

REGULATION OF ALCOHOL ADVERTISING IN AUSTRALIA: DOES THE ABAC SCHEME ADEQUATELY PROTECT YOUNG PEOPLE FROM MARKETING OF ALCOHOLIC BEVERAGES?

BELINDA REEVE*

This paper examines regulation of alcohol advertising in Australia. Specifically, it considers whether the alcohol industry's code of conduct, the Alcohol Beverages Advertising Code ('ABAC') operates as an effective form of industry-based regulation, focusing on provisions that prohibit alcohol advertising in media directed to children and young people, and advertising content or messaging that appeals to minors. The paper sets out a framework for effective self-regulation and applies it to the substantive provisions and regulatory processes established by the ABAC Scheme. The paper finds that the substantive rules found in the ABAC contain a number of significant loopholes, including a failure to adequately restrict the placement of alcohol promotions or to regulate alcohol industry sponsorship. Further, the ABAC Scheme lacks independent administration, systematic monitoring, or meaningful sanctions for responding to non-compliance. Accordingly, regulatory processes lack transparency and accountability, undermining the credibility and efficacy of the Scheme. The paper concludes by outlining a phased or responsive approach to creating a regulatory regime that protects young people more effectively from exposure to alcohol marketing.

I INTRODUCTION

Alcohol consumption poses significant risks to children and young people,¹ and for those less than 18 years of age, not drinking is deemed the safest option.² While the proportion of young people aged 12–17 years who drink alcoholic beverages has declined,³ alcohol use among adolescents remains prevalent, with 9.1 per cent of males and 6.8 per cent of females in this age group exceeding adult guidelines for single occasion risky drinking.⁴ Alcohol use by young people is associated with a range of harms, including violence, unintentional injuries, depression, and

* BA(Hons) (ANU), LLB (Auck), PhD (Sydney), Senior Lecturer, The University of Sydney Law School.

¹ Fiona M Gore et al, 'Global Burden of Disease in Young People Aged 10–24 Years: A Systematic Analysis' (2011) 377 *The Lancet* 2093.

² National Health and Medical Research Council, *Australian Guidelines to Reduce Health Risks from Drinking Alcohol* (NHMRC, 2009) 58 <https://www.nhmrc.gov.au/_files_nhmrc/publications/attachments/ds10-alcohol.pdf>. The term 'young people' is defined here as people aged between 12 and 17 years of age, while the term 'children' refers to individuals aged less than 12 years of age. The term 'minors' refers to persons aged less than 18 years, who are not of legal drinking age in Australia. See, eg, *Liquor Act 2007* (NSW) s 4, Pt 7.

³ Australian Institute of Health and Welfare, *National Drug Strategy Household Survey 2016 —Key Findings* (2017) 58 <<https://www.aihw.gov.au/getmedia/15db8c15-7062-4cde-bfa4-3c2079f30af3/21028.pdf.aspx?inline=true>>.

⁴ *Ibid.*



negative impacts on neurological functioning.⁵ Alcohol consumption among young people also increases the risk of alcohol dependency later in life,⁶ and associated health conditions such as cardiovascular disease, cancer, and liver disease.⁷

Exposure to alcohol advertising is one of a range of factors that influences young people's drinking.⁸ Alcohol advertisements on Australian television have declined since 2005,⁹ but young people are still exposed to high levels of televised alcohol advertising.¹⁰ Advertising via other media channels has also increased, including in digital media,¹¹ as has advertising by retail outlets such as supermarkets.¹² Young people's exposure to digital alcohol advertising is of particular concern, given their extensive use of digital technology, the interactive and targeted nature of digital advertising, and the fact that advertising on social media platforms can be indistinguishable from user-generated content.¹³

Alcohol advertising often contains content that minors find appealing, such as the use of humour and animal characters,¹⁴ and young people interpret alcohol advertising as promoting social and

⁵ See, eg, NHMRC, above n 2, 58–68; Yvonne Bonomo et al, 'Adverse Outcomes of Alcohol Use in Adolescents' (2001) 96 *Addiction* 1485; Donald W Ziegler et al, 'The Neurological Effects of Alcohol on Adolescents and College Students' (2005) 40 *Preventive Medicine* 23.

⁶ RM Viner and B Taylor, 'Adult Outcomes of Binge Drinking in Adolescence: Findings from a UK National Birth Cohort' (2007) 61 *Journal of Epidemiology and Community Health* 902.

⁷ See, eg, Mark J Pletcher et al, 'Alcohol Consumption, Binge Drinking and Early Coronary Calcification: Findings from the Coronary Artery Risk Development in Young Adults (CARDIA) Study' (2005) 161 *American Journal of Epidemiology* 423; Jürgen Rehm et al, 'Global Burden of Disease and Economic Cost Attributable to Alcohol Use and Alcohol-Use Disorders' (2009) 373 *The Lancet* 2223.

⁸ See, eg, John E Donovan, 'Adolescent Alcohol Initiation: A Review of Psychosocial Factors' (2004) 35 *Journal of Adolescent Health* e7; Irene Geurinni, Giorgia Quadri and Allan D Thomson, 'Genetic and Environmental Interplay in Risky Drinking in Adolescents: A Literature Review' (2014) 49 *Alcohol and Alcoholism* 138. 'Advertising' is defined as 'a paid, mediated form of communication from an identifiable source, designed to persuade the receiver to take some action, now or in the future'. Jeff I Richards and Catharine M Curran, 'Oracles on "Advertising": Searching for a Definition' (2002) 31 *Journal of Advertising* 63, 74. Advertising forms part of a mix of marketing tools used by companies to find, keep, and gain customers, including 'the planning and execution of the way a product is designed, tested, produced, branded, packaged, priced, distributed, and promoted'. Sandra Moriaty et al, *Advertising: Principles and Practice* (Pearson, 3rd ed, 2015) 45. This paper will use the term 'advertising' unless referring specifically to another promotional tool such as sponsorship.

⁹ 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.

¹⁰ Lynda Fielder, Robert J Donovan and Robyn Ouschan, 'Exposure of Children and Adolescents to Alcohol Advertising on Australian Metropolitan Free-to-Air Television' (2009) 104 *Addiction* 1157. See also Sandra C Jones and Christopher A Magee, 'Exposure to Alcohol Advertising and Alcohol Consumption among Australian Adolescents' (2011) 46 *Alcohol and Alcoholism* 630.

¹¹ David H Jernigan and Anne E Rushman, 'Measuring Youth Exposure to Alcohol Marketing on Social Networking Sites: Challenges and Prospects' (2014) 35 *Journal of Public Health Policy* 91; Tim Lobstein et al, 'The Commercial Use of Digital Media to Market Alcohol Products: A Narrative Review' (2017) 112 (Suppl 1) *Addiction* 21.

¹² 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, 528.

¹³ Sally Dunlop, Becky Freeman and Sandra C Jones, 'Marketing to Youth in the Digital Age: The Promotion of Unhealthy Products and Health Promoting Behaviours on Social Media' (2016) 4 *Media and Communication* 35; Nicholas Carah et al, 'Emerging Social Media "Platform" Approaches to Alcohol Marketing: A Comparative Analysis of the Activity of the Top 20 Australian Alcohol Brands on Facebook (2012–2014)' (2017) 28 *Critical Public Health* 70.

¹⁴ Fielder, Donovan, and Ouschan, above n 10.

psychological benefits resulting from consuming alcohol.¹⁵ A significant body of research (including longitudinal studies and systematic reviews) suggests that exposure to alcohol advertising influences the likelihood that young people will begin drinking, that those already drinking will increase their intake, or that they will engage in risky drinking.¹⁶ Accordingly, the World Health Organization identifies both the extent of young people's *exposure* to alcohol marketing, and the *content* of such marketing (i.e., its appeal to young people), as crucial issues in reducing the harmful use of alcohol by minors,¹⁷ as well as calling for comprehensive regulation that restricts and reduces alcohol advertising overall.¹⁸ Similarly, voluntary industry codes on alcohol advertising often contain both 'content' and 'exposure' guidelines, which restrict alcohol advertising to media where the majority of the audience consists of adults, and prohibit advertising content that appeals to or targets minors.¹⁹

This paper examines the regulation of alcohol advertising in Australia, specifically the ABAC Responsible Alcohol Marketing Code ('ABAC'), and whether it contains the building blocks of an effective self-regulatory scheme. The regulatory framework for alcohol marketing is complex, but a key component is the industry-based scheme centred on the ABAC. The Code contains a series of standards on the responsible promotion of alcoholic beverages, including a prohibition on advertisements that have strong or evident appeal to minors, and rules that aim to prevent alcohol advertising from being targeted to minors, based on its placement in media with large audiences of young people, or directed to minors based on its content.²⁰ The ABAC Management Committee administers the Code, while the ABAC Adjudication Panel hears public complaints about non-compliance.²¹ A pre-vetting service is available to ensure compliance with the ABAC prior to the publication or broadcast of alcohol advertisements.²² The alcohol industry describes the ABAC Scheme as 'quasi-regulatory', citing federal government representation on the ABAC

¹⁵ See, eg, Sandra C Jones and Robert J Donovan, 'Messages in Alcohol Advertising Targeted to Youth' (2000) 25 *Australian and New Zealand Journal of Public Health* 126; Sandra C Jones, Parri Gregory and Geoffrey Munro, 'Adolescent and Young Adult Perceptions of Australian Alcohol Advertisements' (2009) 14 *Journal of Substance Use* 335.

¹⁶ See White et al, 'Adolescents' Exposure to Paid Alcohol Advertising on Television', above n 9, 1747–8; Jones and Magee, above n 10; Lobstein et al, above n 11, 23; Peter Andersen 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; Petra Meier et al, 'Independent Review of the Effects of Alcohol Pricing and Promotion' (School of Health and Related Research, University of Sheffield, 2008) 91 <http://www.shef.ac.uk/polopoly_fs/1.95617!/file/PartA.pdf>; Gerard Hastings et al, 'Alcohol Marketing and Young People's Drinking: A Review of the Research' (2005) 26 *Journal of Public Health Policy* 296.

¹⁷ World Health Organization, *Global Strategy to Reduce the Harmful Use of Alcohol* (2010) 15 <http://apps.who.int/iris/bitstream/handle/10665/44395/9789241599931_eng.pdf;jsessionid=22FC5C1E4C91DB9D3CE8BE14BBDF0EF8?sequence=1>.

¹⁸ See World Health Organization, *Global Status Report on Noncommunicable Diseases 2010* (2010) 51 <http://apps.who.int/iris/bitstream/handle/10665/44579/9789240686458_eng.pdf?sequence=1>.

¹⁹ Jonathan K Noel, Thomas F Babor, and Katherine Robaina, 'Industry Self-Regulation of Alcohol Marketing: A Systematic Review of Content and Exposure Research' (2016) 112(Suppl 1) *Addiction* 28, 29.

²⁰ The ABAC Scheme, *ABAC Responsible Alcohol Marketing Code* (ABAC, 2017) <http://www.abac.org.au/wp-content/uploads/2017/07/ABAC_CodeofConduct_2017_web.pdf>.

²¹ See The ABAC Scheme Limited, *Rules and Procedures* (2017) ss 1, 3, 4 <<http://www.abac.org.au/wp-content/uploads/2017/10/ABAC-Rules-and-Procedures-approved-29-9-171.pdf>>.

²² *Ibid* s 5.

Management Committee, and the inclusion of a health sector representative on the ABAC Adjudication Panel.²³

At 20 years of age, the ABAC is a well-established part of the advertising regulatory landscape. The Scheme has undergone a number of government reviews since its introduction in 1997,²⁴ which have prompted expansions to the scope of the ABAC, and refinements to the administration and complaint handling processes attached to the Code. However, public health and alcohol control advocates remain dissatisfied with the ABAC. Advocates point to the fact that young people in Australia remain exposed to high levels of alcohol advertising, including content that appeals to minors.²⁵ Researchers and advocates also describe a range of problems with the ABAC Scheme, including that Code provisions are narrowly worded, that important marketing techniques are excluded (for example, sponsorship), and that there are no (or poor) enforcement and monitoring mechanisms.²⁶ Researchers challenge the characterisation of the ABAC Scheme as quasi-regulatory, pointing to (among other things) the fact that the Management Committee is dominated by alcohol industry representatives, and that membership of the Scheme is voluntary.²⁷

Public health organisations have called for legislative restrictions that reduce young people's exposure to alcohol marketing more effectively,²⁸ and two public health organisations have created a 'competitor' complaints handling system as a platform for generating regulatory reforms.²⁹ State

²³ See ABAC Scheme Limited, *About the ABAC Scheme* <<http://www.abac.org.au/about/>>.

