



ABAC Adjudication Panel Determination No. 59/19

Product: Jack Daniels
Company: Brown Forman
Media: Packaging/Brand Extension
Date of decision: 24 September 2019
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns Jack Daniels branded barbecue products by Brown Forman (“the Company”) and arises from a complaint received 30 August 2019.
2. Alcohol marketing in Australia is subject to an amalgam of laws and codes of practice, that regulate and guide the content and, to some extent, the placement of marketing. Given the mix of government and industry influences and requirements in place, it is accurate to describe the regime applying to alcohol marketing as quasi-regulation. The most important provisions applying to alcohol marketing are found in:
 - (a) Commonwealth and State laws:
 - Australian Consumer Law – which applies to the marketing of all products or services, and lays down baseline requirements, such as that marketing must not be deceptive or misleading;
 - legislation administered by the Australian Communications and Media Authority – which goes to the endorsement of industry codes that place restrictions on alcohol advertising on free to air television;
 - State liquor licensing laws – which regulate retail and wholesale sale of alcohol, and contain some provisions dealing with alcohol marketing;

(b) Industry codes of practice:

- AANA Code of Ethics – which provides a generic code of good marketing practice for most products and services, including alcohol;
 - ABAC Responsible Alcohol Marketing Code (“ABAC”) – which is an alcohol specific code of good marketing practice;
 - certain broadcast codes, notably the Commercial Television Industry Code of Practice – which restricts when advertisements for alcohol beverages may be broadcast;
 - Outdoor Media Association Code of Ethics – which places restrictions on the location of alcohol advertisements on outdoor sites such as billboards.
3. The codes go either to the issue of the placement of alcohol marketing, the content of alcohol marketing or deal with both matters. The ABAC deals with both the placement of marketing i.e. where the marketing was located or the medium by which it was accessed and the content of the marketing irrespective of where the marketing was placed. The ABAC scheme requires alcohol beverage marketers to comply with placement requirements in the other codes as well as meeting the standards contained in the ABAC.
 4. For ease of public access, Ad Standards (AS) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by AS, a copy of the complaint is supplied to the Chief Adjudicator of the ABAC.
 5. The complaint is independently assessed by the Chief Adjudicator and AS and streamed into the complaint process that matches the nature of the issues raised in the complaint. On some occasions, a single complaint may lead to decisions by both Ad Standards Community Panel under the AANA Code of Ethics and the ABAC Panel under the ABAC if issues under both Codes are raised.
 6. The complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

7. The 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 this timeframe.
8. The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for the marketing communication.

The Marketing Communication

9. An image of the products referred to in the complaint and the location of the display in the entrance of the Big W store in Toowoomba is included following.



Jack Daniel's Barbecue Glaze and Brush Set



Father's Day Can Cooler - Red

\$4



The Complaint

10. The complainant is concerned that:

- while walking into the BIG W store in Toowoomba Grand Central with a child, a Father's Day display which had 3 products on display that promoted alcohol was in the direct sight line of children (including a Jack Daniels gift box, a "save water drink beer" schooner and an "it's all fun and games until the beer runs out" beer cooler);

- alcohol consumption shouldn't be promoted as a Father's Day message;
- with a background in health promotion I am very aware of the saturation levels of information and products which we are exposed to in our environment, on the neural pathways within our brain (including the effects of product branding such as 'Jack Daniels' as a well established marketing strategy);
- I am also aware of the statistics that support my concerns including and specifically, parent's alcohol consumption playing a large role in Australian child abuse cases (up to 47% of all reported child abuse cases each year across Australia). - Foundation for Alcohol Research & Education, 2015
- social responsibility and accountability especially for prominent companies such as Big W is critical within and for a healthy society; and
- this display is removed immediately, and that my submission provides further evidence for appropriate and regulated advertising standards, that are in the best interest of our community.

The ABAC Code

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

(b)(i) have Strong or Evident Appeal to Minors

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

12. Definition in Part 6 of the ABAC provides:

A **Minor** means a person who is under 18 years of age and therefore not legally permitted to purchase an alcohol beverage in Australia.

