

# ABAC

## ABAC Complaints Panel Determination No: 92/11

### Complaint by Mr Malcolm Hovey Product: Jack Daniels Advertiser: eLiquorDirect

Professor The Hon Michael Lavarch – Chief Adjudicator  
Debra Richards – Member  
Professor Fran Baum – Member

23 November 2011

#### Introduction

1. This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns an internet advertisement for Jack Daniels by eLiquorDirect (“the Advertiser”) and arises from a complaint by Mr Malcolm Hovey received on 31 October 2011.

#### The Quasi-Regulatory System

2. Alcohol advertising in Australia is subject to an amalgam of laws and codes of practice which regulates and guides the content and, to some extent, the placement of advertisements. Given the mix of government and industry influences and requirements in place, it is accurate to describe the regime applying to alcohol advertising as quasi-regulation. The most important provisions applying to alcohol advertising are found in:
  - (a) a generic code (the AANA Advertiser Code of Ethics) with a corresponding public complaint mechanism operated by the Advertising Standards Bureau (ASB);
  - (b) an alcohol specific code (the Alcohol Beverages Advertising Code) and complaints mechanism established under the ABAC Scheme;
  - (c) certain broadcast codes, notably the Commercial Television Industry Code of Practice (CTICP) which restricts when direct advertisements for alcoholic drinks may be broadcast; and
  - (d) The Outdoor Media Association Code of Ethics which includes provisions about Billboard advertising.
3. The complaints systems operated under the ABAC scheme and the ASB are separate but inter-related in some respects. Firstly, for ease of public access, the ASB provides a common entry point for alcohol advertising complaints. Upon receipt, the ASB forwards a copy of the complaint to the Chief Adjudicator of the ABAC Panel.

4. The Chief Adjudicator and the ASB independently assess the complaint as to whether the complaint raises issues under the ABAC, AANA Code of Ethics or both Codes. If the Chief Adjudicator decides that the complaint raises solely issues under the Code of Ethics, then it is not dealt with by the ABAC Panel. If the complaint raises issues under the ABAC, it will be dealt with by the ABAC Panel. If the complaint raises issues under both the ABAC and the Code of Ethics, then the ABAC Panel will deal with the complaint in relation to the ABAC issues, while the ASB will deal with the Code of Ethics issues.
5. The complaint raises concerns under the ABAC and accordingly is within the Panel's jurisdiction.

### **The Complaint Timeline**

6. The complaint was received by ABAC on 31 October 2011.
7. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint has been determined within the 30 day timeframe.

### **Pre-vetting Clearance**

8. The quasi-regulatory system for alcohol beverages advertising features independent examination of most proposed advertisements against the ABAC prior to publication or broadcast. The Advertiser is not a member of the ABAC Scheme and pre-vetting approval was not obtained for this advertisement.

### **The Advertisement**

9. The complaint refers to an email and internet advertisement on ebay.
10. The email sent by ebay had the heading "Deals. Big deals. Little effort." The page contained 11 items available on ebay under the heading "Today's Big Deals". Only one item was an alcohol product and it was the first item displayed. The item features a picture of part of a bottle of Jack Daniel's Single Barrel American Whisky with the text "Save 15%". The description next to the pictures states "Jack Daniels Single Barrel American Whisky \$79.95 Free Postage Buy it Now".
11. When selecting the item viewers are taken to a page on ebay. On the left side of the page is a picture of a bottle of Jack Daniel's Single Barrel American Whisky. On the right side of the page is the heading "eLiquorDirect – Jack Daniel's Single Barrel American Whisky (700ml)". Below the heading is the text "Buy the Best Bourbon for Less + FREE Freight!" "Item condition: Brand New" "Quantity: 1 More than 10 available" "Price: AU \$79.95" "Postage: FREE Standard Postage – See all details" "Delivery: Estimated between Thu. 10 Nov. and Thu. 17 Nov." "Payments: PayPal, Bank Deposit – See payment information. Pay with PayPal and you may be protected up to \$20,000. Conditions apply" "Returns: 7 day exchange, buyer pays return postage – Read details". Following was a heading "eLIQUORdirect Buy the Best for Less". Below the heading a picture of the product is featured with the text "FREE POST! Perfect Gift for Xmas!". Below the product is a heading "Buy the Best Bourbon

