



ABAC Adjudication Panel Determination No. 85/19

Product: Jacobs Creek
Company: Pernod Ricard Winemakers
Media: Digital (Qantas In Flight Entertainment)
Date of decision: 6 November 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 advertising during Qantas In Flight Entertainment by Pernod Ricard Winemakers (“the Company”) and arises from a complaint received 18 October 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 complaint was received on 18 October 2019.
8. The Panel endeavour 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.
9. 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 obtained for the content of this marketing communication.

Marketing Communication Placement

10. An advertisement for Jacobs Creek wines was screened prior to the screening of movies available on the Qantas Inflight Entertainment system including movies given a G and PG classification.

The Complaint

11. Alcohol advertisements should not be screened before G and PG “Disney” and “family” movies. It is inappropriate to expose children to alcohol advertisements. It is not permitted on land and there is no conceivable reason why different rules should apply in the air. Regulatory frameworks need to protect children from alcohol advertising in all contexts.

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 includes definitions including:

Available Age Restriction Controls means age restriction, targeting or affirmation technologies available to restrict a Marketing Communication to Adults, but this does not require a third party platform, website or account that is not primarily related to alcohol to be age restricted in its entirety before it can be used to place a Marketing Communication.

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 Alcohol Guidelines).
- (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.

The Company's Response

14. The Company provided a detailed response to the complaint by letter dated 4 November 2019 included at Annexure 1. In short, the Company contends that it took all reasonable steps available to it to restrict its advertisement appearing before the screening of movies likely to be selected by children using the Qantas Inflight Entertainment system.

The Panel's View

15. Qantas is Australia's largest airline and operates both domestic and international routes. The airline has a livery of various aircraft types which have somewhat different inflight entertainment arrangements for passengers. On some of the Qantas fleet, the inflight entertainment system equips each seat with an individual video screen and passengers are able to make selections from a range of options including movies and TV programs.
16. It seems that in mid-October 2019 the complainant (or at least a colleague of the complainant who has related the experience) was travelling between Perth and Sydney on an aircraft equipped with an individual Inflight Entertainment system. During the flight it would seem the system was used to access movies and the complainant came to the opinion that an advertisement for the Company's Jacobs Creek wine would always appear prior to the screening of a movie irrespective of the movie selected.
17. The complainant contends that the screening of an alcohol ad prior to a movie classified G or PG and in the 'Disney' or 'Family' style should not be accessed with prior alcohol marketing. In essence, it is contended that 'this is not permitted on land and there is no conceivable reason why different rules should apply in the air.' The implicit concern is that it is inappropriate that minors and particularly younger children should be exposed to alcohol marketing.
18. While the underlying premise advanced by the complainant is understandable, the position on 'the land' is a little more nuanced than the complainant possibly believes. There are actually no formal restrictions as such on the screening of alcohol ads with G and PG movies at Australian cinemas. The government classification system for films does seek to provide consumer information, particularly for adults, in making informed choices about the type of movies that may be suitable for children to watch. The Classification system however is not linked to any restrictions on alcohol advertising, although in practical terms both alcohol companies and cinema operators seek to avoid alcohol ads appearing with films likely to attract young audiences.
19. Further, restrictions on alcohol advertising on free to air television are not linked directly to the classifications applied by television networks but to time of day

restrictions e.g. no alcohol ads until after 8-30 pm unless broadcast in conjunction with a live sports event. Also, it should be noted that a G and PG classification does not necessarily mean the program is directed toward children as this classification can be given, for instance, to a documentary which contains no violence or portrayals of sexual behaviour but has a subject matter which is clearly directed toward adults.

20. In short, the interplay between the classification system and the regulation of alcohol marketing is not straightforward. For its part, the ABAC Placement Rules have a policy aim that alcohol marketing should as far as possible be directed toward adults and away from minors. It does this by establishing differential requirements on alcohol marketers related to the technical capacity of the medium by which the advertising is conveyed to target audiences.
21. The Company has provided detailed information regarding the operation of the Qantas Inflight Entertainment system. This advice indicates:
 - the system has an option for users to select 'Kids Zone' which mediates the available programming to items considered suitable for younger children, and in the case of movies only G classified movies are available;
 - in addition to Kids Zone, the system has parental controls that permit the blocking of content above a selected classification e.g. all movies classified M or above;
 - the advertisement was not screened with movies accessed in the Kids Zone; and
 - the advertisement was screened with G and PG movies accessed in the general channel.
22. It would be fair to surmise that the ABAC Placement Rules were not drafted with the workings of Qantas Inflight Entertainment in mind. That said, it would appear the position would be as follows:
 - Rule 1- There are no other codes applying to placement of alcohol ads in these circumstances.
 - Rule 2- The Inflight system does not have an age restriction control such that it is possible to restrict Qantas passengers under the age of 18 from accessing programming and advertising available on the system. The system does have the Kids Zone option which in effect can restrict the accessing of alcohol ads if the option is selected.
 - Rule 3- Unable to assess as it requires data as to the actual viewing patterns of users of the Inflight Entertainment system on the particular flight.