²⁴ See Senate, Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into Alcohol Toll Reduction Bill 2007* (2008)

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2008-10/alcohol_reduction/index>; 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* (Minister for Health (Vic), 2003); House of Representatives, Standing Committee on Family and Community Affairs, Parliament of Australia, *Road to Recovery: Report on Inquiry into Substance Abuse in Australian Communities* (2003)

<http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=fca/subabuse/report.htm>; NSW Alcohol Summit, *Outcomes of the NSW Summit on Alcohol Abuse 2003: Changing the Culture of Alcohol Use in New South Wales* (Alcohol Summit Coordination Unit (NSW), 2003); Drugs and Crime Prevention Committee, Parliament of Victoria, *Inquiry into Strategies to Reduce Harmful Alcohol Consumption Final Report* (2006) vol 1

<http://www.parliament.vic.gov.au/images/stories/committees/dpc/alcoholharmreduction/DCPC-Report_Alcohol_Vol1_2006-03.pdf>; Australian National Preventive Health Agency, *Alcohol Advertising: The Effectiveness of Current Regulatory Codes in Addressing Community Concern: Final Report* (2014)

<[http://www.alcohol.gov.au/internet/alcohol/publishing.nsf/Content/295F33DC21996D1ECA257EF900007EEA/\\$File/Alcohol%20advertising.pdf](http://www.alcohol.gov.au/internet/alcohol/publishing.nsf/Content/295F33DC21996D1ECA257EF900007EEA/$File/Alcohol%20advertising.pdf)>.

²⁵ See Fielder, Donovan, and Ouschan, above n 10; Noel, Babor, and Robaina, above n 19.

²⁶ See Hannah L Pierce, Julia M Stafford and Mike Daube, 'Developing an Alternative Alcohol Advertising Complaint Review System: Lessons From a World-First Public Health Advocacy Initiative' (2017) 27 *Public Health Research & Practice* 1, 2; Sandra C Jones and Ross Gordon, 'Regulation of Alcohol Advertising: Policy Options for Australia' (2013) 2 *Evidence Base* 1; Australian Medical Association, *Alcohol Marketing and Young People: Time for a New Policy Agenda* (2012) 38–9

<https://ama.com.au/sites/default/files/documents/alcohol_marketing_young_people.pdf>.

²⁷ Jones and Gordon, above n 26, 2, 5.

²⁸ World Health Organization, *Global Strategy*, above n 17, 16–17. See also Australian Medical Association, above n 26, 42–3; National Preventative Health Taskforce, *Australia: The Healthiest Country by 2020. National Preventative Health Strategy — Overview* (2009) 48

<[http://www.health.gov.au/internet/preventativehealth/publishing.nsf/Content/AEC223A781D64FF0CA2575FD00075DD0/\\$File/nphs-overview.pdf](http://www.health.gov.au/internet/preventativehealth/publishing.nsf/Content/AEC223A781D64FF0CA2575FD00075DD0/$File/nphs-overview.pdf)>.

²⁹ Pierce, Stafford, and Daube, above n 26.

governments in Western Australia and South Australia have responded by announcing new restrictions on alcohol advertising on public transport and related infrastructure.³⁰ However, successive federal governments have rejected calls to introduce comprehensive legislative bans on alcohol advertising.³¹

In light of concerns about the effectiveness of alcohol advertising regulation in Australia, this paper undertakes a critical evaluation of the ABAC Scheme and whether it contains the building blocks of an effective self-regulatory regime. This involves examining the substantive rules contained in the ABAC, focusing on those that aim to protect young people from advertising content that appeals to this age group. It also evaluates whether the ABAC's new placement rules adequately protect young people from exposure to alcohol advertising. Given that scientific research links exposure to alcohol advertising with young people's drinking behaviours (irrespective of the target audience of that advertising), reducing young people's total exposure to alcohol advertising is an appropriate objective for alcohol advertising regulation (rather than simply restricting advertising directed to minors), as recognised by the WHO. A second part of the analysis evaluates the governance processes established by the ABAC, including administration, monitoring, enforcement, and review.

To undertake this analysis, the paper uses a framework for effective self-regulation drawn from literature on public health governance, empirical and theoretical studies of regulation, including advertising regulation, and government and non-government guides on designing regulation. After briefly reviewing regulation of alcohol marketing in Australia, the paper applies this framework to the ABAC's substantive rules, focusing on the provisions that are concerned with alcohol advertising's impact on minors. The framework is then applied to the regulatory processes established by the ABAC Scheme. The paper also uses determinations from the ABAC Adjudication Panel to illustrate the Panel's interpretation of the ABAC's provisions on advertising that appeals to or is directed to minors, and to describe the strengths and limitations of these provisions.³² Drawing on the theory of responsive regulation, the paper concludes by making recommendations for progressively strengthening regulation of alcohol advertising in Australia, with the objective of protecting young people better, from exposure to alcohol marketing.

II A FRAMEWORK FOR EFFECTIVE SELF-REGULATION

This paper draws on public health studies concerned with effective regulation of the industries that produce products harmful to health, including tobacco, food, and alcohol.³³ These industries are

³⁰ Ibid 4.

³¹ Jones and Gordon, above n 26, 2.

³² The Adjudication Panel's determinations are available from: *Adjudication Decisions* <<http://www.abac.org.au/publications/adjudication/>>. The determinations referred to in this paper were made by the Panel between July 2014 and July 2018.

³³ See, eg, Lisa L Sharma, Stephen P Teret and Kelly D Brownell, 'The Food Industry and Self-Regulation: Standards to Promote Success and to Avoid Public Health Failures' (2010) 100 *American Journal of Public Health* 240; Vivica I Kraak et al, 'Balancing the Benefits and Risks of Public-Private Partnerships to Address the Global Double Burden of Nutrition' (2012) 15 *Public Health Nutrition* 503; Roger Magnusson and Belinda Reeve '“Steering” Private Regulation? A New Strategy for Reducing Population Salt Intake in Australia' (2014) 36 *Sydney*

conceptualised as vectors of the ‘industrial epidemic’ of chronic disease due to their influence on unhealthy consumption patterns and on public health policy.³⁴ Accordingly, a (relatively) new concern for public health researchers is the design and implementation of measures that regulate the products and practices of these industries, for example, restrictions on marketing, taxes on the products themselves, and planning laws that restrict the opening of new retail outlets.³⁵ In addition, public health researchers investigate whether voluntary or collaborative initiatives with the food and alcohol industries can be effective in achieving public health goals — and if so, in what circumstances.³⁶

The theoretical approach taken here is also situated within the discipline of ‘regulatory studies’, that is, empirical and theoretical investigations of regulation in areas such as environmental protection and workplace health and safety.³⁷ The effective design of regulation is a central concern of regulatory scholars, meaning that the regulatory studies literature offers important insights to those investigating regulatory initiatives that impact on public health, as with alcohol advertising restrictions. Regulatory scholars argue that the effectiveness of self-regulation ‘varies enormously among industries’,³⁸ depending on the social and economic environment of self-regulation as well as the institutional design of voluntary schemes themselves.³⁹ However, researchers describe some general factors that are more likely to make it successful, and specify processes and principles for designing effective regulation.⁴⁰ These are the focus of this paper.

Drawing upon these two bodies of literature, Table 2 provides a framework for the design and implementation of effective, transparent, and accountable self-regulation, covering both the substantive rules and provisions contained in self-regulation, and processes for administering, monitoring, and enforcing voluntary regimes.⁴¹ The recommendations contained in Table 2 are

Law Review 25; Boyd Swinburn et al, ‘Strengthening of Accountability Systems to Create Healthy Food Environments and Reduce Obesity’ (2015) 385 *The Lancet* 2534.

³⁴ See, eg, Anna B Gilmore, Emily Savell and Jeff Collin, ‘Public Health, Corporations and the New Responsibility Deal: Promoting Partnerships with Vectors of Disease?’ (2011) 33 *Journal of Public Health* 2; René I Jahiel and Thomas A Babor, ‘Industrial Epidemics, Public Health Advocacy and the Alcohol Industry: Lessons from Other Fields’ (2007) 102 *Addiction* 1335; Rob Moodie et al, ‘Profits and Pandemics: Prevention of Harmful Effects of Tobacco, Alcohol, and Ultra-Processed Food and Drink Industries’ (2013) 381 *The Lancet* 670, 671.

³⁵ See, eg, S L Davoren, ‘Legal Interventions to Reduce Alcohol-Related Cancers’ (2011) 125 *Public Health* 882; Janani Muhunthan et al, ‘Judicial Intervention in Alcohol Regulation: An Empirical Legal Analysis’ (2017) 41 *Australian and New Zealand Journal of Public Health* 365.

³⁶ See, eg, Sharma, Teret, and Brownell, above n 33; Kraak et al, ‘Balancing the Benefits and Risks’, above n 33; Magnusson and Reeve, ‘“Steering” Private Regulation?’, above n 33; Moodie et al, above n 33; Wayne D Hall and Robin Room, ‘Assessing the Wisdom of Funding DrinkWise’ (2006) 185 *Medical Journal of Australia* 635; Peter Anderson, ‘The Beverage Alcohol Industry’s Social Aspects Organisations: A Public Health Warning’ (2004) 99 *Addiction* 1376.

³⁷ See John Braithwaite, ‘The New Regulatory State and the Transformation of Criminology’ (2000) 40 *British Journal of Criminology* 222; Christine Parker and John Braithwaite, ‘Regulation’ in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2012)
doi:10.1093/oxfordhb/9780199248179.013.0007.

³⁸ Neil Gunningham and Joseph Rees, ‘Industry Self-Regulation: An Institutional Perspective’ (1997) 19 *Law & Policy* 363, 370.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ There is a range of other factors that influence the success of a regulatory regime, eg the structure of the regulated industry, whether there is an industry body that can act as an effective regulator, and whether there is industry-wide

drawn from empirical and theoretical studies of self-regulation, including advertising self-regulation, literature on public health governance, and guidelines created by government and non-government organisations (NGOs) on designing effective self-regulation or voluntary code-based schemes.⁴²

Table 2 Criteria for effective self-regulation

Regulatory dimension	Component	Recommendation
Substantive content	Objectives	Clear, measurable objectives against which the success of voluntary schemes can be assessed. ⁴³
	Terms	Clear definitions of key terms. ⁴⁴
	Rules	Clear regulatory rules that are sufficiently expansive to achieve regulatory objectives.
Regulatory processes	Developing code objectives	Representation from multiple interests included in the code development, thus enhancing its transparency. ⁴⁵
	Administration	Fair and transparent administration by an independent body, with members' roles and responsibilities outlined in the main code document. ⁴⁶
	Monitoring	A comprehensive, transparent and independent monitoring system that includes a set of measurable, time-bound process and outcome indicators. ⁴⁷

compliance with self-regulation. See, eg, Gunningham and Rees, above n 38. These factors are not considered here due to space limitations.

⁴² Table 2 is adapted from previously published research by the author. See Belinda Reeve, 'Self-Regulation of Food Advertising to Children: An Effective Tool for Improving the Food Marketing Environment?' (2016) 42 *Monash University Law Review* 419.

⁴³ Australian Competition and Consumer Commission, *Guidelines for Developing Effective Voluntary Industry Codes of Conduct* (2011) 6 <<https://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf>>; Kent Buse, Sonja Tanaka and Sarah Hawkes, 'Healthy People and Healthy Profits? Elaborating a Conceptual Framework for Governing the Commercial Determinants of Non-Communicable Diseases and Identifying Options for Reducing Exposure' (2017) 13 *Globalization and Health* 34, 42.

