



ABAC Adjudication Panel Determination No 11/23

Product: Grey Goose Vodka
Company: Bacardi Martini
Media: TV – Digital
Date of decision: 21 February 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 13 January 2023 and concerns advertising for Grey Goose (“the Product”) by Bacardi Martini (“the Company”) seen on Channel 9 during breakfast program, The Today Show, on Friday 13 January 2023 at approximately 8:35am.
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 the 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 Code”) – which is an alcohol-specific code of good marketing practice;
 - certain broadcast codes, notably the Commercial Television Industry Code of Practice – which restricts when advertisements for alcohol beverages may be broadcast;
 - Outdoor Media Association Code of Ethics and Policies – which place restrictions on the location of alcohol advertisements on outdoor sites such as billboards.
3. The codes go either to the issue of the placement of alcohol marketing, the content of alcohol marketing or deal with both matters. The ABAC deals with both the placement of marketing i.e. where the marketing was located or the medium by which it was accessed and the content of the marketing irrespective of where the marketing was placed. The ABAC scheme requires alcohol beverage marketers to comply with placement requirements in other codes as well as meet the standards contained in the ABAC.
 4. For ease of public access, Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the Ad Standards, a copy of the complaint is supplied to the Chief Adjudicator of the ABAC.
 5. The complaint is independently assessed by the Chief Adjudicator and Ad Standards and streamed into the complaint process that matches the nature of the issues raised in the complaint. On some occasions, a single complaint may lead to decisions by both the Ad Standards Community Panel under the AANA Code of Ethics and the ABAC Panel under the ABAC if issues under both Codes are raised.
 6. The complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaint was received on 13 January 2023.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint was completed in this timeframe.

Pre-vetting Clearance

- The quasi-regulatory system for alcohol beverage marketing features an independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was obtained for the content of the marketing (Approval Number 3986).

The Marketing Communication

- The complaint relates to marketing for Grey Goose Vodka, seen while watching The Today Show.

The relevant marketing communications can be viewed at the following links:

- <https://youtu.be/bu5ME-v9UBQ>
- <https://youtu.be/0CKfLJIC9h8>

Both ads are very similar, and in both cases use Boss by Summer Jike as the background music.

<p>The ad commences with a shot of a person, superimposed with the words "Grey Goose Presents". Birds can be heard chirping in the background. The person is holding a glass, and through the glass we can see a path or track.</p>		
<p>The person is then conveyed along the path or track. Ice is poured into their glass and a hand is seen pouring Grey Goose Vodka into the glass. We see an aerial view of the person on the path/track.</p>		
<p>A hand reaches in to pour more liquid into the glass. A person on a swing places a slice of blood orange in the drink.</p>		

<p>The person is shown sitting by a pool with the drink.</p>		
<p>A goose is shown. The person nods at the goose.</p>		
<p>The advertisement closes with a shot of a bottle of Grey Goose Vodka, a full glass, a can with a slice of blood orange on the top, and a plate of blood orange segments. The words "Vive Le Spritz!" are shown.</p>		

The Complaint

11. The complainant objects to the marketing as follows:

- *Why is Grey Goose Vodka being advertised at 8.30am in the morning? I find this to be very disturbing as after the commercial breaks the Today show crossed over to Sheree in Condell Park and she was rolling around playing with children. I don't think this was very responsible as child friends of the children that were going to be on the cross with Sheree were most likely sitting watching this commercial prior to the cross to Condell Park. This ad portrays a young adult enjoying himself in what looks like a backyard setting which could be misconstrued by much younger ones.*

The ABAC Code

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

- (b)(i) have Strong or Evident Appeal to Minors;
- (b)(iii) depict an Adult who is under 25 years of age and appears to be an Adult unless:
 - they are not visually prominent; or

- they are not a paid model or actor and are shown in a Marketing Communication that has been placed within an Age Restricted Environment;

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

13. Part 6 of the ABAC Code provides that:

Placement Rules means:

- (i) A Marketing Communication must comply with codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy).
- (ii) A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.
- (iii) If a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, a Marketing Communication may only be placed where the audience is reasonably expected to comprise at least 75% Adults (based on reliable, up-to-date audience composition data, if such data is available).
- (iv) A Marketing Communication must not be placed with programs or content primarily aimed at Minors.
- (v) A Marketing Communication must not be sent to a Minor via electronic direct mail (except where the mail is sent to a Minor due to a Minor providing an incorrect date of birth or age).