- Rule 4- The movie selections on the Inflight Entertainment (see Annexure A) certainly has some movies which are primarily aimed at minors but the ad may or may not have been shown before these movies depending if the Kids Zone option was selected.
23. Putting all this together, it appears that the Company was aware of the ability of the Qantas system to provide some measure of age restriction to the placement of its advertisement and it did take action to have the Kid Zone restriction applied. This means that the complainant's contention would have been correct, in that the ad could have been seen before any movie in the general setting of the Entertainment system including children's movies, but this is not the full story. It was possible for parents travelling with children to select Kids Zone and if this happened the ad would not have been screened.
 24. The Panel does not believe in all the circumstances that the spirit of the Code requirements has been breached. The Company applied the available restrictions and it does not seem it is possible to restrict the screening of the ad beyond this. While it is possible the ad could have been screened before a movie primarily directed at children, this was not the Company's intention and more importantly it took steps so this could have been reasonably avoided. As each passenger's viewing choice is personal, it is simply not possible to know.
 25. Accordingly, the complaint is dismissed.

Annexure 1

Pernod Ricard Winemakers Pty Ltd (**Pernod Ricard Winemakers**) is a signatory to the Australian Beverages Advertising (and Packaging) Scheme (**ABAC**) and takes compliance with the ABAC Responsible Alcohol Marketing Code (the **Code**) very seriously. We are committed to the responsible marketing of our products and endeavor to abide by the Code as well as other applicable advertising codes and laws. As a member of the global Pernod Ricard Group, we are also committed to the responsible marketing and consumption of our products through compliance with the Pernod Ricard Code for Commercial Communications.

The complaint relates to a Jacob's Creek television advertisement (the **Advertisement**) that is said to have aired before all movies on Qantas inflight entertainment on flight QF580 Perth – Sydney, including those in the Family and Disney Collections (i.e. G and PG rated) on Tuesday, 15 October at 3.50pm.

While not specified in the complaint, the Jacob's Creek television advertisement shown on Qantas inflight entertainment in October 2019 was the Bring Your Australian television commercial (<https://youtu.be/G1cO6dyHMy4>).

For the reasons set out below, and with respect to the complainant, we submit that there has been no breach by Pernod Ricard Winemakers of the Code and complaint 85/19 should be dismissed by the Panel.

RESPONSES TO YOUR QUESTIONS

Detailed responses to the questions set out in your letter are below.

- 1. Did the alcohol marketing communication referred to in the complaint (the marketing) receive Alcohol Advertising Pre-vetting Service Approval for its content and/or placement?**

Pernod Ricard Winemakers submitted the Advertisement to AAPS for approval on 30 July 2019 and received AAPS approval on 30 July 2019 (Approval No 17451). The approval related to use of the Advertisement on Qantas Airlines inflight entertainment on domestic and international routes.

- 2. Please identify the G and PG movies that Jacobs Creek advertisements were (or could possibly have been) placed with during Qantas inflight entertainment on 15 October at 3:50pm during a Perth – Sydney flight.**

Within the "Kids Zone" channel of Qantas inflight entertainment, the Advertisement was not placed, nor is it possible for the Advertisement to be placed, with any G or PG-rated movies (or any other content within that channel) on 15 October at 3:50pm during a Perth – Sydney flight (or at any other time).

Within the “General” channel of Qantas inflight entertainment, the Advertisement was placed, and could possibly have been placed, on 15 October at 3:50pm during a Perth – Sydney flight with the list of G and PG-rated movies set out as **Annexure A** to this letter.

3. Does Qantas inflight entertainment have any age restriction controls available to be activated for alcohol advertising, and if so were any such controls activated?