⁴⁴ Australian Competition and Consumer Commission, above n 43.

⁴⁵ Jones and Gordon, above n 26, 23; Sharma, Teret, and Brownell, above n 33, 241.

⁴⁶ Jones and Gordon, above n 26, 22–3; Australian Competition and Consumer Commission, above n 43, 7; Department of Treasury and Finance (Vic), *Victorian Guide to Regulation* (2014) 45 (on file with the author); Vivica I Kraak et al, 'An Accountability Framework to Promote Healthy Food Environments' (2014) 17 *Public Health Nutrition* 2467.

⁴⁷ Jones and Gordon, above n 26, 23; Government of Canada, *Voluntary Codes: A Guide for Their Development and Use* (Industry Canada, 1998) 24 <<http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca00863.html>>; Neil Gunningham and Darren Sinclair, *Leaders and Laggards: Next Generation Environmental Legislation* (Taylor & Francis, 2001) 146–7; Anouk van den Broeck and Avalon de Bruijn, *Effective Alcohol Marketing Regulations: Policy Report* (Dutch Institute for Alcohol Policy, 2010) 9.

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	Review	Regular, independent reviews of the scheme’s operation, using baseline data and performance indicators. ⁴⁸
Enforcement	Complaints-handling	A fast, easily accessible complaints handling mechanism; complaints determined by an independent body that possesses significant sanctions. ⁴⁹
	Enforcement	A wide range of enforcement options, including both incentives and deterrents, promotional and educational activities that raise the profile of self-regulation. ⁵⁰

Turning first to the substantive content of self-regulation, literature on regulatory design recommends that voluntary schemes contain clear terms and definitions, as well as ambitious, evidence-based objectives, and regulatory rules that are expansive enough to achieve these objectives.⁵¹ Second, the design of regulatory processes is critical to the transparency and accountability of self-regulation, and in turn, the extent to which external parties have confidence in these schemes, and perceive them as a legitimate form of governance.⁵² Accordingly, effective self-regulation contains mechanisms for fostering transparency and accountability to affected parties outside the industry, for example consumers, NGOs and governments.⁵³ Transparency and accountability mechanisms include independent third party monitoring of participants’ compliance, and of the overall success of the scheme,⁵⁴ as well as the inclusion of external representatives in the initial processes of code development.

Complaints from the public typically trigger enforcement processes attached to advertising codes of conduct. Thus, it is crucial that codes provide a fast, easily accessible, and independent

⁴⁸ Jones and Gordon, above n 26, 23; Australian Competition and Consumer Commission, above n 43, 13; Government of Canada, above n 47, 16; Gunningham and Sinclair, above n 47, 147; van den Broeck and de Bruijn, above n 47, 9.

⁴⁹ Jones and Gordon, above n 26, 23; Australian Competition and Consumer Commission, above n 43, 9–11; Directorate-General for Health and Consumer Protection, *Self-Regulation in the EU Advertising Sector: A Report of Some Discussion Among Interested Parties* (European Commission, 2006) 20 <http://ec.europa.eu/consumers/hot_topics/report_advertising_en.htm>; European Advertising Standards Alliance, *International Guide to Developing a Self-Regulatory Organisation* (2009) 25 <<http://www.easa-alliance.org/Publications/Guides-on-Self-Regulation/page.aspx/267>>; Debra Harker, ‘Towards Effective Advertising Self-Regulation in Australia: The Seven Components’ (2003) 9 *Journal of Marketing Communications* 93, 101–2.

⁵⁰ Australian Medical Association, above n 26, 43; Jones and Gordon, above n 26, 23; Australian Competition and Consumer Commission, above n 43, 11; Department of Treasury and Finance (Vic), above n 46, 28; Harker, above n 49, 635; Andrew King and Michael Lenox, ‘Industry Self-Regulation Without Sanctions: The Chemical Industry’s Responsible Care Program’ (2000) 43 *The Academy of Management Journal* 698; Taskforce on Industry Self-Regulation, *Industry Self-Regulation in Consumer Markets: Report* (The Treasury, 2000) 60 <<http://archive.treasury.gov.au/contentitem.asp?ContentID=1131&NavID=>>>; Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP, 1992)

⁵¹ See Australian Competition and Consumer Commission, above n 43, 6–7; Buse, Tanaka, and Hawkes, above n 43, 42.

⁵² Julia Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ (2008) 2 *Regulation & Governance* 137; Lars H Gulbrandsen, ‘Accountability Arrangements in Non-State Standards Organisations: Instrumental Design and Imitation’ (2008) 15 *Organisation* 563.

⁵³ Gunningham and Rees, above n 38, 382–5; Gunningham and Sinclair, above n 47, 146–7.

⁵⁴ See Gunningham and Sinclair, above n 47, 146; Buse, Tanaka, and Hawkes, above 43, 42.

complaints handling mechanism,⁵⁵ accompanied by enforcement options for cases of non-compliance.⁵⁶ Punitive sanctions should be available to deter non-compliance and to support the use of softer enforcement methods (for example, persuasion and education), if self-regulatory schemes are to be effective.⁵⁷ Monitoring and enforcement should also be accompanied by independent, regular review of self-regulatory schemes, as well as by education and promotional activities that raise the profile of the scheme with both the public and the regulated community.⁵⁸

These recommendations for the design of effective self-regulation operate within a responsive regulatory strategy drawn from the work of Ian Ayres and John Braithwaite.⁵⁹ Ayres and Braithwaite propose a staged approach to regulation, where governments begin their regulatory efforts with the least intrusive forms of regulation and move to more legalistic and coercive regulatory measures only where an industry proves unwilling or unable to self-regulate.⁶⁰ In previous research on public health governance, Belinda Reeve and Roger Magnusson have built upon this approach by suggesting that governments progressively ‘scaffold’ voluntary public health initiatives with more demanding regulatory requirements (including the measures set out in Table 2), for example, by setting the objectives for voluntary schemes to achieve, or by creating independent monitoring mechanisms.⁶¹ However, this approach relies on close government supervision of self-regulation and the capacity and willingness to intervene with statutory regulation, if quasi- or co-regulation fails to achieve meaningful public health objectives, such as reducing young people’s exposure to alcohol advertising.

III REGULATORY CONTROLS ON ALCOHOL MARKETING TO YOUNG PEOPLE IN AUSTRALIA

Alcohol advertising is subject to the *Competition and Consumer Act 2010* (Cth), containing the Australian Consumer Law, which prohibits misleading and deceptive conduct in trade or commerce, including misleading and deceptive advertising.⁶² Alcohol advertising is also subject to regulation under state Liquor Acts, which regulate the wholesale and retail sale of alcohol, and prohibit certain forms of promotion by licensees (pubs, clubs, restaurants, and wholesalers). This includes promotions that are likely to have special appeal to minors because of the use of design features likely to be attractive to them, or which are likely to be attractive to minors for any other reason.⁶³

⁵⁵ Australian Competition and Consumer Commission, above n 43, 10; Directorate-General for Health and Consumer Protection, above n 49, 20; European Advertising Standards Alliance, above n 49, 25; Harker, above n 49, 101–2.

⁵⁶ Australian Competition and Consumer Commission, above n 43, 11.

⁵⁷ See, eg, Ayres and John Braithwaite, above n 50, ch 2; King and Lenox, above n 50.

⁵⁸ Australian Competition and Consumer Commission, above n 43, 11.

⁵⁹ See Ayres and Braithwaite, above n 50.

⁶⁰ *Ibid* 38–40.

⁶¹ See, eg, Magnusson and Reeve, “‘Steering’ Private Regulation?”, above 33; Belinda Reeve and Roger Magnusson, ‘Food Reformulation and the (Neo)-Liberal State: New Strategies for Strengthening Voluntary Salt Reduction Programs in Australia and the United Kingdom’ (2015) 129 *Public Health* 1061; Roger S Magnusson and Belinda H Reeve, ‘Regulation and the Prevention Agenda’ (2013) 199 *Medical Journal of Australia* 89.

⁶² *Competition and Consumer Act 2010* (Cth) sch 2, ss 18, 29.

⁶³ See, eg, *Liquor Act 2007* (NSW) s 102(2)(a). Alcoholic beverages are subject to labelling requirements under the *Australia and New Zealand Food Standards Code* (2011) which are not of immediate relevance. Food Acts in each

The *Broadcasting Services Act 1992* (Cth) sets out regulatory requirements for television and radio broadcasting services (and online content), and establishes a licensing system for commercial television and radio broadcasters.⁶⁴ The Australian Communications and Media Authority ('ACMA') monitors the broadcasting industry, enforces licence conditions, and performs other regulatory functions, including determining standards for broadcast licensees.⁶⁵ These include the *Children's Television Standards 2009* ('CTS 2009'), which obliges licensees to broadcast a certain amount of dedicated children's programming per year (C and P programs). The CTS also regulate the scheduling, volume and content of advertisements broadcast during designated children's viewing times,⁶⁶ known as C and P periods.⁶⁷ Relevantly, CTS 26 prohibits advertising for alcoholic drinks during C periods, during C or P programs broadcast outside C periods, or in a break immediately before or after any C or P program. Further, no advertisement or sponsorship announcement broadcast during a C period may identify or refer to a company, person, or organisation 'whose principal activity is the manufacture, distribution or sale of alcoholic drinks'.⁶⁸ The CTS have a number of limitations, including that they do not apply to times of the day when large numbers of children are watching television. Television audience data shows that the most popular weekday viewing period for children aged 5–12 years is from 6–10pm (peaking at 7–8pm), which largely falls outside the times to which the CTS apply.⁶⁹

The *Broadcasting Services Act 1992* (Cth) creates a co-regulatory framework⁷⁰ whereby broadcasting industry groups create codes of practice for their particular sector,⁷¹ which are then registered by the ACMA.⁷² One of these codes is the *Commercial Television Industry Code of Practice* (the 'Free TV Code'),⁷³ which applies to all free-to-air television programming. The Code establishes a system for classifying program material and commercials, and provides for the scheduling of programs and commercials in the appropriate classification zone.⁷⁴ Television

Australian state and territory also prohibit false conduct in relation to the advertising, packaging and sale of food, which apply to alcoholic beverages. See eg, *Food Act 2003* (NSW) ss 18, 22.

⁶⁴ See David Rolph, Matt Vitins and Judith Bannister, *Media Law: Cases, Materials and Commentary* (Oxford University Press, 2010) 65.

⁶⁵ *Broadcasting Services Act 1992* (Cth) s 125(1).

⁶⁶ See Australian Communications and Media Authority, *Review of the Children's Television Standards 2005: Final Report of the Review* (2009) 1 <http://www.acma.gov.au/WEB/STANDARD/pc=PC_310262>.

⁶⁷ *Children's Television Standards 2009* CTS 5 'C material', 'P material'.

⁶⁸ *Ibid* CTS 36(2).

⁶⁹ See Lesley A King et al, *Consultancy Report on Inappropriate Food Marketing to the National Preventative Taskforce* (Institute of Obesity, Nutrition and Exercise, University of Sydney, 2009) 6

<<http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/engagement-and-consultation-11p>>. See also Australian Communications and Media Authority, *Children's Viewing Patterns on Commercial, Free-to-Air and Subscription Television* (2007)

<http://www.acma.gov.au/webwr/_assets/main/lib310132/children_viewing_patterns_commercial_free-to-air_subscription_television.pdf>.

⁷⁰ Australian Communications and Media Authority, 'Optimal Conditions for Effective Self- and Co-Regulatory Arrangements' (Occasional Paper, June 2010) 5 <http://www.acma.gov.au/webwr/_assets/main/lib311886/self-and_co-regulatory_arrangements.pdf>.

⁷¹ *Ibid*. See *Broadcasting Services Act 1992* (Cth) s 123.

⁷² *Broadcasting Services Act 1992* (Cth) s 123(4).

⁷³ Free TV, *Commercial Television Industry Code of Practice* (2015)

<http://www.freetv.com.au/media/Code_of_Practice/Free_TV_Commercial_Television_Industry_Code_of_Practice_2015.pdf>.