Strong or Evident Appeal to Minors means:

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

The Company Response

14. The Company responded to the complaint by letter emailed on 23 January 2023. The principal comments made by the Company were:

Alcohol Advertising Pre-vetting Service Approval

- The marketing received creative approval under application number 940-2022, approval number 3986.

Responsibility toward Minors

- The setting of the advertisement would be seen more as a generic green outdoor landscape with various trees, plants and flowers (rather than a backyard).

- The creative can be viewed via the following links:

<https://youtu.be/bu5ME-v9UBQ>

<https://youtu.be/0CKfLJIC9h8>

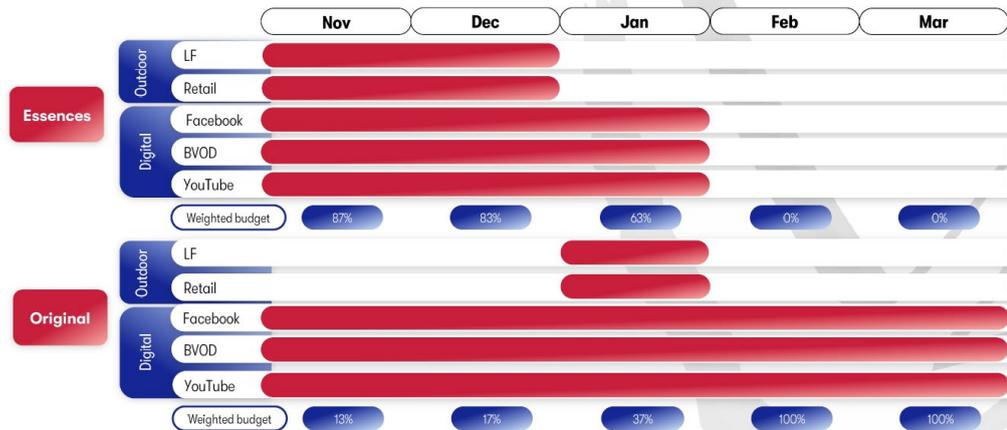
- Bacardi's global Responsible Marketing Principles stipulates that "The content and placement of all marketing and promotional practices will be primarily directed towards consumers of the required legal age to purchase beverage alcohol in the relevant countries and will avoid images and music that would appeal primarily to underage individuals" and given that the LDA varies around the world between 18 and 25 years, Bacardi does not use talent under 25 years of age.

Marketing materials distributed will not feature images of drinkers who are, or look as if they are, younger than 25 years of age.

- At the time of filming (April 2021), the paid actor who appears in the Grey Goose Original advertisements was 37 years of age.
- We confirm that as a part of our targeting, we apply age targeting, only targeting users that are over the age of 23 for Grey Goose. The age gating is linked to the account holder that uses their log in to access the 9NOW app.
- We don't have any activity broadcast on FTA (free to air television) at the moment. We only have activity for BVOD (broadcast video on demand). The files we have supplied for BVOD are unable to run across FTA – these require a different file format. Please see below for our current media block plan

outlining the platforms we are currently live on for Grey Goose.

Revised campaign block plan



- Confirming that as a part of our targeting, we apply age targeting, only targeting users that are over the age of 23 for Grey Goose. The age gating is linked to the account holder that uses their log in to access the 9NOW app. Further, there are no time-of-day restrictions on alcohol advertising in conjunction with programs accessed via digital TV apps, time-of-day restrictions are only faced when appearing on traditional TV.
- Network data on age of logged in users who viewed “The Today Show”:

	% Split
18-24	8.35%
25-34	18.04%
35-49	33.99%
50+	39.62%

- VPM data for the age of the audience of “The Today Show” on 9Now. Please note, this data is based on minutes viewed:

	% Split
U18	4%
18-24	6%
25-39	26%
40-54	37%
55-64	18%
65+	10%

Source: OzTAM Live VPM, Today, 1/11/22 - 13/1/23, metric minutes, includes coviewing on connected tv devices

- Oztam data on the age of audience of the free to air linear broadcast of “The Today Show”:

Demo	TODAY (5 City)
Ppl 0-17	2.7%
Ppl 18-24	0.9%
Ppl 25-39	10.0%
Ppl 40-54	22.5%
Ppl 55-64	27.3%
Ppl 65+	36.7%

Source: OzTAM (5CM), Today (Nine), 1/11/22 - 13/1/23, Profile, consolidated 7 data

- The Today show is a program with an adult focus, canvassing news and current affairs as well as entertainment.