Yes, Qantas inflight entertainment has an age restriction control that prevents alcohol advertising – as well as adult content – being available to minors. The age restriction control available on Qantas inflight entertainment is “Kids Mode”, which is a function available for selection either:

- a. via the welcome screen that airline passengers first see when they board a flight (the **Welcome Screen**); and
- b. via the inflight entertainment “Settings” (the **Settings**).

Both of these settings are discussed below.

Viewing restrictions, in the form of no advertising that is adult in nature (i.e. MA and MA15+ advertisements, including alcohol advertising), is automatically applied in “Kids Mode”.

In the event of an unaccompanied minor flying with Qantas, Qantas cabin crew always selects “Kids Mode” on that child’s inflight entertainment at the start of the flight.

In addition, Qantas recommends and encourages all parents to make use of parental controls and selecting “Kids Mode” when travelling with minors. Qantas’ “Terms of Use” for its inflight entertainment include the following:

“Travelling With Children

We respect your right to choose, so our policy is to screen all movies in their original versions. We also recognize that some movies will not be appropriate for young passengers, so please check the classification and supervise your children accordingly.

Parental Controls

Your Qantas Entertainment System comes with a parental control feature that allows you to block content above your preferred classification (G, PG, or M). It is located in the settings options of the main menu. Our cabin crew can assist with this feature and also block specific titles if required

Kids Zone

For young children, select the Kids Zone either from the Welcome screen or from the Settings option in the main menu. This provides access to only G rated content, and includes an exit lock quiz.”

In light of the above, Qantas’s policy from a practical perspective regarding children accessing content via the Qantas inflight entertainment system is that no minor should use “General” inflight entertainment unless they are accompanied by an adult, who has actively elected not to enable “Kids Mode”.

Please see over the page a screenshot of the Qantas inflight entertainment “Terms of Use” recommending and encouraging parents to make use of parental controls and select “Kids Mode” when travelling with minors for your information.

Qantas Entertainment content ratings are based on the Australian Classification Board ratings. Please use them as a guide to viewing and supervision of your children.

	G (General): The G classification is suitable for everyone - mild impact.
	PG (Parental Guidance): It is not recommended for viewing by persons under 15 years without guidance from parents or guardians. May contain elements such as language and themes that are mild in impact.
	M (Mature): Not recommend for persons under 15 years. May contain elements such as violence and nudity of moderate impact.
	MA15+ (Mature Accompanied): MA15+ classified material contains strong content and is legally restricted to persons 15 years and over. It may contain classifiable elements such as sex scenes and drug use that are strong in impact.
	CTC (Check the Classification): The content has been assessed and approved for advertising unclassified films and computer games.
	NR (Not Rated): At the time of release to Qantas the program was not classified.

Travelling With Children

We respect your right to choose, so our policy is to screen all movies in their original version. We also recognize that some movies will not be appropriate for young passengers, so please check the classification and supervise your children accordingly.

Parental Controls

Your Qantas Entertainment system comes with a parental control feature that allows you to block content above your preferred classification (G, PG, or M). It is located in the settings options of the main menu. Our cabin crew can assist with this feature and also block specific titles if required.