⁷⁴ *Ibid* Pt 2.

advertisers (rather than broadcasters) are also ‘expected to comply’ with the Australian Association of National Advertisers’ (‘AANA’) self-regulatory codes (described below), and with the ABAC.⁷⁵

The Free TV Code regulates the broadcast of commercials for alcoholic drinks, defined as ‘a Commercial that directly promotes the use or purchase of one or more Alcoholic Drinks’.⁷⁶

Commercials for alcoholic drinks must only be broadcast:

- During M and MA15+ classification zones (except between 5:00 and 6:00am and 7.30 to 8.30pm);⁷⁷
- As an accompaniment to a Sports Program on a weekend or a public holiday (regardless of the time of day), or
- As an accompaniment to the broadcast of a Live Sporting Event (where certain conditions are met).⁷⁸

The effect of these provisions is that commercials for alcoholic drinks can only be broadcast between 8.30pm and 5:00am and 12:00 to 3:00pm on school days, and between 8.30pm and 5:00am on weekends and public holidays, except where broadcast during a sports program on a weekend or public holiday, or during a televised live sports event (at any time). This exemption for sports programs and live sports events significantly limits the efficacy of these restrictions. One study found that a quarter of all alcohol advertising broadcast on television was shown during sports television programming; and during the day, the majority of alcohol advertisements were broadcast in sports (87 per cent) rather than non-sports programming (13 per cent).⁷⁹ This loophole leaves thousands of children and adolescents vulnerable to exposure to a large number of alcohol advertisements, particularly given the large number of children who watch televised sports events and sports programs.⁸⁰

A central component of advertising regulation is self-regulation by the advertising industry. The AANA runs the industry’s self-regulatory system, which consists of a series of voluntary codes of conduct on advertising and marketing (applying across all media and to all advertisers); an independent complaints hearing mechanism (the Advertising Standards Community Panel); and

⁷⁵ Ibid cl 5.7.1.

⁷⁶ Ibid cl 8. The definition excludes program sponsorship announcements that make no direct reference to the price of goods or services, commercials that do not directly promote an alcoholic drink for an entity or company that participates in the manufacture, distribution or sale of alcoholic drinks, a commercial where alcohol or a brand associated with alcohol is incidental and any alcohol consumption responsibly depicted, and a commercial for a licensed restaurant or club, entertainment venue, tourist attraction or dining establishment.

⁷⁷ Ibid cl 6.2.1. These are 7.30pm–6am and noon–3pm on school days and 7.30pm–6am on weekends and public holidays (M classification zones), and 8.30pm–5am on all days (MA15+ classification zones) (cll 2.2.2–2.2.3.).

⁷⁸ Ibid cl 6.2.1.

⁷⁹ 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 <<https://doi.org/10.1371/journal.pone.0134889>>.

⁸⁰ Ibid; Foundation for Alcohol Research and Education, Submission to Free TV Australia, *Review of the Commercial Television Industry Code of Practice* (April 2015) 14 <<http://fare.org.au/wp-content/uploads/submissions/FARE-Submission-to-the-Review-of-the-Commercial-television-Industry-Code-of-Practice.pdf>>; Sherilene Carr et al, ‘Child and Adolescent Exposure to Alcohol Advertising in Australia’s Major Televised Sports’ (2016) 35 *Drug and Alcohol Review* 406.

the Advertising Standards Bureau, the Panel's administrative arm.⁸¹ The centrepiece of the system is the AANA's *Code of Ethics*,⁸² which is supplemented by four codes that deal with specific areas of marketing, including the *Code for Marketing and Advertising Communications to Children*.⁸³ This code states that advertising to children 'must not be for, or relate in any way to, Alcohol Products, or draw any association with companies that supply Alcohol Products'.⁸⁴

Industry bodies in Australia have developed product-specific or media-specific advertising codes of conduct, which apply in addition to the codes developed by the AANA. The ABAC falls into this category, as does the Outdoor Media Association ('OMA') *Code of Ethics*,⁸⁵ which sets standards for outdoor advertising. The OMA's *Code of Ethics* states that outdoor media agencies must only display advertisements that comply with the ABAC,⁸⁶ and which have been vetted by the Alcohol Advertising Pre-vetting Service.⁸⁷ An additional set of *Alcohol Advertising Guidelines* prohibit the display of alcohol advertising on fixed signs that are located within a 150 metre sight line of a primary or secondary school.⁸⁸ However, this restriction does not apply if the school is located in the vicinity of a club, pub or bottle shop, or any other venue that sells alcohol products.⁸⁹ Health advocates have criticised the limited scope of the OMA's rule on the placement of alcohol advertising, particularly given its exemptions.⁹⁰ The Code does not have any enforcement mechanisms, bringing its credibility into question, and there are examples of non-compliant advertisements remaining in place, despite advertisers being made aware of the breach.⁹¹

IV THE ABAC SCHEME

The final component of alcohol advertising regulation is the ABAC Scheme. The ABAC operates within the AANA's self-regulatory system,⁹² but was created by four alcohol industry bodies in 1997,⁹³ with input from advertising, media, and consumer bodies, federal government Ministers and Departments, and the ACCC.⁹⁴ A number of government reviews have considered whether the

⁸¹ The Advertising Standards Industry Jury provides a separate adjudication process for complaints lodged by competitors, and considers the truth, accuracy or legality of advertising on a user-pays basis.

⁸² Australian Association of National Advertisers, *Australian Association of National Advertisers Code of Ethics* (2018) <http://aana.com.au/content/uploads/2018/07/AANA_Code-of-Ethics_July2018.pdf>.

⁸³ Australian Association of National Advertisers, *AANA Code for Marketing and Advertising Communications to Children* (2014) <<http://www.aana.com.au/pages/aana-code-for-advertising-marketing-communications-to-children.html>>.

⁸⁴ *Ibid* cl 2.13.

⁸⁵ Outdoor Media Association, *Code of Ethics* (2016) <http://oma.org.au/__data/assets/pdf_file/0014/13118/Code_of_Ethics_2016.pdf>.

⁸⁶ *Ibid* cl 3.6.

⁸⁷ *Ibid* cl 3.7.

⁸⁸ Outdoor Media Association, *OMA Alcohol Advertising Guidelines* (2016) 1 <http://oma.org.au/__data/assets/pdf_file/0003/13449/OMA_Alcohol_Guidelines_2016_Update.pdf>.

⁸⁹ *Ibid*.

⁹⁰ Australian National Preventive Health Agency, above n 24, 118.

⁹¹ *Ibid* 119.

⁹² Jones and Gordon, above n 26, 5–6.

⁹³ The four industry associations involved in the creation of the ABAC were the Australian Associated Brewers, the Distilled Spirits Industry Council of Australia, the Winemakers' Federation of Australia, and the Liquor Merchants' Association of Australia, the latter of which left the scheme early in its history. See National Committee for the Review of Alcohol Advertising, above n 24, 17.

⁹⁴ Jones and Gordon, above n 26, 11.

ABAC adequately protects young people from alcohol advertising.⁹⁵ The most influential of these was an investigation led by the Ministerial Council on Drug Strategy and performed by the National Committee for the Review of Alcohol Advertising ('NCRAA') (a sub-committee of the Intergovernmental Committee on Drugs) in 2003.⁹⁶ The inquiry led to significant changes to the ABAC Scheme, with a representative of the federal Department of Health and Ageing included in the Management Committee, and a public health expert included in the ABAC Adjudication Panel.⁹⁷

Further amendments to the ABAC took place in 2009 and in 2013, following a review of alcohol advertising regulation in Australia by the (now abolished) Australian National Preventive Health Agency ('ANPHA'),⁹⁸ as well as a review of the ABAC Scheme conducted simultaneously by the alcohol industry itself.⁹⁹ Among other changes, these two reviews led to the adoption of a much more detailed standard on alcohol advertising's appeal to minors.¹⁰⁰ In 2017, further amendments to the ABAC were announced, restricting the placement of alcohol advertising for the first time.¹⁰¹

A *The ABAC's Substantive Rules and Provisions*

Having described the ABAC Scheme, this section of the paper analyses the substantive rules contained in the ABAC, with a particular focus on rules relating to alcohol marketing that is directed to or has appeal to minors, as well as the ABAC's objectives. Drawing on Table 2, this section explores whether these provisions protect children and young people sufficiently from advertising content that has strong or evident appeal to this age group, or from exposure to alcohol advertising, irrespective of its target audience.

1 *The ABAC Scheme's Objectives*

⁹⁵ See above n 24.

⁹⁶ National Committee for the Review of Alcohol Advertising, above n 24.

⁹⁷ See Management Committee of the ABAC Scheme, *The ABAC Scheme Annual Report 2004* (2004) 6–7, 12–14 <http://www.abac.org.au/wp-content/uploads/2013/05/ABAC-Annual-Report-2004_.pdf>. The Panel had previously comprised only the Chief Adjudicator, and representatives with media or marketing backgrounds. In 2007 the Management Committee appointed an additional public health representative to improve complaint response times. See Management Committee of the ABAC Scheme, *The ABAC Scheme Annual Report 2007* (2007) 5 <<http://www.abac.org.au/wp-content/uploads/2013/05/ABAC2007AnnualReport.pdf>>.

⁹⁸ Australian National Preventive Health Agency, above n 24. ANPHA was a statutory body established by the *Australian National Preventive Health Agency Act 2010* (Cth), following the report of the National Preventive Health Taskforce in 2008 (see above n 28). ANPHA was charged with functions such as advising the different levels of government on preventive health and determining standards and managing programs on non-communicable disease prevention. The Abbott Coalition Government abolished the Agency in 2013. See Commonwealth of Australia, 'Budget 2014–15: Budget Measures' (Budget Paper No 2, 13 May 2014) 145.

⁹⁹ Australian National Preventive Health Agency, above n 24, 133.

¹⁰⁰ Management Committee of the ABAC Scheme, *The ABAC Scheme Annual Report 2014* (2014) 1 <http://www.abac.org.au/wp-content/uploads/2015/06/ABAC_AR_14_2.pdf>.

¹⁰¹ The ABAC Scheme Limited, 'New Restrictions on Placement of Alcohol Marketing' (Media Release, 19 July 2017) <<http://www.abac.org.au/wp-content/uploads/2017/07/Final-ABAC-media-release-19-July-2017.pdf>>.

Voluntary codes should describe the goals they aim to achieve, and include an explicit set of objectives that relate to these goals.¹⁰² Objectives should be measurable, specific, and time bound, ensuring that self-regulation's success or failure can be quantified through monitoring and audits.¹⁰³ Concrete targets also enable information about companies' performance to be collected and analysed, and comparisons to be made between companies (benchmarking).¹⁰⁴ The capacity for objective assessment of the performance of the scheme also enhances its credibility.¹⁰⁵

The ABAC's preamble states that it is designed to ensure that alcohol is marketed in a responsible manner, and that signatories are committed to ensuring that their marketing complies with the Code's spirit and intent.¹⁰⁶ The first objective is vague and open to interpretation and is not linked to specific targets for signatories, or for the Scheme more broadly, to achieve. As a result, it is difficult (if not impossible) to measure any concrete changes in alcohol advertising practices that can be said to flow from compliance with the ABAC. A more meaningful objective (in relation to alcohol advertising's impact on minors) would be reducing young people's exposure to alcohol advertising, and the persuasive power of alcohol advertising in relation to minors, as recommended by the WHO.

2 *Media Channels and Marketing Techniques Covered by the ABAC*

Under section 2(a), the Code applies to all 'Marketing Communications in Australia generated by or within the reasonable control of a Marketer'.¹⁰⁷ This includes (but is not limited to): brand advertising; competitions; digital communications (including in mobile and social media and user generated content); product names and packaging;¹⁰⁸ alcohol brand extensions to non-alcohol beverage products; point of sale promotions; and marketing collateral.¹⁰⁹ As such, the ABAC applies to a wide range of media and marketing techniques, and also applies to both manufacturers and retailers, including breweries, supermarkets and restaurants, if they advertise alcoholic beverages.¹¹⁰ The wording of section 2(a) provides a non-exhaustive list of different types of marketing communications, permitting the Adjudication Panel to interpret the Code as applying to marketing techniques not expressly mentioned in the ABAC. For example, the Panel has held that

¹⁰² Department of Treasury and Finance (Vic), above n 46, 21; Neil Gunningham, 'Environment, Self-Regulation and the Chemical Industry: Assessing Responsible Care' (1995) 17 *Law & Policy* 57, 71.