for Less + Free Freight!” and the text “eLiquorDirect - Jack Daniel’s Single Barrel American Whisky (700ml). Jack Daniel’s Single Barrel is a Tennessee Whisky from the oldest licensed distiller in America. Made using the same meticulous and time-honoured techniques employed in the globally acclaimed Jack Daniel’s Whisky range, Single Barrel differentiates itself in an important respect. Just like the other members of the Jack Daniel’s family, Jack Daniels Single Barrel Whisky is charcoal-mellowed drop by drop and housed in charred American oak to reach maturity. Single Barrel deviates from the norm as it is laid to rest in a specific area that is subjected to greater fluctuations in seasonal temperatures. In the summer the grain of the oak barrels open up, allowing the whiskey to interact with the wood. Cold chills contract the barrel, forcing the whiskey out of the grain. Moving in and out the whisky obtains its amber hue and subtle flavours from the barrel’s interior. Buy Jack Daniel’s Single Barrel at eLiquorDirect’s online liquor store, where we have an unbeatable range of American Whisky, Irish Whisky and Scotch Whisky.” Below is the heading “Tasting Notes” followed by the text “Deep amber. Noticeably sweet with hints of vanilla and toasted oak. Lemon.”

12. eLiquorDirect terms and conditions at paragraph 3 state that:

- (a) when delivering alcohol “eLiquorDirect may request that the person who receives the Goods at the delivery address provides satisfactory proof of age. eLiquorDirect will refuse to deliver the Goods if the person receiving the Goods is unable or unwilling to provide evidence of proof of age. The Goods will not be delivered to persons under the age of eighteen years or to persons who fail to provide proof of age satisfactory to eLiquorDirect that the person is aged eighteen years or over.”
- (b) “By law, eLiquorDirect are required to provide clear written instruction to persons responsible for delivery of the liquor, requiring hence that the liquor be delivered:
  - To the person over the age of eighteen who placed the Order; or
  - To another adult person at those premises stipulated in the Order; or
  - In accordance to delivery instructions if the Order is delivered on days after the Order is placed, but always to a person over the age of eighteen years.

The person delivering the liquor may refuse to deliver the liquor to any person who fails to provide proof of age satisfactory to the person responsible that the person is aged eighteen years or over.”

### **The Complaint**

13. The complainant argues that the advertisement encourages underage drinking by selling without any practical age restrictions, delivered direct to the home by courier where payment is by PayPal or direct bank deposit (the latter of which has no restrictions), thereby exposing children to unrestricted alcohol advertising and providing them with a way to purchase alcohol with no ID or age restriction as the

courier is under no obligation to know or inspect the contents of the package he delivers.

### **The Code**

14. The ABAC provides that advertisements for alcohol beverages must:
  - a) present a mature, balanced and responsible approach to the consumption of alcohol beverages and, accordingly –
  - ii) must not encourage under-age drinking;

### **The Advertiser's Comments**

15. eBay responded to the complaint and questions posed by the Panel by letter received 11 November 2011. The principal points made by eBay are:
  - (a) There are age restrictions on the purchasing of goods through eBay and the Seller has in place terms and conditions to ensure that alcohol is provided to someone who is over the age of eighteen years. As a condition of buying and selling on eBay, users must register to become an eBay member. The registration process requires the user to expressly indicate that they accept and will comply with eBay's User Agreement and related policies which are available on the website. A further condition to registration is that the member must be at least 18 years of age. Any person who registers with eBay is required to acknowledge this fact prior to registration. Hence, anyone who purchases items on eBay has acknowledged, whether falsely or not, that they have attained the legal age for consuming alcohol in Australia being a minimum of 18 years of age. Further the Seller's terms and conditions at paragraph 3.4 clearly state that the Seller will provide clear written instructions to the courier that the liquor be delivered to the person over the age of 18 who placed the order, to another adult person at those premises stipulated in the order or in accordance with the delivery instructions if the order is delivered on days after the order is placed but always to a person over the age of 18 years. The terms and conditions also stipulate that the courier may refuse to deliver the liquor to any person who fails to provide satisfactory proof that they are over the age of 18 years. Further the Seller includes a disclaimer on its alcohol listings on the eBay website as to responsible consumption of alcohol.
  - (b) Only registered members of eBay receive eBay advertisements via email and therefore have acknowledged they are at least 18 years of age. Further the advertisement was only sent to members who had consented to receiving it by opting in to receive weekly notifications regarding eBay deals. The only way a child or adolescent could view the advertisement were if a child or adolescent made a false statement about their age during the registration process and created an account or an adult who consented to receiving the advertisement provided it to a child or adolescent.