The Panel's View

Introduction

15. This determination arises from a complaint that an advertisement for Grey Goose Vodka was seen during the Channel 9 breakfast program 'The Today Show'. The complainant has several concerns namely:
 - it is inappropriate that alcohol is advertised with a TV program at 8:30am;
 - the ad appeared prior to a segment on the Today Show that involved children and it is likely children would be watching; and
 - the ad itself showed a young adult in a backyard setting and could appeal to and be misconstrued by minors.
16. These concerns raise both the ABAC content standard that marketing does not have strong appeal to minors and the Placement Rules that aim to limit the exposure of alcohol marketing to minors. Both issues will be reviewed.

The Today Show and the ABAC Placement Rules

17. The underlying concern of the complainant is that the alcohol ad was seen during The Today Show. This concern raises the ABAC Placement Rules. The Rules have the policy aim of directing alcohol marketing towards adults and to the extent possible, away from minors. There are five rules of which four are potentially relevant in the current case namely:
 - relevant media codes of practice must be complied with such as the Commercial Television Industry Code of Practice - Rule 1;
 - if a media platform on which the ad appears has age restriction controls to exclude minors, then these controls must be used - Rule 2;

- if age restrictions controls cannot exclude minors, then an ad can only be placed where the audience is reasonably expected to comprise at least 75% adults - Rule 3; and
 - an ad must not be placed with programs or content primarily aimed at minors – Rule 4.
18. The Today Show can be watched by viewers in essentially three ways:
- live to air over linear free to air TV on the primary Channel 9 station;
 - live streamed via the 9Now app; and
 - using the 9Now app as a Broadcast Video on Demand (BVOD) at any time while the program remains available on the app.
19. The first two ways of seeing the program result in it being seen 'live'. The Today Show airs each weekday from 5:30am to 9am. Linear TV might be described as traditional TV and consists of the primary Commercial Channels of 7, 9 and 10 and the public broadcasters of the ABC and SBS. In the 2000's digital TV was progressively introduced and this has enabled each of the TV Networks to add additional channels and methods of viewing content. One innovation has been the 'live streaming' of programs shown on linear TV over apps like 9Now.
20. The importance of this background is in relation to Placement Rule 1. This is because different rules apply regarding alcohol advertising depending on the medium over which content is accessed. Specifically, time of day restrictions apply to alcohol advertising on linear free to air TV but there are no time-of-day restrictions on alcohol advertising accessed via digital TV.
21. Where this easily becomes confusing is when programs are live streamed on digital TV over facilities such as the 9Now app. This is because the ads which are seen on the 'live' broadcast over linear TV will be different from the ads inserted into the 'live streamed' broadcast of the same program on digital TV. To put it simply, household A can be watching the Today Show at 8:30am on linear TV and not get an alcohol ad, while household B is watching the Today Show at 8:30 am but live streamed on digital TV and they can get an alcohol ad. It's the same Today Show seen at the same time, but the ads are different.
22. There is no doubt that the complainant was watching the Today Show at 8:30am and saw the ad for Grey Goose Vodka, but the Company contends this must have been the live streamed program accessed via the 9Now app as the ad was not shown on linear free to air TV. Equally, there are a series of other checks on the TV Networks regarding compliance with the obligations in the Commercial Television Industry Code of Practice (CTICP). If an alcohol ad was shown on traditional linear TV at 8:30 am, it would be a clear breach of the CTICP and the ABAC Placement Rule, but

this is highly improbable. It is far more likely that the complainant saw the ad with the live streamed broadcast of the Today Show.

23. The Panel accepts the ad was not broadcast on linear free to air TV at 8:30am. Rather the ad was inserted into the live streamed digital version of the Today Show at 8:30 am. This means Placement Rule 1 has not been breached as there are no time-of-day restrictions on alcohol ads inserted into programs accessed via digital channels.
24. Placement Rule 2 requires that alcohol marketers use available age restriction controls provided by a media platform to exclude minors from a viewing audience. Digital transmissions via 9Now do have an age restriction capacity. This arises because to access 9Now an account has to be opened and the account holder provides a date of birth. With this information, both the 9 Network and alcohol marketers can exclude account holders aged under 18 years old from being served alcohol ads. The Company advised this facility was used.
25. It is fair to say that the impact of Placement Rule 2 is more meaningful when social media is accessed via internet-connected devices such as phones and tablets. This is because many people including minors have a personal device and personal social media accounts on platforms such as Instagram. These platforms now have quite effective age restriction controls to exclude minors from seeing alcohol marketing. In contrast, 9Now has an age restriction capacity, but in practical terms the account will be held by an adult and the shows will be co-viewed by all people in the household including children.
26. Placement Rules 3 and 4 go to the reasonably expected audience and the nature of the program with which the alcohol ad was placed. Rule 3 provides that an alcohol ad may only be placed where the audience is reasonably expected to comprise at least 75% adults. It is possible to assess the audience of TV programs through the ratings system and the Company has supplied ratings data. This data reveals that the audience for The Today Show over both linear free to air TV and accessed 'on demand' on 9 Now meets the 75% adult benchmark.
27. Rule 4 provides an alcohol ad must not be placed with programs or content primarily aimed at minors. 'Primarily aimed' means the program must be more than being of interest to minors or even that the program has evident appeal to minors. It means that the program has minors as its primary focus. This can be assessed by considering factors such as:
 - the subject matter of the program and whether the subject matter has themes likely to predominately appeal to children or adolescents;
 - the use of familiar children's characters or the use of children and adolescents within the program;

