



ABAC Adjudication Panel Determination No. 171/20

Product: The Glenlivet Scotch Whisky
Company: Pernod Ricard Australia
Media: TV – Free to Air (Digital)
Date of decision: 11 December 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 the advertising of The Glenlivet Scotch Whisky (“the Product”) by Pernod Ricard Australia (“the Company”) on Channel 10 Shake between 7:30am and 8:30am. It arises from a complaint received on 20 November 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 20 November 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. ABAC pre-vetting approval was obtained for the content of the advertisement (Approval Number 18606).

The Placement

10. The complaint relates to the placement of television commercial(s) for The Glenlivet Scotch Whisky on Channel 10 Shake between 7:30am and 8:30am.

The Complaint

11. The complainant objects to the marketing as follows:
 - *SHAKE is a channel 10 kid's channel and the problem is not with the ad itself, but the fact that this advertisement is being shown on this kids channel.*
 - *The advertisement has a disclaimer on the bottom that says "this film not to be shared with anyone under drinking age".*

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (iv) be directed at Minors through a breach of any of the Placement Rules.
13. Part 4 of the ABAC Code provides:

A breach of this 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.

14. Part 6 of the ABAC Code provides:

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.

The Company's Response

15. The Company responded to the complaint by letter emailed on 2 December 2020. The principal points made by the Company were:

- 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 endeavour 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 the placement of an advertisement for The Glenlivet shown on 10 Shake. While not specified in the complaint, the advertisement was for The Glenlivet 12 Year Old Single Malt Scotch Whisky's 'Original by Tradition' campaign (the Advertisement), available to view here:

<https://we.tl/t-8NIWIR2k9a>.

- After a thorough investigation, we regret to advise that due to a human error on the part of Network 10, the Advertisement appeared with programming on 10

Shake on 10 Play platform without our knowledge, and that placement was in breach of the Placement Rules in the Code.

- Detailed responses to the questions set out in your letter, as well as further information which may assist the Adjudication Panel in considering the complaint, are below.
- The Advertisement was submitted to ABAC's Pre-Vetting Service on 4 August 2020 (Application No. 383/20) for its content and received AAPS approval on 17 August 2020 (Approval No. 18606).
- The Advertisement was shown on 10 Shake on 10 Play. To view most content on 10 Play, viewers must register as a member of 10 Play and sign in. 10 Play members must be at least 15 years old. 10 Play does not have available age affirmation technologies to exclude minors from viewing alcohol advertising on that platform.
- 10 Play does, however, 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. Although, as noted by the Panel in its recent determination of complaint 152/20, 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 programs on 10 Play may be potentially served with the ad.
- Pernod Ricard Winemakers attempted to utilise the age targeting capacity to direct the Advertisement to two adult audiences 25 to 45 and 45+ by specifying this age targeting requirement in its media booking authority form with its agency, Initiative Media Australia Pty Ltd (Initiative). Initiative, in turn, specified the age targeting requirements in its media booking request to Network 10.
- Due to an error on the part of Network 10, as set out in further detail below, the age targeting requirements were not implemented by Network 10 for the placement of the Advertisement.
- Network 10 has confirmed that the Advertisement was unfortunately shown during the programs 'Paw Patrol' and 'Blue's Clues & You' on live stream on 10 Shake via the 10 Play platform between 7.30am and 8.30am. After an investigation, Network 10 confirmed that the Advertisement was not shown with either program on live free to air TV or catch up TV on 10 Play, nor any other program on 10 Shake.

- The total audience composition data of 10 Shake live stream, 'Paw Patrol', and 'Blue's Clues & You' for the period between 27 September 2020 and 24 November 2020 is set out in the table below. Our agency has not been able to obtain the actual audience composition data at the time the Pernod Ricard advertisement was shown on the live stream.

