



ABAC Adjudication Panel Determination No 141/24

Product: Jack Daniel's Whiskey
Company: Brown-Forman
Media: TV – Free to Air
Date of decision: 16 October 2024
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Jeanne Strachan

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 25 September 2024 about advertising for Jack Daniel's Whiskey (“the product”) by Brown-Forman (“the Company”) during the Channel 9 News at approximately 6:27pm.
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 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, and 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 25 September 2024.
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 Advice

9. A component of the ABAC Scheme is an advice service by which an alcohol marketer can obtain an independent opinion of a proposed alcohol marketing communication against the ABAC standards before public release. Pre-vetting advice is separate from the complaint process and does not bind the Panel but represents best practice on behalf of alcohol marketers. Pre-vetting advice was not obtained for placement of the marketing.

The Placement

10. The complaint relates to television advertising for Jack Daniel's Whiskey during the Channel 9 News at approximately 6:27 pm.

Complaint

11. The complainant objects to the marketing as follows:
 - *The ad's catchy song, 'I don't give a damn about my reputation' caught my attention. A lady dances in a bar and near train stations wearing a leather jacket.*
 - *The ad was shown on Channel 9, during the news, Tuesday night at 6.27pm.*

The ABAC Code

12. Part 4 of the Code provides that:
 - (a) An Alcohol Marketing Communication must comply with code provisions regulating the placement of Alcohol marketing and an Alcohol Alternative Marketing Communication must comply with code provisions regulating the placement of Alcohol Alternative marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy).
 - (b) Available Age Restriction Controls must be applied to exclude Minors from viewing an Alcohol Marketing Communication and an Alcohol Alternative Marketing Communication.
 - (c) If a digital, television, radio, cinema or broadcast print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, an Alcohol

Marketing Communication and an Alcohol Alternative Marketing Communication may only be placed where the audience is reasonably expected to comprise at least 80% Adults (based on reliable, up-to-date Australian audience composition or social media follower data, if such data is available).

- (d) An Alcohol Marketing Communication and an Alcohol Alternative Marketing Communication must not be placed with programs or content primarily aimed at Minors.

The Company Response

13. The Company responded to the complaint by letter emailed on 10 October 2024. Its primary comments were:
- Brown-Forman Australia takes very seriously our responsibility to market our products in accordance with all applicable laws, 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 contending that we are falling below the high standards we set for ourselves in this regard.
 - We appreciate the ABAC Panel giving us the opportunity to offer our responses as set forth below to each of the questions you have asked in your letter.
 - After receiving this complaint and upon checking with Channel 9, Channel 9 has provided written confirmation that Brown-Forman did not place any advertisements within Metro or Regional Linear TV at any time as alleged. In this instance, it appears that the complainant reporting this marketing communication might have been watching the news through '9Now' Broadcast Video On Demand (BVOD) – streaming content either 'live' or 'on demand' on a smart TV with online streaming capabilities, or through the use of another device via the internet.
 - Both Channel 9, and Starcom, Brown-Forman's media buying agency, follow strict protocols to prevent Alcohol advertising from appearing non-compliant on traditional, linear TV prior to 8:30pm, adhering to the ABAC regulations and the Commercial Television Industry Code of Practice. As stated above, Brown-Forman did not place any advertisements on Metro or Regional Linear TV at that time and it is likely that the individual was watching the news through '9 Now' BVOD. The Jack Daniel's Make it Count (MIC) BVOD campaign that was seen explicitly targets an adult audience in the 18 to 54 year old range.

