://www.abac.org.au/adjudication/97-15/>>. An ad for an alcoholic lemonade, which has some similarities with an ad for soft drink, was found not to have strong or evident appeals to minors: [20]–[24].

⁹⁹ ‘Alcohol Companies Continue to Play By Their Own Rules, Putting Our Children’s Health at Risk’, *Foundation for Alcohol Research and Education* (Blog Post, 22 June 2022) <<https://fare.org.au/alcohol-companies-continue-to-play-by-their-own-rules-putting-our-childrens-health-at-risk/>>.

¹⁰⁰ ABAC Code, (n 77), s 3(b)(iv).

¹⁰¹ Ibid s 6 (definition of ‘placement rules’ (ii)).

¹⁰² Ibid s 6 (definition of ‘placement rules’ (iii)).

¹⁰³ Hannah Pierce et al. ‘Regulation of Alcohol Marketing in Australia: A Critical Review of the Alcohol Beverages Advertising Code Scheme’s New Placement Rules’ (2019) *Drug and Alcohol Review* 38(1) 16.

The third rule is a prohibition on the depiction of minors, unless they appear in an incidental role in a natural setting where there is no implication that the child will consume alcohol (such as a child accompanying a parent into a liquor store).¹⁰⁴

The ABAC adjudication panel has very limited power to impose sanctions on advertisers found to be in breach of the ABAC Code. If a breach is found, the ABAC Rules and Procedures state that a marketer must withdraw, discontinue, or modify the offending marketing as soon as possible and within 5 business days of the panel's determination.¹⁰⁵ If the marketer refuses to withdraw, discontinue or modify the offending marketing, the only powers available to the ABAC Scheme are to terminate the company's membership of the ABAC Code or to notify a range of other parties (governments, media companies etc).¹⁰⁶

C AUSTRALIAN ASSOCIATION OF NATIONAL ADVERTISERS CODES

The Australian Association of National Advertisers, whose members includes alcohol industry companies, has created a number of self-regulatory codes. AANA has a general code that allows consumer complaints in matters of taste, decency, morality, and public health and safety.¹⁰⁷ It also has the Children's Advertising Code¹⁰⁸ that states that 'Advertising or Marketing Communications to Children must not be for, or relate in any way to, Alcohol Products or draw any association with companies that supply Alcohol Products.'¹⁰⁹ But as with the ABAC Code, the AANA rule only applies to marketing 'primarily directed to children' (which are defined as those under 14 years) and not just advertising seen by children.¹¹⁰ This makes the central rule of limited import to the protection of minors from alcohol marketing, as most of children's exposure to alcohol marketing will be via media for a general, or even a primarily adult, audience. But the rule is more weakened further by the fact that it does not prohibit alcohol marketing being directed to those who are 14 – 17 years. It uses a definition of a 'child' that does not match the general conception of a child as a person under 18 years and does not accord with the legal drinking age set in Australian jurisdictions at 18 years.¹¹¹

D REGULATION OF TELEVISION AS A MEDIUM

1 *Broadcasting Services (Australian Content and Children's Television) Standards 2020*

Under the Act, holders of television broadcasting licences are subject to the *Broadcasting Services (Australian Content and Children's Television) Standards 2020* ('Children's TV Standard') which include rules on alcohol marketing. The Children's TV Standard states that, 'a licensee must not broadcast an advertisement for alcoholic drinks during a C program, or in

¹⁰⁴ ABAC Code, (n 77), s 3(b)(ii). There are also limitations on the depiction of persons under the age of 25 years: see at s 3(b)(iii).

¹⁰⁵ ABAC Rules and Procedures, (n 84) [4.12]. See also [4.13] for the placement of marketing communications.

¹⁰⁶ Ibid [4.19].

¹⁰⁷ Australian Association of National Advertisers, 'Code of Ethics' (1 February 2021) s 2.

¹⁰⁸ Australian Association of National Advertisers, 'Children's Advertising Code' (March 2021)

¹⁰⁹ Ibid s 2.12.

¹¹⁰ Ibid s 1 (definitions).