Demos	10 Shake Live Stream	Paw Patrol	Blue's Clues & You
C00-04	6%	19%	12%
C05-12	4%	11%	11%
C13-17	2%	2%	0%
P18-24	5%	3%	1%
P25-39	29%	23%	30%
P40-54	31%	23%	20%
P55-64	14%	11%	17%
P65+	9%	8%	9%

Data source: OzTAM, vpm_live_ratings/vpm_daily_reach, 27/09/20-24/11/20

- Very regrettably, due to the error at Network 10 set out below, the Advertisement was shown with the programs 'Paw Patrol' and 'Blue's Clues & You' which are primarily aimed at minors.
- Pernod Ricard Winemakers has engaged Initiative for media planning and buying services. Under the terms of our contract, Initiative must ensure that the services it performs complies with the Code, amongst other codes and laws. The following are special conditions of the contract:
 - If a media platform does not have age restriction controls that are capable of excluding minors (i.e. under 18 years of age), the Consultant warrants that prior to publishing, communicating or otherwise placing Pernod Ricard Winemakers' marketing communications on a media platform, it has made inquiries and is satisfied that 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). The Consultant agrees to confirm to Pernod Ricard Winemakers that it is so satisfied and, if requested by Pernod Ricard Winemakers, the Consultant must provide the data or other evidence relating to audience composition.*

- b) *The Consultant will ensure that Pernod Ricard Winemakers' marketing communications are not placed with programs or content primarily aimed at Minors.*
- In September 2020, Pernod Ricard Winemakers entered into a media booking authority form with Initiative for the placement of the Advertisement. The target age audiences specified in the bookings were 25-45 and 45+. Our agency in turn specified the audience target to Network 10 when requesting to buy advertising space on 10 Play.
 - The 25 – 45 targeting was booked directly with Network 10 as a 25 – 45 year old demographic targeting package. The 45+ targeting was booked directly with Network 10 all demographic targeting package and then overlaid with 45+ data set at the demand-side platform level by our agency to reach the 45+ audience. (Pernod Ricard Winemakers were not aware of this overlay but it usually provides an extra layer of targeting, limiting the inventory available to the agency to 45+.)
 - We were surprised to learn that the Advertisement appeared on 10 Shake because at the time we entered into the media booking authority form with Initiative, 10 Shake had not yet been launched and we were unaware that it existed. We were concerned to learn that this new channel broadcasts a significant amount of children's and teen programming, in addition to adult programming. We immediately sent your letter to our agency asking them to work with Network 10 to investigate what occurred and take immediate action to remove the Advertisement from 10 Shake. Network 10 advised our agency as follows:
 - a) *An initial audit was carried out on the day the complaint was made known to Network 10 (23/11/20). We have carried out further daily audits since then on all 10 Play channels (10 Main, 10 Peach, 10 Bold and 10 Shake). This was a manual audit where 10 went through all campaigns (inactive or active) and ensured relevant targeting exclusions were in place to ensure no 10 Shake or Kids programs were being passed through. It then went to another member in the 10 programmatic team for a second check to ensure all exclusions were applied correctly. The daily audits are also being completed in the same manner, going through a double check.*
 - b) *The new children's channel 10 Shake launched on 27/09, from here it is a manual process for 10 to enter into the back end of their SSP [supply-side platform] to remove any bookings that are not compliant as per ABAC standards to ensure we are not targeting any programmes with an audience of 25% or more under 18 years of age. It was at this stage the error occurred. During an*

audit to remove 10 Shake prior to the launch of the channel, the TGL [The Glenlivet] booking was missed and consequently inventory was erroneously passed through. The TGL booking was made on 03/09 prior to the launch of 10 Shake hence this booking being missed from the audit on 10's side.

- c) *This was rectified immediately, and the deal is no longer passing through inventory of children's content on 10 Shake Live or 10 Play Video on Demand.*
 - d) *Exclusions are currently applied manually due to technical limitations with our ad server. 10 have now guaranteed further checks and processes in place to minimise the risk of any further breaches moving forward; this includes a full audit conducted twice daily by 2x separate team members.'*
- In addition Initiative advised us:
 - a) *'Please note on Pernod and the agencies side all measures were overlaid on the TGL buy to ensure that we do not target people under 18 years old. This was implemented through the deals that were made with the publishers as well as in the back end of the DSP [demand-side platform]. In this case of the TGL specific buy that was in breach on 10's all demographic targeting this was an error on 10's side where they did not implement the necessary measures in the back end of their SSP to ensure it was compliant as per the ABAC standards of not targeting programmes that have an audience of 25% or more under 18 years of age.'*
 - Network 10 has confirmed that it has its own internal processes and guidelines for placing alcohol advertisements to exclude minors from the audience. Network 10's Alcohol Advertising Guidelines state:

'The alcohol industry has its own code (the ABAC Code). Under the ABAC Code they are prohibited from advertising alcohol in programs (including sport) where the audience is expected to comprise at least 25% children (under 18 years of age). So don't advertise in kids content or shows popular with kids.'
 - Network 10 advised: 'In the case of programmatic buying alcohol compliance procedures the Agency requests a deal set up. Advertiser and campaign targeting parameters are confirmed at this stage.' If an advertisement relates to alcohol, all children's programming on 10 Play catch up and live 'is required to be excluded at set up manually through the 10 SSP [supply-side platform], regardless of whether or not this is requested by any agency.' Internal approvals should be given before any ad is eligible to be placed with children's

programming and 'as a general rule we do not allow alcohol advertising during children's programming.'