¹⁰³ Australian Competition and Consumer Commission, above n 43, 6; Buse, Tanaka, and Hawkes, above n 43, 42.

¹⁰⁴ Gunningham, above n 102, 71. See also Kraak et al, 'An Accountability Framework', above n 46, 11.

¹⁰⁵ Australian Competition and Consumer Commission, above n 43, 13.

¹⁰⁶ ABAC, above n 20, s 1.

¹⁰⁷ *Ibid* s 2(a).

¹⁰⁸ Section 2(b) includes what is known as the 'grandfathering' provision, enabling companies to use product names and packaging that are non-compliant with the ABAC, so long as they were 'supplied for bona fide retail sale in the ordinary course of business in Australia prior to 31 October 2009'.

¹⁰⁹ Defined as 'material used by a Marketer to promote a brand and support the sales and marketing of Alcohol Beverages, including gifts with purchase, competition prizes and branded merchandise': ABAC, above n 20 s 5.

¹¹⁰ See eg, *Roberts and Australian Brewery* (ABAC Adjudication Panel Determination No 66/16, 27 May 2016) (beer, cinema advertising) <<http://www.abac.org.au/wp-content/uploads/2016/06/66-16-Determination-Australian-Brewery-27-May-2016.pdf>>; *Confidential & Bell and Urban Purveyor Group* (ABAC Adjudication Panel Determination No 59 & 66/15, 22 May 2015) (Lowenbrau Keller, digital and outdoor advertising) <<http://www.abac.org.au/wp-content/uploads/2015/05/59-66-15-Determination-Lowenbrau-Keller-22-May-2015.pdf>>; *Confidential and ALDI Liquor* (ABAC Adjudication Panel Determination No 87/15, 25 August 2015) (various alcohol products, email communication) <<http://www.abac.org.au/wp-content/uploads/2015/08/87-15-Determination-ALDI-25-August-2015.pdf>>.

the Code applies to product placement,¹¹¹ and to posts on Instagram by a social media ‘influencer’ hired to promote alcohol beverages, because these posts were within the reasonable control of the manufacturer.¹¹²

The Code continues to exclude some media channels and promotional techniques, including cinema advertising. In one determination, the Panel noted that the screening of an alcohol advertisement prior to a G-rated movie did not, of itself, breach the ABAC, nor any other applicable law or regulation.¹¹³ Section 2(b) also explicitly excludes sponsorship,¹¹⁴ and as a result, the Panel cannot rule on complaints concerned solely with the direct manifestations of sponsorship arrangements, although it will examine advertisements that flow from, or relate to sponsorship deals.¹¹⁵ This exclusion is a critical loophole in the Code, as young people are widely exposed to alcohol promotions through sports sponsorship arrangements,¹¹⁶ and sports sponsorship is shown to influence children’s and parents’ brand recall and beliefs, as well as their preferences for sponsoring companies’ products.¹¹⁷ A number of complaints to the Adjudication Panel have concerned children being exposed to alcohol promotions via alcohol industry sponsorship of sports events,¹¹⁸ including via alcohol brands and logos on sports uniforms,¹¹⁹ and signage at venues,¹²⁰

¹¹¹ See *Marshall and LNJ Imports LLC* (ABAC Adjudication Panel Determination No 81/14, 19 December 2014) (Birthday Cake Vineyards wine, music videoclip Youtube) <<http://www.abac.org.au/wp-content/uploads/2014/12/81-14-Determination-Birthday-Cake-Wines-19-Dec-2014.pdf>>.

¹¹² *Confidential and Diageo* (ABAC Adjudication Panel Determination No 133/16, 11 January 2017) (Smirnoff, digital media) <<http://www.abac.org.au/wp-content/uploads/2017/01/133-16-Determination-Smirnoff-11-Jan-2017.pdf>>.

¹¹³ *Confidential and Schweppes Australia / Diageo Australia* (ABAC Adjudication Panel Determination No 40/15, 24 April 2015) <<http://www.abac.org.au/wp-content/uploads/2015/04/40-15-Determination-Schweppes-24-April-2015.pdf>>.

¹¹⁴ Defined as ‘any agreement or part of an agreement involving payment or other consideration in lieu of payment by a Marketer to support a sporting or cultural property, event or activity, in return for which the sponsored party agrees to be associated with or promote the sponsor’s Alcohol beverage or outlet’: ABAC Scheme, *ABAC Responsible Marketing Code*, above n 20, s 6.

¹¹⁵ See *Murray and CUB* (ABAC Adjudication Panel Determination No 68/15, 4 June 2015) 6 <<http://www.abac.org.au/wp-content/uploads/2015/06/68-15-Determination-VB-4-June-2015.pdf>>.

¹¹⁶ See eg, Jill Sherriff and Mike Daube, ‘Cricket: Notching up Runs for Food and Alcohol Companies?’ (2009) 34 *Australian and New Zealand Journal of Public Health* 19, 20.

¹¹⁷ Helen Dixon et al, ‘Parent’s Responses to Nutrient Claims and Sports Celebrity Endorsements on Energy-Dense and Nutrient-Poor Foods: An Experimental Study’ (2011) 14 *Public Health Nutrition* 1071; Simone Pettigrew et al, ‘Game On: Do Children Absorb Sports Sponsorship Message?’ (2013) 16 *Public Health Nutrition* 2197.

¹¹⁸ See, eg, *Hester, re Tooheys New Advertiser: Lion* (ABAC Complaints Panel Determination No 42/14, 12 August 2014) <<http://www.abac.org.au/wp-content/uploads/2014/08/42-14-Determination-Tooheys-New-12-August-2014.pdf>>; *Abdel-Fatah, re Wild Turkey, Campari Australia Pty Ltd* (ABAC Complaints Panel Determination No 44/14, 12 August 2014) <<http://www.abac.org.au/wp-content/uploads/2014/08/44-14-Determination-Wild-Turkey-12-August-2014.pdf>>; *Murray and CUB* (ABAC Adjudication Panel Determination No 68/15, 4 June 2015) above n 115; *Lim (FARE) and Carlton & United Brewers* (ABAC Adjudication Panel Final Determination No 74A/16, 8 September 2016) <<http://www.abac.org.au/wp-content/uploads/2016/09/74A-16-Final-Determination-VB-Blue-Packaging-8-September-2016.pdf>>; *Lim (FARE) and Carlton & United Brewers* (ABAC Adjudication Panel Determination No 74B/16, 13 October 2016) <<http://www.abac.org.au/wp-content/uploads/2016/10/74B-16-Determination-VB-Blue-Advertisements-13-October-2016.pdf>>.

¹¹⁹ *Hester, re Tooheys* (ABAC Adjudication Panel Determination No 42/14, 12 August 2014), above n 118; *Murray and CUB* (ABAC Adjudication Panel Determination No 68/15, 4 June 2015), above n 115.

¹²⁰ *Hester, re Tooheys* (ABAC Adjudication Panel Determination No 42/14, 12 August 2014) above n 118; *Abdel-Fatah, re Wild Turkey* (ABAC Complaints Panel Determination No 44/14, 12 August 2014), above n 118.

which were then broadcast during televised sports events.¹²¹ In its determinations on these complaints, the Panel noted that it could not review these promotions as they were manifestations of sponsorship arrangements, although the Panel has made determinations on product packaging that formed part of a sponsorship deal and was promoted in a series of advertisements (described below).

3 *Restrictions on Content That Has Strong or Evident Appeal to Children*

Section 3 of the Code sets out the standards to be applied in alcohol advertising, including those relating to the responsible and moderate portrayal of alcohol, responsible depiction of the effects of alcohol, alcohol and safety, and ‘Responsibility toward Minors’, defined as a person under the age of 18 years.¹²² Section 3(b) prohibits alcohol marketing that has ‘Strong or Evident Appeal to Minors’, depictions of a person who is or appears to be a minor,¹²³ or of adults under 25 years of age.¹²⁴ It also prohibits alcohol marketing that is directed at minors through a breach of the placement rules (discussed below). Section 6, the Code’s definition provision, defines ‘Strong or Evident Appeal to Minors’ as:

- Likely to appeal strongly to Minors;
- Specifically targeted at Minors;
- Having a particular attractiveness for a Minor beyond the general attractiveness it has for an adult;
- 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
- Using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

Section 3(b) contains a relatively expansive provision on alcohol advertising’s appeal to minors, and the Adjudication Panel interprets this provision to encompass promotions that have strong or evident appeal to minors, *and* to other age groups. In other words, a promotion does not need to appeal to minors *exclusively* if it is to breach the ABAC. Further, section 5 (on ‘interpretation’) states that the compliance of alcohol marketing with the ABAC ‘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’. Accordingly, an advertisement can breach the ABAC if it can be said objectively that the promotion has strong or evident appeal to minors, regardless of whether young people were the advertiser’s intended audience. In 2017 the Adjudication Panel upheld a complaint about limited edition packaging for a beer brand (and a series of print and digital advertisements promoting this packaging), which

¹²¹ *Hester, re Tooheys* (ABAC Adjudication Panel Determination No 42/14, 12 August 2014) above n 118; *Abdel-Fatah, re Wild Turkey* (ABAC Complaints Panel Determination No 44/14, 12 August 2014), above n 118; *Murray and CUB* (ABAC Adjudication Panel Determination No 68/15, 4 June 2015) above n 115.

¹²² ABAC, above n 20, s 6.

¹²³ Unless they are shown in an incidental role in a ‘natural situation’, and there is no implication they will consume or serve alcohol.

¹²⁴ Unless they are not visually prominent, or they are not paid models or actors and are shown in a marketing community that has been placed within an age-restricted environment. ‘Age restricted environment’ is defined as: licensed premises that do not permit entry by Minors, or a non-alcohol specific age-restricted digital platform which requires users to register and login to use the platform, and is able to hide the existence of any alcohol-related pages, sites and content, so that they are only visible to registered users: ABAC, above n 20, s 5.

linked the beer to the brewer's sponsorship of a rugby league team.¹²⁵ The Panel held that the limited edition packaging (which was designed to resemble the team's jersey), gave the beer a novelty value and the status of a collectable item. According to the Panel, the combination of these features meant that the packaging would have strong or evident appeal to minors,¹²⁶ despite the fact that rugby league has broad appeal to a range of age groups, and that the packaging would have appealed to adults as well as to minors.

4 *Restrictions on the Placement of Alcohol Advertisements*

The impact of the standard on advertising's appeal to minors has been undermined by the fact that the ABAC did not (until 2017) regulate the *placement* of alcohol beverage promotions.¹²⁷ As such, the broadcast or publication of an alcohol advertisement in media with a large audience of young people did not, in itself, breach the ABAC. Arguably, it undermines the value of restrictions on advertising *content* that has strong or evident appeal to minors if children and young people are still exposed to a large amount of alcohol advertising (irrespective of that advertising's target audience), including in media that is clearly directed to minors.¹²⁸ The lack of placement restrictions has been problematic in relation to digital media, particularly given the alcohol industry's growing use of digital platforms to promote its products.¹²⁹ One 2016 complaint to the Adjudication Panel concerned the complainant's child being exposed to posts about alcohol products via an Instagram account that belonged to a social media influencer.¹³⁰ However, the complaint was dismissed as the ABAC (at that time) did not require age-gating of social media or other internet sites, and the content of the post could not be said to have strong or evident appeal to minors. Accordingly, while the ABAC may have restricted advertising *content* that had strong or evident appeal to minors, prior to 2017 it did little to protect children from *exposure* to alcohol promotions (including in media that was clearly targeted to children), which the WHO (and public

¹²⁵ *Lim (FARE) and Carlton & United Brewers* (ABAC Adjudication Panel Final Determination No: 74A/16, 8 September 2016), above n 118; *Lim (FARE) and Carlton & United Brewers* (ABAC Adjudication Panel Determination No: 74B/16, 13 October 2016), above n 118.