¹¹¹ See, eg, *Liquor Control Reform Act 1995* (Vic) s 123.

a break immediately before, during or immediately after a C program'.¹¹² The same restrictions applies to an advertisement of sponsorship announcement 'that identifies or refers to a company, person, or organisation whose principal activity is the manufacture, distribution or sale of alcoholic drinks'.¹¹³ This rule applies only to C programs which are programs that meet criteria under the Children's TV Standard, the first of which is that it is a program 'made specifically for children, or groups of children, of school age'.¹¹⁴

The benefits of this provision are very limited in terms of protecting minors from exposure to alcohol marketing, as it only applies to a 'holder of a commercial television broadcasting licence'.¹¹⁵ This means that it only applies to commercial broadcast television and not to subscription television or video on demand services (such as Netflix). Furthermore, with commercial broadcast television, it does not apply to the broadcasting corporations' multi-channel services delivered over the internet (eg, Seven West media has a commercial broadcast licence under the Act or Channel 7 but it also offers, over the internet, other channels such as 7two, 7mateHD etc).

2 *Television Industry Codes Approved or Registered by the Australian Communications and Media Authority under the Broadcasting Services Act.*

There are four categories of television broadcasters set down in the Act: commercial, community, subscription, and national.¹¹⁶ Advertising by these broadcasters, including in relation to alcohol, is largely self-regulated by the broadcasting industry associations through a set of codes of practice. However, television is the medium in which the Commonwealth government, through the statutory agency, the Australian Communications and Media Authority ('ACMA'), has the most extensive regulatory involvement. ACMA has a role in rule-setting and rule enforcement in the industry self-regulatory schemes. In the case of commercial free to air, community and subscription television, there is a legislative requirement under the Act that each segment of the broadcasting industry develops a code of practice.¹¹⁷ ACMA then registers these codes pursuant to its powers under the Act if it is satisfied that the codes meet certain standards mandated by the Act.¹¹⁸ In the case of the national broadcasters, the Australian Broadcasting Corporation ('ABC') and the Special Broadcasting Corporation ('SBS') each develop their own codes,¹¹⁹ which they are required by

¹¹² *Broadcasting Services (Australian Content and Children's Television) Standards 2020* (Cth) standard 37(1).

¹¹³ *Ibid* standard 37(2).

¹¹⁴ *Ibid* standard 8 (definition of 'C program').

¹¹⁵ *Ibid* standards 37 and 8 (definition of a 'licensee').

¹¹⁶ *Broadcasting Services Act 1992* (Cth) s 11 ('*Broadcasting Act*').

¹¹⁷ *Broadcasting Act* s 123(1). For the codes for each broadcasting segment, see: 'Commercial Television Industry Code of Practice 2018' (Free TV Australia, 2018) (commercial free-to-air television) ('TV Code'); 'Community Television Broadcasting Codes of Practice 2008' (Australian Community Television Alliance, 9 June 2011) (community broadcasting); 'Codes of Practice 2013, Subscription Broadcast Television' (Australian Subscription Television and Radio Association, 2013) (subscription broadcasting).

¹¹⁸ *Broadcasting Act* s 123(4). There is incentive for the industry to create a code because ACMA has the power to set standards where there is no code of practice addressing a particular issue (or the code is 'not operating to provide appropriate community standards'): at s 125.

¹¹⁹ 'Code of Practice 2023' (Australian Broadcasting Corporation, 2023); 'Codes of Practice 2021' (Special Broadcasting Corporation, amended April 2022) ('SBS Code').

statute to notify to ACMA.¹²⁰ Through the code registration and notification processes, ACMA thereby obtains power under the Act to investigate consumer complaints about alleged breaches of the codes should the broadcaster fail to respond to complaints.¹²¹

Of all the industry codes for broadcast television, the Commercial Television Industry Code of Practice ('TV Code') has the most elaborated provisions on alcohol advertising ('Alcohol Rules'), yet, in terms of the public health objective of minimising the exposure of minors to alcohol marketing, the TV Code is deeply inadequate in many respects. The Alcohol Rules have been progressively weakened over the years, with the most recent amendments in 2015 opening the way for more alcohol marketing, despite protests from public health groups. A solid framework of rules, which reflects and inspires a virtuous 'corporate conscience'¹²² is fundamental to functional industry self-regulation but the TV Code fails this test.

The TV Code allows the broadcasting of alcohol marketing during some programming that will have an under-age viewing audience. The TV Code states that 'Commercial[s] for Alcoholic Drinks' may only be shown on commercial television during the following times:¹²³

- a. 8.30pm – 5am, 12 noon – 3pm Monday to Friday (school days);
- b. 8.30pm – 5am Monday to Friday (school holidays), Saturday and Sunday; or
- c. as an accompaniment to the broadcast of a 'sports program' on 'weekends' and public holidays.