- Appropriate steps were taken to apply the highest level of Age Restrictions controls (as detailed below) at all times, thereby abiding by both the ABAC Code and ABAC's 'Best Practice for Responsible Digital Marketing'. Furthermore, the '9Now' BVOD is only accessible to users who have created a '9Now' account, which requires that the user provide their date of birth. Given we are able to know each '9Now' user's age, we used selected targeting to ensure the Jack Daniel's MIC campaign would only be accessed by individuals who were over the age of 18.
- The placement of the Jack Daniel's MIC marketing communication did not breach Part 4 of the ABAC Code as it complied with the ABAC Code provisions regulating the general placement of Alcohol Marketing. Per Section 4(b) of the ABAC Code, we chose to place Jack Daniel's marketing communications on '9Now' BVOD to ensure compliance as all Available Age Restriction Controls were applied to exclude Minors from viewing an Alcohol Marketing Communication (including the aforementioned restriction of the Jack Daniel's marketing communication to accounts that had supplied a date of birth of an individual aged 18 years or over). Additionally, this Age Restriction Control was combined with programmatic 18+ age targeting to also exclude those who appeared to be under 18 based on the interests and behaviours of that viewer. These Age Restriction Controls served as key safeguards to ensure Minors could not be targeted by this marketing campaign, which is also in line with the guidance in the 'ABAC Best Practice for Responsible Digital Marketing'.
- Per Section 4(b) of the ABAC Code, and as noted above, Channel Nine's '9Now' platform is only accessible to logged in users who are required to include their date of birth when signing up, meaning this platform has adequate targeting restrictions to allow advertisers to apply 100% age gating.
- Both Starcom, and Channel 9 applied these age restrictions programmatically to this campaign in order to target an appropriate audience - those being between 18 to 54 years old. Moreover, age targeting was performed from both the DSP (demand side platform) that serves advertisements on behalf of Brown-Forman, and on the SSP (Sales Side Platform) that places the advertisements programmatically on Channel 9's side - thus restricting exposures to any users that could appear to be under the age of 18 on the '9Now' platform.
- In an additional step (pursuant to 4(c) of the ABAC Code and Part 1 (7) of the ABAC Best Practice for Responsible Digital Marketing guide), Channel 9 also applied program filters to all Brown-Forman buys to ensure that Brown-Forman marketing communications would not appear during or next to any programming that could have an audience where under 80% of

viewers were aged 18 or over, or could be deemed as ‘children’s content’ such as ‘Lego Masters’.

- Accordingly, we confirm that the multi-faceted Age Restriction Controls were put in place to ensure that Minors were excluded from viewing the Jack Daniel’s marketing communication.
- This placement was run programmatically via ‘9Now’ BVOD on a logged in platform with age controls in place. In other words, it was targeted exclusively at users over 18 years of age. Moreover, in accordance with 4(c) of the ABAC Code, Channel 9 news attracts an adult audience, with 96.9% of Monday through Friday evening viewers being 18 years or older. On this basis, the audience was not reasonably expected to comprise less than 80% Adults.

ROY MORGAN SINGLE SOURCE AUSTRALIA: JUL 2019 - JUN 2024

Survey Period: Jul 23 - Jun 24
 Filter: All cases
 Weights: Projected population of Australia 14+ (in '000)
 No ranking

"To make sure we have a true cross-section of people, would you mind telling me your approximate age?"

		ALL TV PROGRAMS			
		TOTAL	9: 9News (Weeknights) (M-F)	9: 9News (Weekend Nights) (Sa, Su)	9: 9News Morning (M-F)
(unweighted) uc		64708	7078	4251	2231
(POPN '000) wc		22381	1245	856	268
AGE - summary					
TOTAL 18+	wc	21114	1206	839	258
	v%	94.3%	96.9%	98.0%	96.3%
	ix	100	103	104	102

JUN24P5CT_PBL
 Roy Morgan Research Ltd., Melbourne, Australia

- Channel 9 News was specifically selected as a relevant placement for Jack Daniel’s to run via BVOD, as Roy Morgan data shows that 96.9% of the audience that watch this program are Adults. When this campaign ran via BVOD, we also applied the 18+ targeting to ensure compliance with ABAC regulations.
- Accordingly, we confirm that Channel 9 News is not primarily aimed at minors.

Concluding Observations

- We believe that our marketing communications placed on Channel 9 News via the ‘9Now’ BVOD platform are fully compliant with the ABAC Code and respectfully disagree that any aspect is violative of the ABAC Code. We confirmed that the Jack Daniel’s marketing communication was not shown on Metro or Regional Linear TV as alleged. Additionally, data shows that

about ninety-seven percent of weekday evening viewers of Channel 9 News are 18 years old and above. Finally, the Jack Daniel's marketing communication was intended to be accessed only by registered, logged in users who are aged 18 years or above as verified by the date of birth provided upon sign up; and we deployed programmatic 18+ age targeting to exclude those who appear to be under the age of 18 based on interests and behaviours of that viewer.