- the storyline and whether the complexity of the plot suggests its target audience is adult;
 - the use of language and the presence of adult themes such as violence and the portrayal of sexuality; and
 - the actual audience of the program.
28. The Company has submitted that The Today Show is a program with an adult focus, canvassing news and current affairs as well as entertainment. The Today Show is a breakfast program which combines news, weather reports and entertainment reporting with various interviews. While some content will from time to time have appeal to minors, the show as a whole is clearly directed towards adults and is not 'primarily aimed' at minors. The Panel does not believe the screening of an alcohol ad with the Today Show is a breach of Placement Rule 4.
29. Drawing all this together, there has not been a breach of the ABAC Placement Rules by showing alcohol ads with The Today Show given:
- the ad was inserted into a 'live streamed' version of the program shown on BVOD and not linear TV and hence the time restrictions provisions in the CTICP do not apply;
 - the age restriction controls available on the 9Now BVOD platform were utilised to exclude account holders who are minors from being served with alcohol ads;
 - the audience for The Today Show is well within the 75% adult threshold of the Placement Rules; and
 - The Today Show cannot be said to be primarily aimed at minors.

Strong or Evident appeal to minors

30. Beyond the question of the placement of the ad with The Today Show, it was contended that the ad was set in a backyard, an environment which children would find relatable. The relevant content standard is contained in Part 3 (b)(i) of the Code and provides that an alcohol ad must not have strong or evident appeal to minors. This might be breached if the ad:
- specifically targets minors;
 - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; or
 - uses imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to minors.

31. The benchmark applied when assessing if an ABAC standard has been satisfied is the 'reasonable person' test. This means the Panel puts itself in the shoes of a person who has the life experiences, opinions and values commonly held by most Australians, and assesses how this reasonable person would probably understand the marketing communication.
32. The Company has submitted that the setting of the advertisement would be seen more as a generic green outdoor landscape with various trees, plants and flowers, rather than a backyard.
33. The Panel has considered the factors that might give rise to a strong or evident appeal to minors on previous occasions. While each marketing communication must always be assessed individually, some characteristics within marketing material which may make it strongly appealing to minors include:
 - the use of bright, playful, and contrasting colours;
 - aspirational themes that appeal to minors wishing to feel older or fit into an older group;
 - illusion of a smooth transition from non-alcoholic to alcoholic beverages;
 - creation of a relatable environment by use of images and surroundings commonly frequented by minors;
 - depiction of activities or products typically undertaken or used by minors;
 - language and methods of expression used more by minors than adults;
 - inclusion of popular personalities of evident appeal to minors at the time of the marketing (personalities popular to the youth of previous generations will generally not have strong current appeal to minors);
 - style of humour relating to the stage of life of a minor (as opposed to humour more probably appealing to adults); and
 - use of a music genre and artists featuring in youth culture.
34. It should be noted that only some of these characteristics are likely to be present in a specific marketing communication and the presence of one or even more of the characteristics does not necessarily mean that the marketing item will have strong or evident appeal to minors. It is the overall impact of the marketing communication rather than an individual element that shapes how a reasonable person will understand the item.

35. The Panel does not believe the ad breaches the ABAC standard. It was noted that:
- the ad is not set in a stereotypical backyard, it is more akin to a large park or botanic garden. There are no fences, houses or neighbours evident, or other items often found in backyards, such as barbecues, lawnmowers or clotheslines.
 - there is no depiction of activities or products typically undertaken or used by minors (for example, play equipment such as balls, bikes or trampolines);
 - no minors are shown;
 - the style and tone of the ad is mature and not considered highly relatable to children or adolescents; and
 - the character depicted in the ad is clearly an adult male, who the Company advises is 37 years old.
36. Accordingly, the complaint is dismissed.