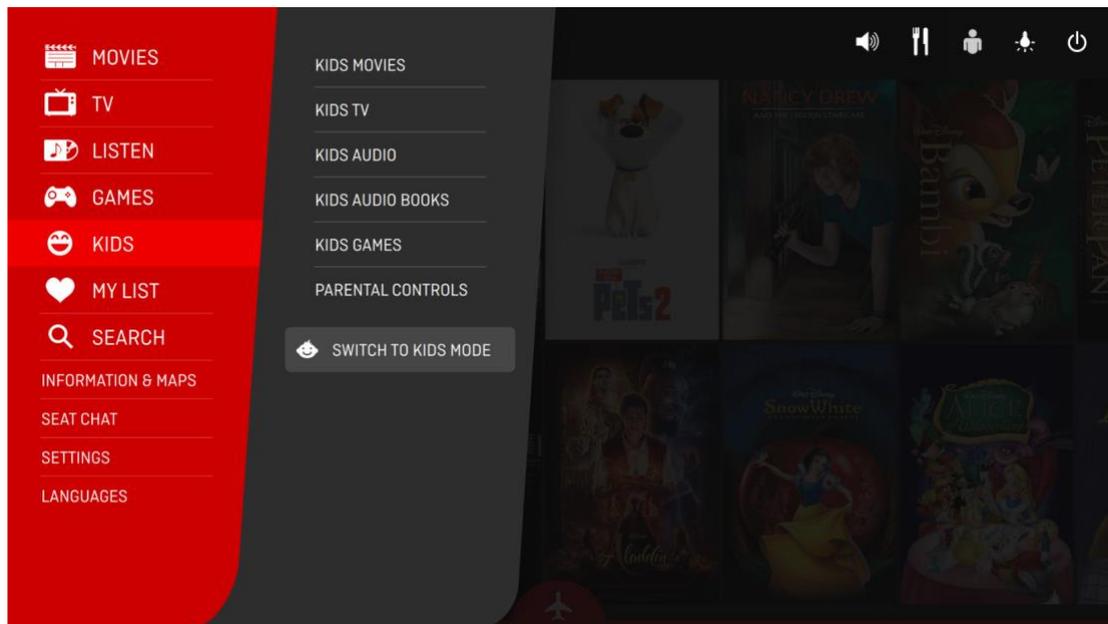
Kids Zone

For young children, select the Kids Zone either from the Welcome screen or from the Settings option in the main menu. This provides access to only G rated content, and includes an exit lock quiz.

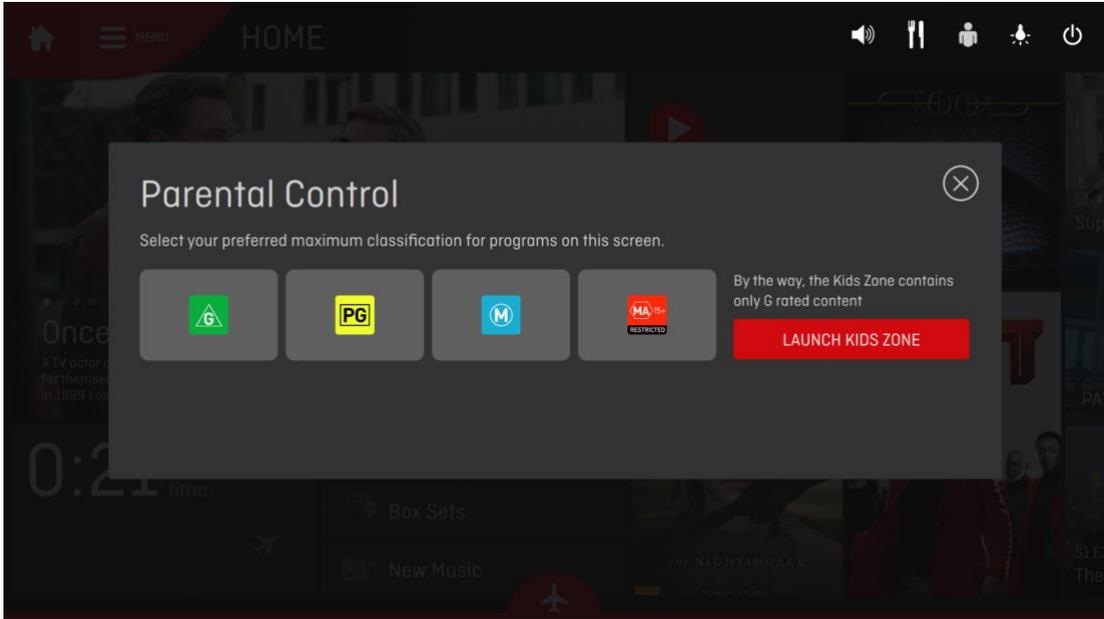
4. Please provide a detailed explanation of 'Kids mode' on Qantas inflight entertainment i.e. what is it, how is it activated and the effect of activation on viewing of content and advertising. Please also include screenshots of the option provided to viewers to elect this mode.