¹²⁶ *Lim (FARE) and Carlton & United Brewers* (ABAC Adjudication Panel Final Determination No: 74A/16, 8 September 2016), above n 118; *Lim (FARE) and Carlton & United Brewers* (ABAC Adjudication Panel Determination No: 74B/16, 13 October 2016), above n 118.

¹²⁷ See Australian Medical Association, above n 26, 39.

¹²⁸ See, eg, an incident where an advertisement for Bundaberg rum was screened with a 'Dora the Explorer' show on YouTube: Amy Corderoy, 'Bundaberg Rum Advertisements on Dora the Explorer Videos Spark Outrage', *Sydney Morning Herald* (online) 24 September 2015 <<https://www.smh.com.au/healthcare/bundaberg-rum-advertisements-on-dora-the-explorer-videos-spark-outrage-20150923-gjte3x.html>>. The Adjudication Panel has previously dismissed complaints about alcohol advertisements that appeared on children's websites, as the content of the advertisement did not have strong or evident appeal to minors and the placement of the advertisement did not, of itself, breach the ABAC (prior to 2017). See, eg, *Gibson, re Summer Bright Lager, Lion Australia* (ABAC Complaints Panel Determination No: 6/12, 18 January 2012) <<http://www.abac.org.au/adjudication/6-12/>>.

¹²⁹ See eg, Jernigan and Rushman, above n 11; Lobstein et al, above n 11; White et al, 'How Has Alcohol Advertising in Traditional and Online Media in Australia Changed?', above n 12; N Carah, S Brodmerkel and M Shaul, *Breaching the Code: Alcohol, Facebook and Self-Regulation* (Foundation for Alcohol Research and Education, 2015) 37–8 <<http://fare.org.au/wp-content/uploads/research/Breaching-the-code-Alcohol-Facebook-and-self-regulation.pdf>>.

¹³⁰ *Confidential and Diageo* (ABAC Adjudication Panel Determination No133/16, 11 January 2017), above n 112.

health advocates) have identified as an important objective for effective alcohol advertising regulation.¹³¹

In 2017 the alcohol industry introduced new restrictions on the placement of alcohol advertisements in media directed to children, which aimed to address this loophole. Contained in section 6 of the ABAC, the ‘placement rules’ require compliance with all applicable media-specific codes regulating the placement of alcohol advertising. The rules also require signatories to use age restriction controls on digital platforms, where available. Where not available, alcohol advertisements must only be placed in media with an audience of at least 75 per cent adults. The placement rules additionally prohibit alcohol marketing communications in programs or content ‘primarily aimed at minors’, as well as sending electronic marketing communications to minors.¹³²

While it is a positive step for the ABAC to include provisions on the use of age related controls on digital media, attempts to prevent minors from viewing digital advertising are not always particularly effective.¹³³ Accordingly, the requirement that signatories use age restriction controls will not necessarily reduce young people’s exposure to digital alcohol advertising. For example, age-gating is used on the websites of alcohol brands (by requiring users to enter their birth date), but is easily circumvented by minors entering a false birth date into the site.¹³⁴ One study found that while Twitter’s age-gating requirements prevented fictitious 14 year old and 17 year old users from following the official pages of the 25 alcohol brands, these users could still view video and picture content, like, and re-tweet posts from alcohol industry feeds or pages, and interact with content in other ways.¹³⁵ Similarly, Instagram prevents users under the age of 18 years (or those who have not entered a birth date in their account) from following alcohol brand pages or from being shown paid alcohol advertising.¹³⁶ However, these controls appear not to apply to posts made by social media influencers,¹³⁷ and re-posts or shares of posts can still be viewed by minors.¹³⁸

It is questionable whether the ABAC’s other placement restrictions will have any impact on young people’s exposure to alcohol advertising. The majority of media have an audience share consisting mainly of adults, because minors comprise a relatively small proportion of the total population —

¹³¹ See World Health Organization, above 17; Australian Medical Association, above n 26.

¹³² ABAC, above n 20, s 6.

¹³³ Australian National Preventive Health Agency, above n 24, 116.

¹³⁴ *Ibid.*

¹³⁵ Adam E Barry et al, ‘Alcohol Marketing on Twitter and Instagram: Evidence of Directly Advertising to Youth/Adolescents’ (2016) 51 *Alcohol and Alcoholism* 487, 489. Twitter does not require age information to establish a profile but offers an age-screening tool for alcohol marketers, which activates a request for date of birth, and the follow request is declined if the date entered indicates that the user is under the legal drinking age for the country in which they reside: see Dunlop et al, above n 13, 39. Facebook also prevents minors from viewing or liking alcohol company pages and does not show alcohol marketing to minors. See Federal Trade Commission (US), *Self-Regulation in the Alcohol Industry: Report* (2014) ii <<https://www.ftc.gov/system/files/documents/reports/self-regulation-alcohol-industry-report-federal-trade-commission/140320alcoholreport.pdf>>; Facebook, ‘1. Alcohol’, *Advertising Policies* <https://www.facebook.com/policies/ads/restricted_content/alcohol>.

¹³⁶ See *Confidential and Carlton & United Brewers* (ABAC Adjudication Panel Determination No 11/18, 9 March 2018) <<http://www.abac.org.au/adjudication/11-18/>>.

¹³⁷ See *McCusker Centre for Action on Alcohol & Youth and Diageo* (ABAC Adjudication Panel Determination No 12/18 (14 March 2018) <<http://www.abac.org.au/adjudication/12-18/>>.

¹³⁸ See *Jackson, Cancer Council Victoria and Lion* (ABAC Adjudication Panel Determination No 48/18, 16 April 2018) <<http://www.abac.org.au/adjudication/48-18/>>.

less than 25 per cent.¹³⁹ For this reason, even when a particular medium has large absolute numbers of viewers aged less than 18, adults will still generally comprise the majority of the audience. Accordingly, minors can still be exposed to alcohol advertising in programs such as *Masterchef*, which are watched by large absolute numbers of adults *and* minors.¹⁴⁰ The placement restrictions also exclude cinema and outdoor media (including bus shelters and train stations, as well as billboards), which are subject only to the OMA's (weak) guidelines on outdoor alcohol marketing.¹⁴¹

In several complaint determinations the Adjudication Panel has commented on when television programs or other media content will be considered 'primarily aimed at minors', for the purposes of the placement rules. When interpreting this phrase, the Panel has said that it will consider matters such as the audience composition of the program, its subject matter, whether it has themes likely to predominantly appeal to minors, the use of techniques such as familiar children's characters, and the complexity of the storyline.¹⁴² Importantly, the phrase 'primarily aimed at minors' is narrower than the phrase 'strongly or evidently appealing to minors' and it is possible for a program to be strongly or evidently appealing to minors while not primarily aimed at this age group.¹⁴³ Further, a program that has appeal across a range of age groups, including but not limited to minors, will generally not be 'primarily aimed at minors'.¹⁴⁴ This interpretive approach excludes general audience programs which have appeal to family audiences, including both adults and children.¹⁴⁵ Thus, while the ABAC may prevent promotions being placed in media that are clearly targeted to minors, the new placement restrictions seem unlikely to have a significant impact on the overall *volume* of alcohol promotions viewed by young people. As such, the ABAC does not

¹³⁹ See Alcohol Advertising Review Board, 'New Alcohol Industry Ad Rules Dismissed as Window Dressing' (Media Release, 20 July 2017) 1 <<https://www.alcoholadreview.com.au/resources/New-alcohol-industry-ad-rules-dismissed-as-window-dressing---NAAA-and-AARB-200717.pdf>>.

¹⁴⁰ Julia Stafford and Hannah Pierce, 'New Industry Ad "Rules" Are Nothing More Than Window Dressing' on *DrinkTank* (24 July 2017) <<http://drinktank.org.au/2017/07/new-industry-ad-rules-are-nothing-more-than-window-dressing/>>. Similar criticisms have been made of the Australian food industry's codes on marketing to children, which also use an audience share requirement to restrict the placement of unhealthy food marketing in media directed primarily to children. See Reeve, 'Self-Regulation of Food Advertising to Children: An Effective Tool for Improving the Food Marketing Environment?', above n 42 .

¹⁴¹ See *Pierce, McCusker Centre for Action on Alcohol and Youth and Treasury Wine Estates* (ABAC Adjudication Panel Complaint Determination No 8/18, 1 March 2018) <<http://www.abac.org.au/adjudication/8-18/>>; *Confidential and Beam Global* (ABAC Adjudication Panel Determination No 127/17, 10 January 2018) <<http://www.abac.org.au/adjudication/127-17/>>; *Confidential and Diageo* (ABAC Adjudication Panel Determination No 128/17, 4 January 2018) <<http://www.abac.org.au/adjudication/128-17/>>.

¹⁴² *McKeich and Lion* (ABAC Adjudication Panel Complaint Determination No 121/17, 21 December 2017) 6 <<http://www.abac.org.au/adjudication/121-17/>>; *McCusker Centre for Action on Alcohol and Youth and ALM Liquor Group* (ABAC Adjudication Panel Determination No 123/17, 10 January 2018) 8 <<http://www.abac.org.au/adjudication/123-17/>>.

¹⁴³ See, eg, *McKeich and Lion* (ABAC Adjudication Panel Determination No 121/1721 December 2017), above n 142, 6.

¹⁴⁴ See, eg, *Confidential and Moet—Hennessy Australia* (ABAC Adjudication Panel Determination No 118/17, 14 December 2017) <<http://www.abac.org.au/adjudication/118-17/>>.

¹⁴⁵ Although many such programs would likely appear in time slots during which alcohol advertising would be prevented by the Free TV Code.

deal adequately with the cumulative impact of young people's exposure to a large number of alcohol advertisements across a range of different media.¹⁴⁶

B *The Regulatory Processes Established by the ABAC Scheme*

Having considered the loopholes in the substantive rules contained in the ABAC, this paper now describes the regulatory processes established by the ABAC Scheme and analyses them against the criteria set out in Table 2.

1 *Code Development*

Including representation from multiple interests in the process of code development can help to enhance the transparency of self-regulation.¹⁴⁷ External stakeholder representation can also help to identify the problems that self-regulation should address, and ensure that self-regulation's goals reflect its underlying public purpose.¹⁴⁸ A range of parties had input into the development of the ABAC, including both government and industry bodies.¹⁴⁹ This increased the transparency of the code development process, but the Management Committee appears not to have engaged in consultation with external stakeholders when making subsequent amendments to the Code, including when introducing the new placement rules.¹⁵⁰ This undermines the transparency and accountability of the Scheme, and leaves it open to the criticism that it reflects industry interests rather than public objectives.¹⁵¹

2 *Administration*

Effective self-regulation is administered in a fair and transparent manner by an accountable, independent body.¹⁵² Often, industry associations incorporate an administrative committee into their existing infrastructure.¹⁵³ Such committees should include representatives from external stakeholder groups such as governments, consumer organisations and NGOs,¹⁵⁴ thus enhancing the transparency of administrative processes, ensuring that they reflect multiple viewpoints, and making industry based schemes more likely to be accepted as legitimate forms of regulation by external stakeholders.¹⁵⁵

¹⁴⁶ See also Carah, Brodmerkel, and Shaul, above n 160, 19.

¹⁴⁷ Sharma, Teret, and Brownell, above n 33, 241; Buse, Tanaka, and Hawkes, above n 43, 42; Belinda Reeve, 'Private Governance, Public Purpose? Assessing Transparency and Accountability in Self-Regulation of Food Advertising to Children' (2013) 10 *Bioethical Inquiry* 149, 151.

¹⁴⁸ Government of Canada, above n 47, 12–13; Taskforce on Industry Self-Regulation, above n 50, 60. See also Debra Harker and Michael Harker, 'The Role of Codes of Conduct in the Advertising Self-Regulatory Framework' (2000) 20 *Journal of Macromarketing* 155, 157–9.

¹⁴⁹ National Committee for the Review of Alcohol Advertising, above n 24, iii.