The 'sports program' carve-out was introduced in its current form in 2015. A live sports exception has applied to alcohol advertising on commercial television since at least 1975,¹²⁴ but the TV Code was amended to cover any sporting broadcast. A 'sports program' is now defined very broadly as a 'program predominantly consisting of (a) coverage of a sporting event (whether *live*, *replay* or *highlights*); (b) sporting commentary, analysis, interview and news; or (c) presentations/awards and ceremonies associated with a sporting event.'¹²⁵ Furthermore, the concept of a 'weekend' has also been defined as extending from 6pm Friday evening to midnight on the following Sunday night.¹²⁶ It is because of the broad exception that all kinds of alcohol marketing material is seen during sports broadcasts, including traditional in-break advertising as well as sponsors' names on the field or pitch and around the boundaries of the sporting arena. It is this latter form of marketing, embedded in the programming, that serves to link sports so tightly to alcohol brands and use.

¹²⁰ *Australian Broadcasting Corporation Act 1983* (Cth) s 8(1)(e) ('ABC Act'); *Special Broadcasting Corporation Act 1991* (Cth) s 10(1)(j).

¹²¹ *Broadcasting Act* ss 148, 149 (commercial, community and subscription broadcasters), ss 150–151 (ABC and SBS).

¹²² Neil Gunningham and Joseph Rees, 'Industry Self-regulation: An Institutional Perspective' (1997) 19 *Law & Policy* 363, 382.

¹²³ TV Code, (n 117), s 6.2.

¹²⁴ Australian Broadcasting Control Board, *Television Programme Standards* (1975) [40(c)].

¹²⁵ TV Code, (n 117), s 8 (definition of 'sports program').

¹²⁶ *Ibid* s 8 (definition of 'weekend'). In 1975, no alcohol advertising was allowed at all on Sundays, Christmas Day or Good Friday, and the sporting exception applied only to Saturdays: see Australian Broadcasting Control Board, (n 124), [40(c)].

The TV Code definition of a ‘Commercial for Alcoholic Drinks’ is also narrow, potentially leaving a considerable amount of alcohol marketing outside its strictures. A ‘Commercial for Alcoholic Drinks’ only means ‘a commercial that *directly promotes the purchase or use* of one or more alcoholic drinks’,¹²⁷ which does not include certain categories of alcohol marketing: ‘program sponsorship announcements which make no direct reference to the price of goods or services’;¹²⁸ ‘any commercial where alcohol or a brand associated with alcohol is incidental and alcohol consumption is responsibly depicted’;¹²⁹ ‘commercials for licenced restaurants, clubs, entertainment venues, tourist attractions and dining establishments’;¹³⁰ and ‘a commercial which does not directly promote an alcoholic drink for an entity or company that participates in the manufacture, distribution or sale of alcoholic drinks’.¹³¹

The sanctions available for breaches of the Alcohol Rules in the TV Code are also limited. Where a person is concerned about alcohol advertising on TV being non-compliant with a provision in the TV Code, the person *must* take their complaint to the broadcaster in the first instance.¹³² The broadcaster must decide whether to uphold a complaint against itself, but is not subject to any penalty if it does so. However, if the complaint remains unresolved, then the complainant can forward the matter to ACMA for investigation.¹³³ Where ACMA finds a breach of an industry code, ACMA has discretion under the Act to impose an additional condition on the broadcaster’s licence¹³⁴ or accept an enforceable or unenforceable undertaking from the licensee.¹³⁵

VI CONCLUSION

Television remains a powerful medium for the marketing of alcohol to the Australian population. Television is no longer about the box in the corner of the living room. It is delivered by multiple service-providers, via broadcast and digital technologies, and viewable on many different devices inside and outside the home. The marketing of alcohol is highly sophisticated, with brands and products being promoted by alcohol producers through relationships with powerful commercial associates, with the major sporting codes and the digital and broadcasting media companies being the most important allies of the alcohol industry in Australia. The alcohol industry is lauded in advertising circles for the creativity seen in its marketing.¹³⁶ But

¹²⁷ TV Code, (n 117), s 8 (definition of ‘commercial for alcoholic drinks’).

¹²⁸ Ibid s 8 (definition of ‘commercial for alcoholic drinks’, para (a)).