"Kids Mode" is a function available for selection by the user either:

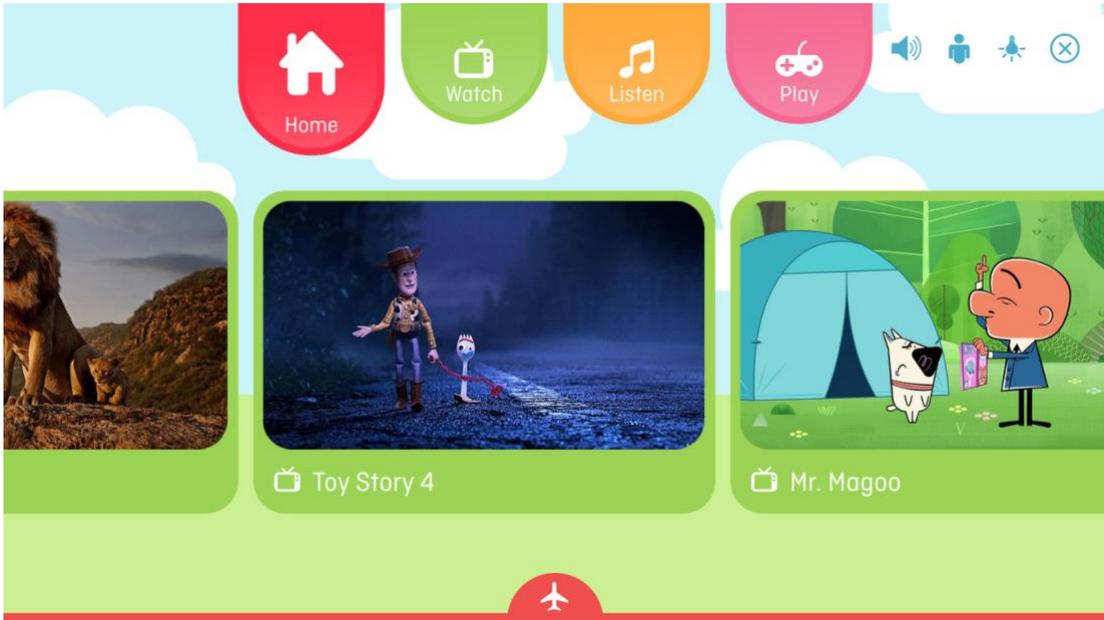
- a. via the Welcome Screen; or

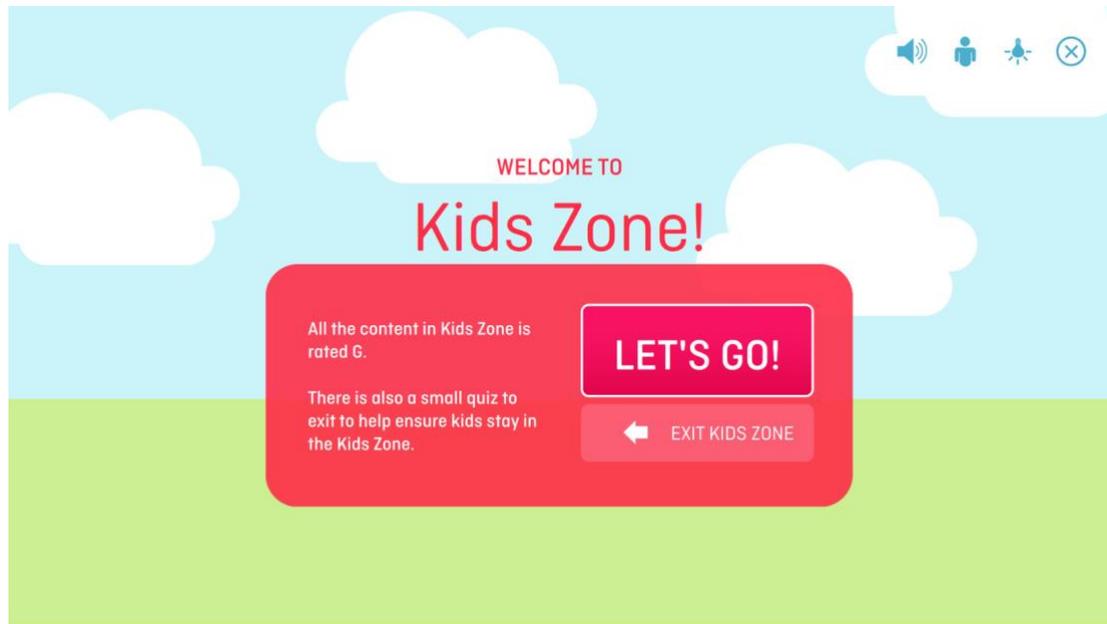


- b. via the Settings.



