



## ABAC Adjudication Panel Determination No 75/23

**Product:** Maker's Mark Whisky  
**Company:** Beam Suntory  
**Media:** TV – Free to Air  
**Date of decision:** 2 June 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 8 May 2023 and concerns a television commercial for Maker’s Mark (“the Product”) by Beam Suntory (“the Company”). The marketing was seen on free to air television when watching Channel Seven’s daytime movie, on Friday 5 May at approximately 1:30pm.
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 8 May 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

9. 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 not obtained for placement of the marketing.

## The Placement

10. The complaint relates to a commercial for Maker's Mark Whisky, seen while watching the daytime movie on Channel Seven.

## The Complaint

11. The complainant saw the advertising on free-to-air TV on Friday 5 May 2023 at approximately 1:30pm, and objects to the marketing as:
  - *Alcohol advertising shouldn't be allowed during the day.*

## The ABAC Code

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

- 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).
- A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.
- 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).
- A Marketing Communication must not be placed with programs or content primarily aimed at Minors.

- 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).

## The Company's Response

14. The Company responded to the complaint by email on 12 May 2023. The principal comments made by the Company were:

- Makers Mark had two TV spots recently appear in Adelaide running within Midday Movie (The Perfect Assistant).
- These spots appeared after 12:25pm.
- The Perfect Assistant delivered a 99.4% P18+ audience.

Standard eTAM Report : New File\*

Period : 5/05/2023

Data Types : Ave AUD (Total People), Ave AUD (P 18+), Profile % (Total People), Profile % (P 18+)

Options : With Guests, Viewing > 5mins C, Consolidated 7 (Last Consolidated 4/05/2023), All Minutes

Data Source : Metro 5 City Panel plus Subscription

Day Part Set File : 12:00 - 15:59 SMTWTFS\*

Calculation : Audience Event Calculation Methodology = Average (within the market)

Markets : Metro 5 Cap City, Sydney, Melbourne, Brisbane, Adelaide, Perth

Info : R&F Apply Weighting to Seconds Viewed: ON

No Page Headings

	Ave AUD (Total People)	Ave AUD (P 18+)	Profile % (Total People)	Profile % (P 18+)
M- THE PERFECT ASSISTANT (R)	85,000	85,000	100.0%	99.4%

- Based on CAD restrictions, Midday Movies fall largely within the ABAC guidelines.
- PHD and Scheduling / traffic teams monitor all program suitability in line with Adult vs. Children skew (particularly over holiday periods) and will pre-empt any spots that may attract a higher Children audience.
- Alcohol can be advertised on commercial and SBS televisions. However, it can only be shown at certain times. The regulations for alcohol ads on television are currently as follows:
  - After 6pm during sports programs, weekends and public holidays
  - 12pm and 3pm on school days
  - 8:30 pm and 5:00am on all other days.

## The Panel's View

### Introduction

15. This determination arises from a complainant's concern that alcohol advertising was seen while watching a movie in Adelaide on Channel 7 free-to-air television, at approximately 1:30pm.

### ABAC Placement Rules

16. The point made by the complainant is not about the content of the advertisement but the broadcast of the alcohol ad during the day. This brings into play the ABAC Placement Rules. The Rules have the policy aim that to the extent possible alcohol advertising should be directed towards adult audiences and away from minors.
17. There are four rules which could be of relevance to the complaint namely:
- have media industry codes regulating placement been complied with - Rule 1;
  - does the media platform on which the ad appeared have age restriction controls to exclude minors, and if so, were they used - Rule 2
  - was the audience of the program with which the ad was placed in excess of 75% adult - Rule 3; and
  - can the movie be regarded as being 'primarily aimed' at minors - Rule 4.
18. Rule 1 requires that all media codes applying to alcohol placement be complied with, for example, the Commercial Television Industry Code of Practice (CTICP). The CTICP regulates alcohol advertising on free to air television. It does this primarily by designating time zones during which alcohol advertising can be broadcast, as follows:

*A Commercial for Alcoholic Drinks may be broadcast at any of the following times:*

- a) in the M and MA15+ classification zones set out in Section 2 (except between 5.00 am and 6.00 am, and 7.30 pm and 8.30 pm); and*
- b) as an accompaniment to a Sports Program on a Weekend or a Public Holiday; and*
- c) as an accompaniment to the broadcast of a Live Sporting Event broadcast simultaneously across more than one licence area, if one of subclauses (a) or (b) is satisfied for:*

- i. *the licence area in which the Live Sporting Event being broadcast is held, for an event taking place in Australia;*
- ii. *the majority of metropolitan licence areas in which the Live Sporting Event is shown, for an event taking place overseas.*

19. The CTICP provides the following information about the M Classification zone:

***M Classification zone.*** *Subject to sub clause 2.3.2(a), material that has been classified M may only be broadcast at the following times:*

- |  |                           |
|--|---------------------------|
| a) <i>School Days</i>                  | <i>7.30 pm to 6.00 am</i> |
|  | <i>12 noon to 3.00 pm</i> |
| b) <i>Weekends and School Holidays</i> | <i>7.30 pm to 6.00 am</i> |
| c) <i>Public Holidays</i>              | <i>7.30 pm to 6.00 am</i> |

20. The CTICP is complicated, but broadly speaking, it permits alcohol advertising during live sporting events or at times when children would generally be expected to be in bed or at school (i.e. after 8:30pm and between 12 noon and 3:00pm on school days).
21. The complainant saw the advertisement on free-to-air television on Friday 5 May at approximately 1:30pm. This was a school day in Adelaide, meaning that the CTICP permitted alcohol advertising between 12 noon and 3pm. As the advertising was seen at 1:30pm, Placement Rule 1 has not been breached.
22. Rule 2 requires that age restriction controls should be used when available. Free-to-air television does not have available age restriction controls, meaning that Rule 2 has not been breached.
23. Rule 3 goes to the audience of a program. It 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 'reasonably expected' audience of TV programs through the ratings system.
24. While the complainant could not recall the name of the movie they were watching, the Company was able to identify the film from its advertising schedule. The movie was "The Perfect Assistant". Ratings data provided by the Company shows that the audience of the movie comfortably exceeded the 75% adult benchmark. On this basis, Placement Rule 3 has not been breached.
25. Rule 4 goes to the content of programs and raises the question of whether The Perfect Assistant can be said to be primarily aimed at under 18 year olds. Some factors to be considered in assessing this question include:

- the actual audience composition of a program;
- the subject matter of the program and whether the subject matter has themes likely to predominantly 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; and
- the use of language and the presence of adult themes such as violence and the portrayal of sexuality.

26. "The Perfect Assistant" is not a household name when it comes to movies however a review of on-line information about the film indicate it would not be regarded as primarily aimed at minors given:

- the movie has a "M" rating in Australia; and
- various plot summaries indicate that the movie focuses on adult relationships, and features adult language and themes, for example:
  - *A woman becomes obsessively infatuated with her boss, and when his wife becomes ill, she sees an opportunity to seduce him.*

27. Accordingly, as none of the Placement Rules have been breached, the complaint is dismissed.