¹²⁹ Ibid s 8 (definition of ‘commercial for alcoholic drinks’, para (c)).

¹³⁰ Ibid s 8 (definition of ‘commercial for alcoholic drinks’, para (d)).

¹³¹ Ibid s 8 (definition of ‘commercial for alcoholic drinks’, para (b)).

¹³² Ibid s 7.2.1.

¹³³ *Broadcasting Act* s 148. See also *ibid* s 7.3.2.

¹³⁴ *Broadcasting Act* s 43. ACMA could make compliance with the relevant code a condition of the broadcaster’s licence, such that any future breach would expose the licensee to the range of sanctions that are available for breaches of the licence conditions: see at ss 139–143.

¹³⁵ Ibid ss 205V–205X, especially s 205W(1)(d)–(f).

¹³⁶ Miranda Ward, ‘Beer Ads Bottlenecked as Brands Cut TV Spending’, *Australian Financial Review* (online, 24 May 2021) <<https://www.afr.com/companies/media-and-marketing/beer-ads-bottlenecked-as-brands-cut-tv-spending-20210521-p57twj>>.

this perspective ignores the nature of the product being advertised and the harms that it causes. Alcohol consumption is one of the major contributors to the global burden of disease and death. The evidence is strong that exposure to marketing of alcohol causes initiation to drinking and harmful drinking patterns in minors.

Yet, Australia has failed to take seriously the task of regulating alcohol marketing. It has not heeded the WHO's recommendation that countries enact bans or comprehensive restrictions on alcohol marketing. Australia's regulation is at the other end of the regulatory spectrum. There is a weak alcohol industry code that prohibits alcohol marketing that has 'strong or evident appeal to minors' or in programming where adults make up less than 75% of the audience. The rules in their design and application are inadequate to address the way television works in the digital age. The advertising industry code is similarly ineffective to protect minors from exposure to alcohol marketing. The television-specific regulation focusses on commercial free to air television and leaves the new digital platforms free to do as they see fit with respect to advertising.

Australia has been a world leader with respect to tobacco marketing, introducing its first measures to ban tobacco advertising on radio and television in 1973.¹³⁷ Australia gradually phased out tobacco marketing through further legislative interventions by the Commonwealth, state and territory governments over the next 25 years. In 2023, the Commonwealth has undertaken to introduce further reforms to ensure that tobacco marketing is not re-emerging through new technology and new strategies used by the industry.¹³⁸ The experience with tobacco demonstrates that Australia is not lacking the regulatory capacity to design and implement controls on marketing by a harmful industry. There are more challenges in regulating the digital technology than the original broadcast media, but there are regulatory options available.¹³⁹ Australia has the institutional and intellectual capability and a very sound model in the tobacco marketing legislation that could be adapted to alcohol (as well as other harmful products such as gambling and unhealthy foods). However, the Commonwealth, state and territory governments have not been sufficiently motivated to regulate alcohol marketing more strenuously. The industry opposition to pressure on governments at all levels from vested commercial interests, including the alcohol, media and sporting sectors, is likely to be considerable.¹⁴⁰ But the public needs courageous government policy that confronts the challenges of media regulation, re-prioritises the public's health over commercial gain, and fully recognises that the harms from alcohol marketing and sales inflict on individuals, families, communities and the society at large.

¹³⁷ E Greenhalgh, M Scollo, and M Winstanley, 'Tobacco in Australia: Facts and Issues' (Cancer Council Victoria, 2023) ch 11. Available at <www.TobaccoInAustralia.org.au>.

¹³⁸ Becky Freeman, 'Reigniting Tobacco Control: Returning Australia to the Front of the Pack' (2023) 33 Public Health Research and Practice e3312304.

¹³⁹ See Thomas Norman et al, 'Regulating Alcohol Advertising for Public Health and Welfare in the Age of Digital Marketing: Challenges and Options' (2022) *Drugs: Education, Prevention & Policy* (early view); *Reducing the Harm from Alcohol by Regulating Cross-Border Alcohol Marketing, Advertising and Promotion: A Technical Report* (World Health Organization, 2022) ch 8.2.

¹⁴⁰ Paula O'Brien, Robin Room and Dan Anderson-Luxford, 'Commercial Advertising of Alcohol: Using Law to Challenge Public Health Regulation' (2022) 50 *Journal of Law, Medicine and Ethics* 240.