Once “Kids Mode” is selected, Qantas inflight entertainment does not show any advertising that is adult in nature (i.e. MA and MA15+ advertisements, including alcohol advertising) and a “Kids Mode” skin is applied to the inflight entertainment, as shown below:





5. **Does the marketing breach Part 3 (b)(iv) of the Code by directing the marketing at minors by its placement with G and PG movies, including its “Disney” and “Family” collection of movies, in particular:**

It is not known whether the complainant enabled “Kids Mode” or not on 15 October at 3:50pm during a Perth – Sydney flight, as Qantas does not keep a record of this information.

We assume that the complainant did not enable “Kids Mode” because the Advertisement would not have been placed with a G or PG-rated movie on the flight if the complainant had elected to choose “Kids Mode”.

In the complainant failing to use the parental controls available to him/her, we do not accept that there has been a breach of Part 3 (b)(iv) of the Code in the circumstances.

a. **Please provide reliable, up-to-date age of audience composition data for Qantas inflight entertainment generally and also specifically the G and PG movies, including “Disney” and “Family” movies, the ad was placed with. Please supply copies of the source data.**

Qantas does not record or keep age of audience composition data for Qantas inflight entertainment generally or, more specifically, the G and PG-rated movies, including “Disney” and “Family” movies, the Advertisement was placed with. We have also assumed that the majority of Qantas’ passengers are adults.

b. **Was the advertisement placed during Qantas inflight entertainment with G and PG movies that are primarily aimed at minors?**

It is important to point out that there are two audiences for Qantas inflight entertainment, namely an audience under the “General” channel and an audience under the “Kids Mode”. The “General” channel audience overlaps with the “Kids Mode” audience to the extent that both audiences can watch G and PG-rated movies. In this regard, G and PG-related movies are not primarily aimed at minors; they are for all inflight entertainment audiences.

- c. If not, on what basis do you hold this view i.e. what are the characteristics of the G and PG movies the ad was allegedly placed with that are said to be adult in nature?**

See above.

ADDITIONAL COMMENTS

A. Reasonable steps taken by PRW regarding our agency

While it is unclear whether the Code applies to marketing communications on inflight entertainment (particularly, whether this would be considered Out of Home), Pernod Ricard Winemakers has at all times sought to comply with the spirit and intent of the Code.

We engaged a marketing agency (Spark Foundry, a division of Publicis Media Australia Pty Ltd) under a written agreement to execute an oOh!media Campaign Media Plan on the basis that the Code applied to the Advertisement.

It was an express term of the agreement that, in adherence with the Code, the agency would ensure that the Advertisement was not placed with programs or content primarily aimed at Minors (as defined under the Code).

In light of this, Pernod Ricard Winemakers believes that it took all reasonable steps to correctly and adequately brief the agency as to the execution of the marketing communication in compliance with the Code.

B. Reasonable steps taken by Spark Foundry, oOh!media and Qantas

Within the “Kids Zone”, no advertising that is adult in nature (i.e. MA and MA15+ advertisements, including alcohol advertising) can be, or is, shown.

In light of this, Spark Foundry, oOh!media and Qantas took all reasonable steps to ensure that the Advertisement could not possibly be, and was not, shown within the “Kids Mode”.

C. No Fault Breach

Under section 4 of the Code, a breach of the Code that is reasonably unforeseeable by, or outside the reasonable control of the Marketer or their agency, will be classified as a “no fault breach”

Pernod Ricard Winemakers submits that there has been no breach of the Code regarding this Advertisement.

However, if the Panel determines that there has been a breach of the Code, then that breach has occurred through no fault of Pernod Ricard Winemakers and its agency (Spark Foundry). Rather, the breach would have been due to a third party's actions (Qantas), which were outside of the reasonable control of Pernod Ricard Winemakers and its agency (Spark Foundry).

Accordingly, if the Panel determines that there has been a breach of the Code, then Pernod Ricard Winemakers submits that the breach should be recorded as a "no fault breach".

If a "no fault breach" is recorded, then in accordance with the *Guidance Notes – ABAC Responsible Alcohol Marketing Code*, such breach should not be included in the list of breaches published on the ABAC website and in the ABAC annual report.

Lastly, we wish to reiterate that Pernod Ricard Winemakers is committed to the responsible marketing of its products and upholding compliance with the Code. Pernod Ricard Winemakers maintains strict internal and external processes to help ensure this compliance.

We thank you for your consideration of this matter and await the outcome of the determination of the Panel.