Placement Rules means:

(ii) A Marketing Communication must comply with codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Alcohol Guidelines).

(iii) A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.

(iv) If a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, a Marketing Communication may only be placed where the audience is reasonably expected to comprise at least 75% Adults (based on reliable, up to date audience composition data, if such data is available).

(v) A Marketing Communication must not be placed with programs or content primarily aimed at Minors.

Strong or Evident Appeal to Minors means:

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

The Company's Response

13. The Company responded to the complaint by letter dated 17 September 2019. The principal points made by the Company were:

- We would like to assure you that Brown-Forman Australia ("**Brown-Forman**") takes very seriously our responsibility to market our products in accordance with all applicable laws, as well as the ABAC Code, and above all, responsibly, to Australian consumers. Therefore, it is always a matter of serious concern for us to receive a complaint that we are falling below the high standards we set for ourselves in this regard.
- The licensed products in question are gift packs/grill sets containing a bottle of barbeque sauce with Jack Daniel's Tennessee Whisky flavouring, accompanied by a BBQ utensil adorned with Jack Daniel's branding. We can confirm that the Jack Daniel's branding on these licensed products was authorised by Brown-Forman through a formal licensing arrangement with two (2) third party licensees in Australia. The licensee for the licensed products in question was granted a license to use Jack Daniel's intellectual property on or in connection with the "design, manufacture, sale, advertising, promotion and distribution of the licensed products in Australia and New Zealand, to approved distribution retail channels, which includes mass retail outlets such as Big W.
- With respect to brand extensions of non-alcohol beverage products, we understand it is optional for such categories of products to be submitted for ABAC pre-vetting. As these licensed products - being barbeque sauces and BBQ utensils - are culinary or culinary-related products, and not alcoholic beverage products, the licensee did not believe there was any need to pre-vet these products with ABAC. In any case our licensing policy has always focused on licensing products intended for use by adults or adult-oriented products. Accordingly, the licensee did not submit the brand extensions for ABAC pre- vetting approval.
- We do not consider that the licensed product and its packaging breaches section 3(b)(i). Brown-Forman is committed and works to ensure that our communications are targeted exclusively to consumers above the legal drinking age. By the very nature of these products, being barbeque sauces

and barbecue utensils - essentially culinary products - which would overwhelmingly be used by adults over the age of 18 years, it is clear this product is not targeting minors. In terms of the packaging, it does not have any features that are likely to appeal strongly to Minors, is not specifically targeted at minors and does not have a particular attractiveness to Minors beyond the general attractiveness it has for an adult. Note the colour of the packaging is black and white, masculine in orientation and doesn't contain any imagery likely to appeal strongly to minors or use brand identification for use primarily by Minors.

- We do not consider that the advertisement breaches section 3(b)(iv) of the ABAC Code. The license granted in respect of these licensed products includes the design, manufacture, sale and distribution of such licensed products in any retail channel or business where at least 70% of that channel's or business' customers are over the age of 18. Such retail channels includes, without limitation, department stores, mass market retailers, grocery stores etc, including Big W. Regarding the placement of the products within the specific store, once the licensee has sold the licensed products to the retailer, as to where the licensed products is placed within the retail store is entirely at the discretion of the retailer, in this case Big W. Neither Brown-Forman nor the licensee has any input or control as to where these products are positioned within the retail outlet. It would not be reasonable for Brown-Forman or the licensee to dictate to Big W the location in the store where the licensed product should be placed for sale.
- We do note, however, that the photo accompanying the complaint shows a section of the menswear department within the Big W store. This is a section ordinarily shopped by adults. And by virtue of the occasion for this licensed product as identified in the complaint – Father's Day - we believe the complainant has made our point that this licensed product is indeed meant for purchase to be used by adults - fathers, grandfathers etc.
- We hope that you will find that our responses to your questions valuable as you consider the received complaint. As noted above, Brown-Forman is committed to maintaining the highest standards in its marketing activities.

