



ABAC Adjudication Panel Determination No. 152/20

Product: Cellarbrations
Company: Independent Brands Australia
Media: TV – On Demand
Date of decision: 17 November 2020
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns on-demand television advertising for Cellarbrations bottle shops by Independent Brands Australia (“the Company”) and arises from a complaint received 22 October 2020.
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 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 meeting 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 22 October 2020.
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 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 (Approval Number 18780).

The Placement

10. The complaint relates to the placement of a television commercial on 10 Play during Junior MasterChef.

The Complaint

11. The complainant objects to the placement of the marketing during Junior MasterChef as they believe it is inappropriate to be advertising alcohol during a show targeting children.

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

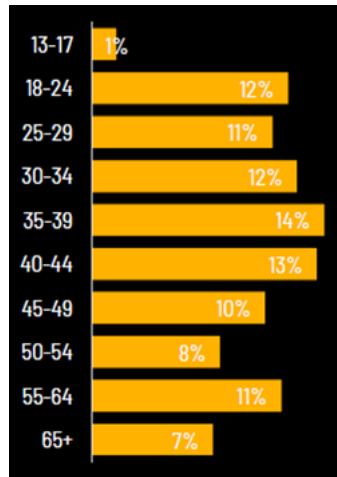
13. Part 6 of the ABAC Code includes definitions including:

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.

Company Response

14. The Company responded to the complaint by emails dated 2 November 2020 and 3 November 2020. The principal points made by the Company were:
- The content of the advertisement received ABAC pre-vetting service approval.
 - Legally Ten is not able to collect data of minors. We also only target 25-54 year olds via logged in data on their platform.
 - The ad does not appear across any Children's programming across Ten. Junior MasterChef is classified as a Reality program and as per the above, targeting is restricted to people aged 25-54.
 - Junior MasterChef is classified as a Reality program and is not targeted at minors.
 - Junior MasterChef is an extension of the MasterChef franchise, not a program specifically made for children and is classified under the Reality genre.
 - The demo breakdown shown below is for viewership across 10 Play specifically (catch up TV only). It is data from the first 3 weeks of the series launch, so 11/10 – 31/10.



- Please see the below show breakdown on linear TV (OzTAM Metro TV) of the episodes prior to the complaint on 21st Oct. Note the complaint was not made after seeing our ad on linear TV (the program is not part of our linear TV spot buy) – so the below is not as relevant.

DATE	18/10/2020		19/10/2020		20/10/2020	
PROGRAM NAME	JUNIOR MASTERCHEF AUSTRALIA SUN		JUNIOR MASTERCHEF AUSTRALIA MON		JUNIOR MASTERCHEF AUSTRALIA TUES	
TIMESLOT	19:31:00 - 20:47:57		19:31:00 - 20:40:11		19:31:00 - 21:11:17	
DEMO BREAKDOWN	REACH	% OF AUDIENCE	REACH	% OF AUDIENCE	REACH	% OF AUDIENCE
P 0-17	81,641	12%	51,084	10%	53,010	8%
P 18-24	24,648	4%	24,023	5%	37,276	6%
P 25-34	64,059	10%	66,036	13%	77,004	12%
P 35-49	179,998	27%	124,257	25%	168,544	26%
P 50-64	170,065	26%	124,626	25%	180,720	28%
P 65+	135,998	21%	101,990	21%	139,596	21%
	656,409	100%	492,016	100%	656,150	100%

- OzTam VPM data available for Junior Masterchef .