Annexure A

**LIST OF G AND PG-RATED MOVIES ON QANTAS INFLIGHT ENTERTAINMENT
OCTOBER 2019**

CATEGORY	TITLE	AUS Rating
PREMIERE	Toy Story 4	G
PREMIERE	Pokémon: Detective Pikachu	PG
PREMIERE	The Secret Life of Pets 2	PG
PREMIERE	Aladdin (2019)	PG
PREMIERE	Little	PG
PREMIERE	Breakthrough	PG
ENCORE	Nancy Drew and the Hidden Staircase	PG
MARVEL ICONS	Marvel's Ant-Man	PG
DISNEY	Snow White And The Seven Dwarfs	G
DISNEY	Bambi	G
DISNEY	Alice In Wonderland	G
DISNEY	Peter Pan	G
DISNEY	Lady and the Tramp	G
DISNEY	Robin Hood	G
DISNEY	Tarzan	G
DISNEY	The Emperor's New Groove	G
DISNEY	Tangled	PG
DISNEY	Frozen	PG
DISNEY	Moana	PG
DISNEY	Beauty and the Beast	PG
DISNEY	Toy Story	G
DISNEY	Toy Story 2	G
DISNEY	Toy Story 3	G

HARRY POTTER	Harry Potter and the Sorcerer's Stone	PG
HARRY POTTER	Harry Potter and the Chamber of Secrets	PG
CLASSICS	10 Things I Hate About You	PG
CLASSICS	27 Dresses	PG
CLASSICS	Adam's Rib	PG
CLASSICS	Arsenic and Old Lace	PG
CLASSICS	Best in Show	PG
CLASSICS	The Big Sleep	PG
CLASSICS	Calendar Girls	PG
CLASSICS	The Devil Wears Prada	PG
CLASSICS	Dumb and Dumber	PG
CLASSICS	Edward Scissorhands	PG
CLASSICS	Father of the Bride (1950)	G
CLASSICS	Gentlemen Prefer Blondes	PG
CLASSICS	The Goonies	PG
CLASSICS	Hairspray	PG
CLASSICS	Hidden Figures	PG
CLASSICS	The Legend of Bagger Vance	PG
CLASSICS	The Secret Life of Walter Mitty	PG
CLASSICS	The Seven Year Itch	PG
CLASSICS	Tim Burton's Corpse Bride	PG
CLASSICS	To Have and Have Not	PG
AUSTRALIAN	2040	G
AUSTRALIAN	Jedda	G
AUSTRALIAN	Breaker Morant	PG
AUSTRALIAN	Crocodile Dundee 2	PG
AUSTRALIAN	Mao's Last Dancer	PG
AUSTRALIAN	Red Dog	PG

AWARD WINNERS	The Accidental Tourist	PG
AWARD WINNERS	Anastasia	G
AWARD WINNERS	Doctor Dolittle	G
AWARD WINNERS	East of Eden	PG
AWARD WINNERS	Empire of the Sun	PG
AWARD WINNERS	Florence Foster Jenkins	PG
AWARD WINNERS	Harvey	G
AWARD WINNERS	How the West Was Won	PG
AWARD WINNERS	The Hustler	PG
AWARD WINNERS	Invictus	PG
AWARD WINNERS	The King and I	G
AWARD WINNERS	Life of Pi	PG
AWARD WINNERS	Mrs. Doubtfire	PG
AWARD WINNERS	A Star is Born	G
AWARD WINNERS	The Wizard of Oz	G
SPOTLIGHT ON HITCHCOCK	Dial M for Murder (1954)	PG
SPOTLIGHT ON HITCHCOCK	Vertigo	PG
SPOTLIGHT ON HITCHCOCK	The Birds	PG
FAMILY	The Secret Life of Pets	G
FAMILY	How to Train Your Dragon	PG
FAMILY	Despicable Me	PG
FAMILY	Shrek	PG
FAMILY	Night at the Museum	PG
FAMILY	Night at the Museum: Battle of the Smithsonian	PG
FAMILY	Night at the Museum: Secret of the Tomb	PG
FAMILY	The Lego Movie 2: The Second Part	PG
FAMILY	The Lego Movie 2: The Second Part (HD)	PG

FAMILY	The Kid Who Would Be King	PG
FAMILY	The Kid Who Would Be King (HD)	PG
ASIAN	Fall In Love at First Kiss 一吻定情	PG
ASIAN	Gold	PG