- (c) eBay has taken reasonable steps to ensure that only people over the age of 18 years of age receive the advertisement. eBay is committed to the responsible advertising of alcohol and refers members to the Alcohol Beverages Advertising Code on its Alcohol Policy Page. eBay asks that all members comply with the Code when listing alcohol on the website and will remove listings that are found to be in breach of the Code.

### **The Panel's View**

16. This complaint raises both substantive and procedural issues which will be dealt with in turn.

#### **The Procedural Aspects**

17. The ABAC is a quasi-regulatory system which has at its heart the commitment of advertisers to comply with the standards contained within the ABAC and abide by the pre-vetting and complaints processes which make up the ABAC Scheme. This commitment is embodied through the sponsorship of the ABAC Scheme by three (3) peak alcohol industry bodies, namely the:

- Brewers Association of Australia & New Zealand
- Distilled Spirits Industry Council of Australia
- Winemakers Federation of Australia.

18. While the individual companies which are members of the sponsoring industry bodies cover the vast majority of alcohol beverage advertisers in Australia, there are alcohol producers and advertisers who are not member of the relevant industry bodies or are not signatories to the ABAC Scheme. The advertiser in this particular case is not an ABAC signatory. This means that the advertising was not subject to pre-vetting prior to its use. Further, this decision by the Panel does not have any binding force on the advertiser. That said, the advertiser has cooperated with the Panel and expressed a commitment to responsible advertising of alcohol and the ABAC, and accordingly a determination can be made.

#### **The Substantive Aspects**

19. The ABAC lays out a series of standards that alcohol beverage advertising is to satisfy. These standards relate to the content of an ad and were devised in the period where advertising was primarily conducted by means of print, billboards or other outdoor media, radio, television and cinema. At the commencement of the ABAC in 1998, the internet and e-mail were technologies in the early stages of their existence and had not been extensively utilised for the marketing of alcohol products.
20. Not surprisingly, the ABAC system operates most easily when applied to advertising mediums against which the scheme was conceived. And while the scheme was extended to advertising on the internet in 2004, direct marketing initiatives via e-mail have not often featured in Panel determinations.

21. In this case, the underlying concern of the complainant is not so much the content of the Jack Daniels product advertising via eBay but more the nature of eBay itself as a means to market alcohol products. The complainant's contention is that the e-mail from eBay which contains the method to secure a home delivery of Jack Daniels could facilitate the purchase and use of the product by an underage drinker.
22. For its part, eBay details various provisions and practices that it claims limits the prospect of an underage person being able to utilize its services to purchase alcohol. The advertiser concluded that its safeguards are adequate and that its Jack Daniels promotion is not inconsistent with good standards of practice in alcohol marketing.
23. The ABAC scheme is not designed nor intended to deal with all links in the potential chain involved in the marketing, sales and delivery of alcohol products to consumers. Rather, it applies to the content of alcohol beverage advertising. In this regard, the relevant provisions of the ABAC provide that advertising must not encourage underage drinking nor have strong or evident appeal to children and adolescents.
24. The actual content of the "advertising" promoting the alcohol product attributes characteristics from its method of distillation which it is claimed gives the product a particular flavor. The Panel does not believe the content of the ad can be said to be particularly appealing to younger people.
25. Accordingly, the Panel does not find the advertising in breach of ABAC standards. It is a matter for the industry and government to assess if direct marketing of alcohol via eBay should be subject to any further form of regulation to ensure that this method cannot be utilised to facilitate underage drinking.
26. The complaint is dismissed.