The Panel's View

14. Shortly before Father's Day 2019, the complainant in the company of a child was shopping at the Grand Central Shopping Centre in the Queensland city of Toowoomba. Near the entrance of the Big W store there was located a display containing various products promoted as being potential choices for a Father's Day gift. Several of the products had an alcohol theme and it is the relationship between these products and the ABAC which forms the basis of this determination.
15. The complainant has a background in health promotion and the nature of the products raised a concern which was initially taken up with staff of the Big W store. In short, the complainant contends that it is socially irresponsible to associate an event such as Father's Day with alcohol use. It is argued that the alcohol themed products contribute to a saturation level of alcohol marketing which impact neural pathways and to negative social outcomes such as the correlation between parental alcohol use and instances of child abuse.

16. The ABAC regulates the marketing of alcohol beverages by alcohol producers, distributors and retailers. The products that were being sold by the Toowoomba Big W are not alcohol beverages and Big W does not retail alcohol beverages. The ABAC does not purport to regulate every reference to alcohol generically that arises in everyday life. For the ABAC Scheme and the Panel to have any jurisdiction over the issues raised in the complaint the threshold issue is whether the marketing of the products can be said to fall within the ambit of a marketing communication for ABAC purposes.

Does the ABAC apply to the products identified in the complaint?

17. The complaint relates to Big W promoting alcohol themed products and specifically:
- two Jack Daniel's branded non-alcohol beverage products namely a 'grill kit' and 'basting pack'; and
 - two other products namely a stubbie holder and beer stein which are not branded.
18. Given Big W is not an alcohol beverage producer, distributor or retailer the ABAC does not apply to the way in which the company chooses to promote alcohol themed (but not actual alcohol beverage) products. This means the Panel has no jurisdiction to review the promotional displays set up by Big W.
19. The vast majority of matters which come before the Panel relate to the direct marketing of an alcohol beverage by way of broadcast mediums like TV or radio advertisements or the transmission of alcohol marketing via digital platforms over the internet. The ABAC, however, also captures other forms of marketing such as 'marketing collateral' or through the branding of a non-alcohol beverage product with an alcohol beverage name (brand extensions).
20. The beer stein and stubbie holder could potentially fall within the ambit of marketing collateral, but this would require the items to be associated with a specific alcohol beverage brand owner or a recognised alcohol retailer. In this case neither the stein or the stubbie holder relates to an alcohol beverage brand or retailer but rather both products make references to alcohol use more generically. This means these two products do not fall within the remit of the ABAC scheme.
21. In contrast the grill kit and basting pack are branded as Jack Daniel's products. The Company has confirmed that it's branding appears on the products as a result of a licensing arrangement that permitted the third-party owners of the two BBQ products to use the intellectual property of the Company. This means that these two products fall within the concept of a brand extension and are captured as a marketing communication for ABAC purposes.

Is the Jack Daniel's brand extension consistent with ABAC Standards?

22. The principal argument advanced by the complainant might be summarised as - 'that the community is harmed by saturation levels of alcohol marketing and Big W promoting alcohol themed products at Father's Day simply worsens this problem'. While this is a legitimate view to advance it is at its core raising questions of government public policy about alcohol use and promotion which are well beyond

the remit of the Panel. The Panel's role is much more limited and that is to assess the consistency of individual marketing communications with the ABAC standards raised by the nature of the complaint.

23. The complaint raises the promotion being seen by children and the timing in conjunction with Father's Day. Part 3 (b) of the Code provides that an alcohol marketing communication must not have strong or evident appeal to minors. This might arise by the marketing being specifically targeted towards minors or having an attractiveness for minors beyond the general attractiveness it has for adults.
24. The Panel does not believe the Jack Daniel's branded BBQ products would have strong or evident appeal to minors. The product's packaging shows the Jack Daniel's brand and logo but otherwise does not feature any eye-catching designs or thematic which are likely to draw the attention or the engagement of under 18 year olds. The product's branding and presentation is consistent with an appeal to adults and likely older adults.
25. The staging of the promotional display by Big W in the lead up to Father's Day is not something which the Company had any control over and as noted earlier Big W itself is not an entity captured by the ABAC scheme. For completeness, the Company was asked to provide a response to concerns about the branded products being available in a Big W store, but this fact of itself is not subject to a Code standard nor an ABAC Placement Rule.
26. Accordingly, the complaint is dismissed.