¹⁵⁰ Alcohol Advertising Review Board, above n 139, 1.

¹⁵¹ See Australian National Preventive Health Agency, above n 24, 133–4.

¹⁵² Sharma, Teret, and Brownell, above n 33, 24; Department of Treasury and Finance (Vic), above n 46, 31; Kraak et al, 'An Accountability Framework', above n 46, 11; Buse, Tanaka, and Hawkes, above n 43, 37.

¹⁵³ Australian Competition and Consumer Commission, above n 43, 8.

¹⁵⁴ *Ibid* 8.

¹⁵⁵ *Ibid* 8–9. Reeve, 'Private Governance, Public Purpose?' above n 147, 151.

Central to the ABAC's administration is the ABAC Management Committee, which comprises an independent chair, members of three industry bodies representing the wine, spirits and beer sectors, and a representative of the federal Department of Health and Ageing.¹⁵⁶ The Committee monitors and reviews the operation of the ABAC Scheme, amends the terms of the ABAC, and coordinates the creation of an annual report.¹⁵⁷ The Committee also administers the Alcohol Advertising Pre-Vetting Service,¹⁵⁸ which involves two individuals from outside the alcohol industry reviewing alcohol advertisements for compliance with the ABAC and the AANA *Code of Ethics* prior to the advertisement's broadcast or publication.¹⁵⁹

Government representation on the Management Committee subjects the ABAC Scheme to some degree of government oversight, but the Management Committee remains industry dominated, creating an imbalance between the different interests represented on the Committee.¹⁶⁰ Both the independent chair and the government representative can be outvoted if there is a difference of opinions between Committee members, given that the majority of the Committee are industry representatives.¹⁶¹ A fully independent management body — or at least one with equal representation of interests — would enhance the Scheme's public credibility, provide greater separation between the self-regulatory structure and the industry, and lessen the dominance of the alcohol industry bodies in the Scheme.¹⁶²

3 *Monitoring*

Voluntary schemes should incorporate tools for collecting data and monitoring companies' compliance. For example, administrative committees can monitor codes by systematically reviewing advertising and the extent to which it complies with relevant codes of conduct.¹⁶³ Regular monitoring and report identifies systemic problems in the scheme and areas for

¹⁵⁶ The three industry bodies are: Distilled Spirits Industry Council of Australia; Winemakers' Federation of Australia; and Brewers' Association of Australia and New Zealand. See ABAC Scheme, *Rules and Procedures*, above n 21, cl 1.1-1.2.

¹⁵⁷ ABAC Scheme, *Rules and Procedures*, above n 21, cl 1.3. The annual report is published on the ABAC Scheme website. See The ABAC Scheme Limited, *Annual Reports* <<http://www.abac.org.au/publications/annual-reports/>>.

¹⁵⁸ ABAC Scheme, *Rules and Procedures*, above n 21, cl 1.7.

¹⁵⁹ *Ibid* cl 5.2. Pre-vetting is undertaken on a user pays basis, and is mandatory for television, radio, outdoor, and cinema advertising, but optional for print, digital, and point-of-sale promotions, marketing collateral, names and packaging, and the placement of promotions.

¹⁶⁰ Australian National Preventive Health Agency, above n 24, 135.

¹⁶¹ Further, the independence of the chair can be questioned given that he or she is appointed to the Management Committee by the Directors of the ABAC Scheme, who are representatives of the three alcohol industry peak bodies that fund the ABAC. See Danica Keric, 'The Alcohol Code's Not So Independent Chair' on *DrinkTank* (1 July 2018) <<http://drinktank.org.au/2018/07/the-alcohol-advertising-codes-not-so-independent-chair/>>. The author is grateful to one of the anonymous reviewers of this paper for making this point.

¹⁶² Australian National Preventive Health Agency, above n 24, 137.

¹⁶³ Harker, above n 49, 102. See also European Advertising Standards Alliance, above n 49, 16; Reeve, above n 147, 151; Jean J Boddewyn, *Advertising Self-Regulation and Outside Participation: A Multinational Comparison* (Quorum Books, 1988).

improvement,¹⁶⁴ enables participants to improve compliance,¹⁶⁵ and facilitates external scrutiny of the scheme's effectiveness, enhancing public confidence in its operation.¹⁶⁶

Annual reporting on the operation of the ABAC Scheme enhances its transparency and enables some degree of public scrutiny of its operation. However, there is no proactive monitoring of alcohol marketing's compliance with the ABAC, or of young people's exposure to alcohol promotions.¹⁶⁷ The Scheme relies solely on consumer complaints to bring any instances of non-compliance to the attention of the Adjudication Panel.¹⁶⁸ A complaints driven system allows a significant number of non-compliant promotions to remain in the market, as the number of people who are likely to complain about an offending advertisement tends to be low, particularly where awareness of the relevant self-regulatory scheme is low, as is the case with the ABAC.¹⁶⁹

Some of the concerns about the lack of monitoring may be addressed by the Alcohol Advertising Pre-Vetting Service, which reduces the number of complaints and provides some protection from exposure to non-compliant advertisements.¹⁷⁰ However, pre-vetting is not mandatory for all forms of alcohol promotion,¹⁷¹ including promotions from companies that are not ABAC signatories (although non-signatories are able to use the service).¹⁷² Further, the Panel has upheld complaints about pre-vetted advertisements, indicating that the pre-vetting service does not necessarily prevent all instances of non-compliance. A number of studies also suggest that the provisions on alcohol advertising's appeal to children are regularly breached by advertisers,¹⁷³ despite the existence of pre-vetting services.

4 *Complaints Handling Mechanism*

An independent, easily accessible complaints handling mechanism is crucial to the effective operation of advertising self-regulation,¹⁷⁴ as it enhances consumer confidence in the scheme and enables industry to identify and remedy systemic problems with its operation.¹⁷⁵ The publication of complaint determinations also enhances the transparency and credibility of the system,¹⁷⁶ allows for 'naming and shaming' of non-compliant companies, and enables the development of precedent on unacceptable forms of advertising.¹⁷⁷

¹⁶⁴ Australian Competition and Consumer Commission, above n 43, 12.

¹⁶⁵ *Ibid*; Taskforce on Industry Self-Regulation, above n 50, 60.

¹⁶⁶ Australian Competition and Consumer Commission, above n 43, 12; Buse, Tanaka, and Hawkes, above n 43, 42; Taskforce on Industry Self-Regulation, above n 50, 79.

¹⁶⁷ Jones and Gordon, above n 26, 22.

¹⁶⁸ Australian National Preventive Health Agency, above n 24, 100.

¹⁶⁹ *Ibid*.

¹⁷⁰ National Committee for the Review of Alcohol Advertising, above n 24, 36–7.

¹⁷¹ See The ABAC Scheme, *Rules and Procedures*, above n 21, cl 5.2.

¹⁷² *Ibid* cl 5.3.

¹⁷³ Jones and Gordon, above n 26, 13. See also Gerard Hastings et al, 'Alcohol Advertising: The Last Chance Saloon' (2010) 340 *British Medical Journal* 184.

¹⁷⁴ Australian Competition and Consumer Commission, above n 43, 10; Directorate-General for Health and Consumer Protection, above n 49, 20; European Advertising Standards Alliance, above n 49, 25; Harker, above n 49, 101–2. Reeve, above n 147, 51.

¹⁷⁵ Taskforce on Industry Self-Regulation, above n 50, 73.

¹⁷⁶ Directorate-General for Health and Consumer Protection, above n 49, 21.

¹⁷⁷ Harker, above n 49, 635; Reeve, above n 147, 152.

The ABAC Adjudication Panel consists of a Chief Adjudicator with a legal background, two members with media or advertising industry backgrounds, and two public health representatives. A public health representative sits on every three-person panel convened to hear a complaint.¹⁷⁸ Where the Panel upholds a complaint about the content of a marketing communication, marketers ‘must’ withdraw, modify or discontinue the communication within five days of the determination.¹⁷⁹ If the complaint concerns the placement of an advertisement, marketers must also take reasonable precautions to ensure that it will not be placed again in the location, time or manner that was found to breach the Code.¹⁸⁰ The Adjudication Panel determines the majority of complaints within a 30 day timeframe and produces relatively detailed decisions that describe the reasoning behind the Panel’s decision, and decisions sometimes critique the ABAC’s provisions. There is also evidence of the development of precedent, with the Adjudication Panel using its determinations to create principles that it applies in subsequent determinations.¹⁸¹ This enhances the consistency and predictability of its decision making.

While the Panel is nominally independent of the alcohol industry, researchers question the impartiality of the Panel’s decision making, particularly as it is funded by a levy on the alcohol industry, and panel members are paid a retainer, plus an amount for each complaint heard.¹⁸² One study compared determinations on 14 alcohol advertisements made by the Panel with the judgments of a six person panel of marketing, communications, and public health experts.¹⁸³ The ABAC Adjudication Panel dismissed all but one of the advertisements, yet a majority of the independent panel thought that eight of the advertisements breached the ABAC and only two did not (the panel was evenly split on the remaining four advertisements). The authors concluded that the Adjudication Panel’s views did not adequately reflect community standards on alcohol advertising.¹⁸⁴ Such studies provide support for the argument that the Panel’s interpretive approach limits the ability of the complaints handling mechanism to protect young people from non-compliant alcohol promotions.¹⁸⁵

5 *Enforcement*

¹⁷⁸ ABAC Scheme, *Rules and Procedures*, above n 21 cl 4.5. Panel decisions are made by a simple majority: cl 4.6.

¹⁷⁹ Ibid cl 4.9. Published material must be modified prior to any republication, and the *Rules and Procedures* acknowledge that a widespread outdoor advertising campaign may take longer than five working days to be withdrawn, but must be withdrawn as quickly as possible.

¹⁸⁰ ABAC Scheme, *Rules and Procedures*, above n 21, cl 4.10. The Panel uses a two-step process for hearing complaints about product names and packaging, where the marketer is offered the opportunity to seek a rehearing of a provisional determination made by the Panel. This recognizes the significant financial impact that flows from the Panel upholding a complaint in these circumstances, as marketers are required to cease further orders for production of the name, packaging, and marketing collateral if it is found to breach the ABAC: see cl 4.10.

¹⁸¹ See, eg, *Marshall and LNJ Imports LLC*, (ABAC Adjudication Panel Determination No 81/14, 19 December 2014) above n 111, 6, where the Panel considered a previous determination on whether the ABAC applied to product placement.

¹⁸² Robert J Donovan, Lynda Fielder and Geoffrey Jalleh, ‘Alcohol Advertising Advocacy Research No Match for Corporate Dollars: The Case of Bundy R Bear’ (2011) 20 *Journal of Research for Consumers* 1, 3.

¹⁸³ Sandra C Jones, Danika Hall and Geoffrey Munro, ‘How Effective is the Revised Regulatory Code for Alcohol Advertising in Australia?’ (2008) 27 *Drug and Alcohol Review* 29.

¹⁸⁴ Ibid 37.

¹⁸⁵ See also Noel, Babor, and Robaina, above n 19.