- In summary, we took active steps to employ the highest level of Age Restriction Controls available, as set out above, to ensure that Minors could not be targeted by this marketing campaign and ensured that the Jack Daniel's marketing communication was only shown in appropriate programming. We submit that the complaint should be dismissed in its entirety and again wish to thank the ABAC Panel for giving us this opportunity to respond.

The Panel's View

14. The complainant has raised a concern regarding the placement of an ad for Jack Daniel's Whiskey on free-to-air television during the Channel 9 News at approximately 6:27pm on a Tuesday. The Panel assumes that the concern expressed is that alcohol advertising should not be shown between 8:30 am and 8:30 pm, due to the chance of children seeing the advertising.
15. The ABAC contains both content and placement standards. The content standards go to the messaging contained within alcohol marketing while the placement standards have the policy aim that alcohol marketing be directed towards adults and to the extent reasonably possible, away from minors. The complainant does not suggest that the content of the Jack Daniel's TV ad was inappropriate, so the issue to be examined is whether the ABAC Placement Standards have been complied with.
16. The ABAC Placement Standards are detailed in Part 4 of the Code. As a broadcast medium, it is not possible to exclude those under 18 years old from watching free-to-air TV, so the ABAC rules seek to limit the exposure of advertising to minors through three stipulations on alcohol marketers namely:
 - all applicable media codes applying to alcohol advertising must be complied with i.e. the Commercial Television Industry Code of Practice (CTICP) - Placement Standard 1;
 - available age restriction controls must be applied to exclude minors from viewing an alcohol marketing communication – Placement Standard 2;
 - the advertisement may only be placed with programs where the audience is reasonably expected to comprise at least 80% adults - Placement Standard 3; and

- the advertisement must not be placed with programs or content primarily aimed at minors - Placement Standard 4.
17. The CTICP is a longstanding media code governing free-to-air TV and its time-of-day restrictions on alcohol advertising have been in place since the 1980s. The ABAC commenced in 1998 as a content-only set of advertising standards. The Placement Standards came into operation in November 2017 and for free-to-air TV, adopted the pre-existing regime contained in the CTICP as a starting point and built upon it.
 18. In its response to the complaint, the Company advised that it was not advertising on free-to-air television, and that it was probable that the complainant was watching the News on 9Now. The Company provided a letter from Channel 9 supporting that the advertisement was not shown on free-to-air TV.
 19. It is clear Placement Standard 1 has not been breached. This is because the CTICP, while generally restricting the broadcast of alcohol advertising to after 8:30 pm, does not apply to TV broadcasts via apps such as 9Now.
 20. The second placement standard requires that alcohol marketers apply available age restrictions controls to exclude minors. To use the 9Now app, someone in the household must initially open an account. This in turn requires the giving of a date of birth. If the account is the name of a minor, alcohol ads will not be inserted in programs accessed using the app and that account. There is no information before the Panel which suggests that a minor with an account in the complainant's household has been served an alcohol ad.
 21. The age restriction controls are quite effective when minors typically have an individual internet capable device like a smartphone or tablet. This is because the minor will have an account in their own name. The standard is less effective in the case of a family internet connected TV, because the account will generally be in the name of a parent or other adult and the family co-view shows rather than the one-on-one viewing that occurs with a phone or tablet.
 22. Placement Standard 3 establishes the 80% adult audience benchmark for the placement of alcohol marketing. Information on the audience of TV programs is available through the ratings system. The Company has advised that Channel 9 news attracts an adult audience, with 96.9% of Monday through Friday evening viewers being 18 years or older. It is evident the placement rule benchmark of an 80% adult audience has not been breached.
 23. Placement Standard 4 provides that irrespective of the actual audience, alcohol ads cannot be placed with content aimed primarily at minors. While older minors should have an interest in current affairs and no doubt some individual news stories have appeal to minors, taken as a whole the nightly news broadcast is a program that is self-evidently aimed towards an adult audience.

In fact, the audience data is highly suggestive that the appeal of the News is primarily to adults.

24. As there has been no breach of the ABAC standards, the complaint is dismissed.