10 — Top 10 Programs										Date: 15/10/2020 — 11/11/2020										Number of Days: 28	
Network	Series	Episode	BVOD Audience	Length	Minutes	BVOD Reach	Posted Date	Adult Female (%)					Adult Male (%)					Child (%)			
								18-24	25-30	40-54	55-64	65+	18-24	25-30	40-54	55-64	65+	00-12	13-17		
TEN	The Bachelorette Australia	The Bachelorette - S6 Ep. 4	154,000	50.3	7,737,000	177,000	15/10/2020	6%	18%	16%	6%	6%	4%	12%	11%	4%	4%	8%	5%		
TEN	The Bachelorette Australia	The Bachelorette - S6 Ep. 8	146,000	47.4	6,921,000	165,000	29/10/2020	6%	18%	16%	6%	6%	4%	12%	11%	4%	4%	8%	5%		
TEN	The Bachelorette Australia	The Bachelorette - S6 Ep. 6	146,000	48.2	7,022,000	164,000	22/10/2020	6%	19%	16%	6%	6%	4%	12%	11%	4%	4%	7%	5%		
TEN	The Bachelorette Australia	The Bachelorette - S6 Ep. 5	139,000	55.4	7,713,000	159,000	21/10/2020	6%	18%	16%	6%	6%	4%	12%	11%	4%	4%	8%	5%		
TEN	The Bachelorette Australia	The Bachelorette - S6 Ep. 7	130,000	47.1	6,148,000	146,000	28/10/2020	6%	19%	16%	6%	6%	4%	12%	11%	4%	4%	7%	5%		
TEN	The Bachelorette Australia	The Bachelorette - S6 Ep. 3	122,000	51.3	6,271,000	145,000	14/10/2020	6%	19%	16%	6%	6%	4%	13%	11%	4%	4%	6%	5%		
TEN	The Bachelorette Australia	The Bachelorette - S6 Ep. 9	103,000	56.8	5,823,000	124,000	04/11/2020	6%	18%	16%	6%	6%	4%	12%	11%	4%	4%	8%	5%		
TEN	The Bachelorette Australia	The Bachelorette - S6 Ep. 10	85,000	81.9	6,943,000	110,000	05/11/2020	6%	18%	16%	6%	6%	4%	12%	11%	4%	4%	8%	5%		
TEN	The Bold and The Beautiful Fast Tracked	The Bold and The Beautiful - S1 Ep.8390	57,000	21.7	1,232,000	58,000	31/10/2020	4%	13%	17%	9%	12%	4%	10%	10%	5%	7%	5%	4%		
TEN	Junior MasterChef Australia	Junior MasterChef - S3 Ep. 6	57,000	74.8	4,228,000	69,000	20/10/2020	5%	17%	16%	6%	6%	4%	13%	12%	4%	5%	7%	5%		

The Panel's View

15. Junior MasterChef is a spin off TV program based on the popular reality series MasterChef and features young contestants aged 9 to 14 competing to prepare meals in a set time frame. There have been three series of Junior MasterChef screened in Australia with the most recent aired on the primary free to air channel 10 with episodes of the program also accessible on the related Broadcaster Video on Demand (BVOD) service through 10 Play. The complaint arises from an advertisement from the Company which the complainant saw while watching an episode of Junior MasterChef via 10 Play.
16. The complaint isn't about the content of the advertisement but its placement with Junior MasterChef. It is argued that it is inappropriate to advertise alcohol with a show targeting children. A complaint of this nature enlivens the ABAC Placement Rules which have the policy aim that to the extent possible, alcohol advertising should be directed towards adults and away from minors. The rules create a differential set of obligations which are linked to the technical capacity of the medium over which the ad is conveyed to target the audience of the ad.
17. There are four Placement Rules potentially in play with the broadcast of an alcohol ad over a BVOD platform namely:

- have applicable media codes of practice regulating the broadcast of alcohol marketing been complied with - Rule 1
 - does 10 Play have age restriction controls to exclude minors and if so, have these been applied - Rule 2
 - if age restriction controls cannot exclude minors, then was the ad placed with a program where the audience is reasonably expected to comprise at least 75% adults - Rule 3
 - was the ad placed with a program or content primarily aimed at minors - Rule 4
18. The Company contends that none of the Placement Rules has been breached. It advises that it did not make a conscious decision to place its ad with Junior MasterChef. Its instructions were that the ad when served over 10 Play was to be directed to persons logged in with 10 Play accounts aged 25 to 54. The placement with an episode of Junior MasterChef arose at all due to the classification of the program given by Network 10 as "Reality" and then it was served only to logged accounts held by persons aged 25 and over. The Company goes on to supply viewership data for the program which indicate a predominantly adult audience more than the 75% benchmark. Finally, it is contended the show is not primarily aimed at minors.
19. 10 Play is a public streaming service on which Network 10 and other content is made available to subscribers. The basic service is free to join with a paid subscription version also available which does not carry advertising. To subscribe to 10 Play, a user must be at least 16 years of age. The Commercial Television Industry Code of Practice restricts time of broadcast on free to air television but does not apply to broadcast video on demand platforms and would not prohibit the placement of an alcohol ad with Junior Masterchef. Hence Placement Rule 1 has not been breached.
20. As a media platform, 10 Play does have a capacity for advertisers to target their advertising to particular age groups. This means it is possible to age restrict the audience of an alcohol ad so that it is only served to an account in the name of a subscriber who is aged over 18. In this case the Company utilised the age targeting capacity to direct its ad to adults in the age range of 25 to 54. Accordingly, the Company has complied with Placement Rule 2. It is noted however that the age restriction is effective only to the extent that it is based on the age of the named subscriber to the service. In a typical household containing children it might be expected that the 10 Play account will be opened in the name of a parent who will be aged over 18. This means a family watching Junior MasterChef will have been potentially served with the ad unless the parent named on the account was under 25 years old.
21. Placement Rule 3 imposes an obligation that the reasonably expected audience of the program with which the ad is placed be at least 75% adults. With TV programs it is possible to gain an accurate picture of audiences because of the ratings system. The Company supplied several sources of data based on subscriber information

from 10 Play and ratings data. From this information it seems that the audience for Junior MasterChef is predominantly adult ranging from only 1% of 10 Play account holders watching the program being minors to no more than 12% of overall viewers being under 18. Placement Rule 3 therefore has not been breached.

22. Placement Rule 4 applies irrespective of the actual audience demographics of a program and provides that an alcohol ad must not be placed with a program which is 'primarily aimed' at minors. Some factors to be weighed in assessing if a program is primarily aimed at minors include:
 - the actual audience of the program;
 - the subject matter of the program and whether it contains themes likely to predominantly appeal to minors;
 - the use of minors in the program and characters familiar to minors;
 - the storyline and whether the complexity of the plot suggests its target audience is adult; and
 - the use of language and the treatment of sex, sexuality, and violence.
23. The “senior” MasterChef program is a staple on Australian television. It can be described as a family friendly program but would not be regarded as primarily aimed at children or adolescents. The junior version of the show follows a modified format but is still essentially the same program but with children as the contestants. That minors are the “personalities” within the program would enhance its appeal to under 18-year olds as it makes the program more relatable to minors. That said the program remains aimed at a whole of family audience rather than being aimed at minors as such.
24. Network 10's internal classification system has designated the program as “Reality” and not “Children”. This means alcohol advertising can, in accordance with the Network's protocols, be placed with Junior MasterChef. The ratings data indicated far more adults than minors watch the program. The Panel believes that the program would have strong appeal to minors, but it cannot be concluded that the program is “primarily aimed” at minors. The program is aimed at a wide audience and not minors, like programs such as Play School or children's cartoons are aimed at.
25. The Panel's role is to fairly apply the provisions of the ABAC as drafted and in doing this the complaint must be dismissed. Obviously, there is no suggestion that the child contestants in the program are consuming or serving alcohol and viewers understand the difference between the content of the program and a 30 second ad seen with the program. That said, it is not an ideal outcome that alcohol advertising should be placed with a program which heavily features the involvement of children. The Company did not seek to have its ad shown with Junior MasterChef. For the future, a better outcome would be for the Company to expressly exclude the program as one which its ad can be shown and Network 10

to adopt a position to not permit alcohol advertising with the program even if it the show is designated as "Reality".

26. The complaint is dismissed.