Self-regulation should provide for a wide range of enforcement options, ranging from penalties to deter non-compliance to rewards for good behaviour, enabling enforcement action to be tailored to the seriousness of the breach.¹⁸⁶ While voluntary schemes tend to rely on informal sanctions and peer pressure for their enforcement, research suggests that external sanctions are required to deter companies from ‘free-riding’ on other members’ compliance with the scheme.¹⁸⁷ A key limitation of the ABAC Scheme is the lack of meaningful enforcement options. The Panel cannot enforce its determinations and there are no sanctions available for companies that refuse to follow its rulings, or for those who produce non-compliant promotions.¹⁸⁸ Industry actors argue that being required to modify or withdraw a campaign is a sufficient penalty, given its financial and reputational impact.¹⁸⁹ However, this sanction is voluntary (i.e., it relies on the cooperation of various industry groups), and there is no option of escalating sanctions in response to on-going or serious non-compliance.¹⁹⁰

6 Review

Self-regulation should provide for structured, regular reviews of the scheme’s operation.¹⁹¹ The review framework should include the baseline data that will be collected to judge effectiveness, performance indicators that can be used to measure success, and timeframes for evaluation.¹⁹² Periodic review ensures that regulation is meeting its objectives, and enables revisions to the codes’ terms that reflect the needs and concerns of affected parties.¹⁹³ Reviews can be performed by non-government organisations or professional third-party bodies,¹⁹⁴ but an independent body comprising a wide range of stakeholders may add to the credibility and transparency of review procedures.¹⁹⁵

There have been a number of government reviews of the ABAC Scheme, many of which have led to improvements to the ABAC or to its governance processes. However, the alcohol industry’s response to such reviews has not necessarily been systematic, comprehensive, or transparent. ANPHA’s report on alcohol advertising regulation noted that the ABAC Scheme had proceeded with its own review of the Code in 2013, which led to the introduction of an expanded version of the ABAC in 2014. However, ANPHA was critical of the industry’s failure to engage in public consultation for the purposes of the review, particularly given the important public interest matters which it regulates.¹⁹⁶ ANPHA called for regular, independent, periodic scrutiny of the scheme by

¹⁸⁶ Taskforce on Industry Self-Regulation, above n 50, 61.

¹⁸⁷ See, eg, King and Lenox, above n 58; Reeve, above n 147, 152.

¹⁸⁸ See, eg, Senate, Standing Committee on Community Affairs, *Inquiry into Alcohol Toll Reduction Bill 2007*, above n 24, 15; Australian National Preventive Health Agency, above n 24, 312.

¹⁸⁹ Australian National Preventive Health Agency, above n 24, 131.

¹⁹⁰ *Ibid* 132.

¹⁹¹ Sharma, Teret, and Brownell, above n 33, 24; Department of Treasury and Finance (Vic), above n 46, 27; Government of Canada, above n 47, 16.

¹⁹² Department of Treasury and Finance (Vic), above n 46, 27.

¹⁹³ Australian Competition and Consumer Commission, above n 43, 13; Government of Canada, above n 47, 24.

¹⁹⁴ See Virginia Haufler, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Carnegie Endowment for International Peace, 2001) 72–4.

¹⁹⁵ *Ibid*. See also Reeve, above n 147, 152; Gunningham, above n 102, 72–4.

¹⁹⁶ Australian National Preventive Health Agency, above n 24, 130–31.

a regulatory agency,¹⁹⁷ which would significantly enhance the transparency and accountability of the ABAC Scheme.

In sum, the publication of documents such as annual reports lend the ABAC Scheme some degree of transparency and accountability, as does the complaints handling mechanism and the determinations published by the ABAC Adjudication Panel. There is also some degree of external input and oversight of the Scheme via government representation on the Management Committee, and public health representation on the Adjudication Panel. However, the ABAC Scheme lacks systematic, independent monitoring and review, and meaningful sanctions for non-compliance, undermining the transparency, accountability and thus the credibility of the Scheme. The governance processes established by the Scheme remain industry dominated, bringing into question whether external stakeholder representation can ensure that the public interest informs the operation of the ABAC.

V STRENGTHENING ALCOHOL ADVERTISING REGULATION

This paper has described loopholes in the ABAC's rules (particularly as they relate to alcohol advertising and minors), and limitations in the ABAC Scheme's governance processes, including the absence of effective monitoring, enforcement and review mechanisms. Further, regulatory processes remain industry dominated (despite public health and government involvement), undermining the accountability of the Scheme and its credibility as a regulatory system with important public health impacts. Despite new restrictions on the placement of alcohol promotions in media, the ABAC is still unlikely to prevent young people from being exposed to a high volume of alcohol advertising across a range of different media.¹⁹⁸

Alcohol advertising regulation could be strengthened by introducing a legislative ban on all forms of alcohol marketing.¹⁹⁹ However, a legislative ban would face significant resistance from the alcohol and advertising industries, and would be time consuming and expensive to implement.²⁰⁰ As mentioned above, there appears to be little political appetite in Australia for comprehensive statutory restrictions on alcohol marketing. In light of the practical and political barriers to legislative bans on alcohol marketing, this paper proposes a phased approach to strengthening regulatory controls, drawing on the theory of responsive regulation and the concept of 'regulatory scaffolding' developed by Reeve and Magnusson.²⁰¹ Here, government would draw on increasingly coercive forms of regulation in order to close off the loopholes in the ABAC Scheme

¹⁹⁷ Ibid 131.

¹⁹⁸ See references cited above nn 9–10.

¹⁹⁹ The French *Loi Evin* bans advertising for drinks over 1.2% alcohol by volume on TV and cinemas, as well as alcohol industry sponsorship of sports and cultural events, and places strict rules on the content of alcohol advertising that is permitted. See Alain Rigaud and Michel Craplet, 'The "Loi Evin": A French Exception' (20 May 2004, paper presented to Bridging the Gap European Alcohol Policy Conference, Warsaw, Poland) <http://btg.ias.org.uk/pdfs/btg-conference-2004/papers/rigaud_craplet.pdf>.

²⁰⁰ Jones and Gordon, above n 26, 22.

²⁰¹ This approach also draws on similar proposals put forward by the NCRAA and by the National Preventive Health Taskforce. See National Committee for the Review of Alcohol Advertising, above n 24, vii; National Preventive Health Taskforce, above n 28, 48.

and to progressively tighten restrictions on alcohol marketing. Quasi-regulation can be defined as forms of government influence in voluntary regulatory schemes, falling short of statutory intervention.²⁰² While the first phase of this approach would maintain elements of the quasi-regulatory approach currently represented by the ABAC Scheme, it would require more meaningful forms of government intervention than is seen in the ABAC at present.

Under Phase One, the Federal government could set targets for the ABAC to achieve, related to reducing young people's exposure to alcohol marketing,²⁰³ and develop performance indicators for ABAC signatories, related to compliance with the Code. The government could also collect and analyse data on young people's level of exposure to alcohol marketing (creating a baseline against which to measure the effectiveness of the ABAC) and undertake periodic monitoring of the amount of alcohol advertising in different media, as well as compliance with the ABAC. The findings of these activities would be reported publicly,²⁰⁴ enhancing the transparency and accountability of the scheme, and allowing for instances of non-compliance to be readily identified.

Phase One would involve the creation of an independent committee to administer the ABAC, comprising balanced representation from a wide range of interests, including government, public health and alcohol control bodies.²⁰⁵ This Committee would be charged with managing revisions to the ABAC (which would also involve processes of public and government consultation), and would be empowered to enforce the ABAC using a wide range of sanctions.²⁰⁶ These would include naming and shaming non-compliant companies, for example through adverse publicity orders requiring companies to notify the public of changes made to non-compliant advertising, recall provisions for packaging breaches, and the option of financial penalties for serious repeat offenders.²⁰⁷ An independent panel could be established to hear complaints about breaches of the Code, operating without funding from industry.²⁰⁸ Regular, independent review by an external third party would strengthen the credibility and accountability of the ABAC Scheme, and provide another avenue for external engagement with the Scheme.²⁰⁹

Phase One would also involve closing off the loopholes in the substantive rules found in the ABAC. This could include restrictions on alcohol advertising in media with an audience comprising a smaller percentage of minors than is found under the current placement rules (for example, 10 per cent or more people under the age of 18 years, as recommended by Gerard Hastings and colleagues), a comprehensive ban on all outdoor alcohol marketing within 150 metres of any school, playground, or childcare centre, and prohibitions on the screening of alcohol advertisements prior to movies with a less than R18+ rating.²¹⁰ It could also involve the creation of a more detailed standard on when the creative content of media will be considered primarily aimed at minors, for example, if media makes use of cartoon or animal characters. It may prove politically difficult to place tighter constraints on alcohol industry sponsorship of sports events,

²⁰² See Magnusson and Reeve, above 33, 272.

²⁰³ Foundation for Alcohol Research and Education, above n 80, 5.

²⁰⁴ *Ibid*; Jones and Gordon, above n 26, 23.

²⁰⁵ Jones and Gordon, above n 26, 22–3.

²⁰⁶ *Ibid* 23.

²⁰⁷ Australian National Preventive Health Agency, above n 24, 123.

²⁰⁸ Jones and Gordon, above n 26, 22–3.

²⁰⁹ Australian National Preventive Health Agency, above n 24, 131.

²¹⁰ Hastings et al, 'Alcohol Advertising: The Last Chance Saloon', above n 174, 186.

but this must be done in order to achieve meaningful reductions in young people's exposure to alcohol advertising. Improvements to the ABAC should also be accompanied by the removal of the loophole in the Free TV Code for alcohol advertising accompanying the broadcast of sports programs or sports events.²¹¹

Phase Two would be triggered if monitoring demonstrated that the improvements introduced in Phase One had not led to significant reductions in young people's exposure to alcohol marketing. Under Phase Two the government would create legislative infrastructure that required government approval of the ABAC; mandatory compliance with the Code by all alcohol manufacturers, retailers and advertisers; mandatory use of the pre-vetting service for all promotions; and the progressive expansion of the Code's substantive provisions. For example, alcohol promotions could be banned on all digital platforms, and in all outdoor settings.²¹² Administration, monitoring and enforcement of the ABAC could be shifted to a government department or agency. One way in which Phase Two could be implemented is via registration of the ABAC with the ACCC. This would subject the Code to an independent public review process, increasing the transparency of the Scheme, and set up the ACCC as the ultimate enforcer of the Code, thus giving it 'teeth' (as well as ensuring that sanctions are not seen as anti-competitive conduct).²¹³ This is an important step, given the industry's apparent reluctance to create any form of sanctions for non-compliance with the ABAC.

Phase Three controls would be triggered if monitoring and review exercises found that co-regulation had failed to make meaningful progress in protecting young people from exposure to alcohol marketing. Phase Three would involve legislative bans on alcohol marketing on television during viewing periods with audiences comprising a large absolute number of young people (as determined by television audience data), as well as bans on promotions via other media channels with large audiences of young people.²¹⁴ It would also involve the mandatory phasing out of all sponsorship arrangements between alcohol companies and youth, cultural and music events, and with professional and community sports organisations. Such organisations would be assisted by government to obtain alternative, socially responsible funding.²¹⁵ Phase Three restrictions are an intrusive form of intervention that would face strong industry resistance. Based on the theory of responsive regulation, their true importance lies in the fact that they represent the 'big stick' with which government encourages industry to cooperate with 'softer' regulatory options, thereby avoiding the introduction of legislation. However, the success of this approach hangs on a credible threat by the federal government of progressively strengthening regulatory controls if existing measures fail to protect young people from exposure to alcohol marketing.

VI CONCLUSION

²¹¹ Foundation for Alcohol Research and Education, above n 80.

²¹² Hastings et al, 'Alcohol Advertising: The Last Chance Saloon', above n 174, 186.

²¹³ Australian National Preventive Health Agency, above n 24, 132–3. See *Competition and Consumer Act 2010* (Cth) Pt IVB.

²¹⁴ See Hastings et al, 'Alcohol Advertising: The Last Chance Saloon,' above n 174, 186.

²¹⁵ Australian Medical Association, above n 26, 51.

This paper has described significant loopholes in the ABAC's substantive rules, including a failure to regulate alcohol industry sponsorship and the placement of alcohol marketing adequately, despite the introduction of new placement rules in 2017. The regulatory processes established by the ABAC Scheme also have significant limitations, including lack of meaningful monitoring and enforcement mechanisms. Combined with industry dominated governance processes, these limitations undermine the transparency, accountability and credibility of the ABAC Scheme. The paper proposed a phased or responsive approach to progressively strengthening controls on alcohol marketing, which permits some degree of industry involvement in the operation of the regulatory scheme, but within a framework of much stronger government oversight and intervention. Critical to the success of this approach will be a credible threat of comprehensive statutory regulation if an improved (co-regulatory) scheme does not produce meaningful improvements in the alcohol advertising environment. Given the ABAC Scheme's significant gaps and limitations — and that it is unlikely to produce significant reductions in young people's exposure to alcohol advertising — it is appropriate for the federal government to introduce more effective forms of alcohol advertising regulation.