- Network 10 further explained for programming specifically aimed at those under the age of 18, all ads must go through Network 10 internal approvals before being eligible to buy this inventory. As our agency puts it: 'For further content, inventory on programs directed for under 18's on VOD (Video On Demand) is automatically excluded on all deals, with Network 10 creating the deal based on the targeting parameters required as set out in the deal. For live inventory however, Network 10 has confirmed that it is not possible to automate this and so must be excluded manually at the deal level (if the deal is for an alcohol, wagering or another sensitive brand, all programming directed for under 18's (on 10 Shake live and catch-up) is required to be excluded at set-up manually, regardless of whether or not this is requested by the agency). Unfortunately, with current ad server capabilities it is not technically possible for alcohol marketing communications to be flagged and inventory excluded automatically.'
- In summary, it appears that as a result of 10 Shake launching after the deal with Network 10 was set up, due to a human error at Network 10 in the manual setup of the programmatic deal, our advertisement unfortunately appeared with these programs on 10 Shake when they should not have, and without us being aware.
- Despite the placement of the Advertisement being due to an error on the part of Network 10, we will continue to work closely with Initiative and Network 10, and will work with other agencies and broadcasters, to remind them of the Code requirements that must strictly be adhered to when placing our ads. We will also continue our review of the current processes and systems involved in the way our ads are placed to identify any additional measures we can implement to ensure compliance with the Code, including investigating with Network 10 and other publishers the feasibility of automating any manual processes to remove the possibility of human errors occurring which could lead to the placement of our ads being in breach of the Placement Rules
- At this time, Initiative has contacted all other broadcasters with current media buy deals for Pernod Ricard Winemakers to ensure that children's programming is already being excluded from our deals, which has been confirmed. Also, although already specified on a broader scale, Initiative has committed to ensuring that Placement Rule requirements are repeated in every future deal request as an extra precautionary layer so that each individual publisher representative who may deal with the placement of our ads are reminded of the Placement Rules requirement during the deal set up process.
- 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'.

- We submit that the breaches of the Code have occurred other than because of a fault by Pernod Ricard Winemakers and its agency, Initiative. Rather, the breaches appear to be due to a third party's actions (Network 10) which were outside of the reasonable control of Pernod Ricard Winemakers and its agency, and/or was reasonably unforeseeable due to the fact that 10 Shake came into existence after the deal to place the Advertisement with Network 10 was made.
- Accordingly, Pernod Ricard Winemakers submits that the breaches should be recorded as 'no fault breaches'.
- If 'no fault breaches' are 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.
- 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 compliance, including contractual terms with our agencies requiring them to comply with the Code in the placement of our advertisements. We deeply regret that this ad was shown in conjunction with these programs, as this should not have occurred. Pernod Ricard Winemakers will continue to work with our agencies (including Initiative), Network 10 and other broadcasters to ensure that an event like this does not occur again.

The Panel's View

16. The 10 Network is one of three major commercial television networks operating in Australia with ABC and SBS being public broadcasters. In recent years, the traditional primary free to air broadcast channel of each of the networks have been supplemented by digital channels and Broadcaster Video on Demand (BVOD) services. The most recent addition to the available digital channels is part of the 10 Network and is known as 10 Shake which was launched on 27 September 2020. It is the placement of an advertisement from the Company accessed on 10 Shake via the 10 Network BVOD 10 Play which is the basis of this determination.
17. 10 Shake has a children heavy focus in its programming in the hours of 6:00am to 6:00pm with content including shows such as Totally Wild, Scope, PAW Patrol and SpongeBob SquarePants. In the hours from 6:00pm to 6:00am, the channel has adult programming. The complaint concerns an ad for Glenlivet Whisky which was aired between 7:30am and 8:30am. The complainant did not take issue with the content of the ad but its placement on 10 Shake with children's programming.
18. The ABAC Placement Rules provide a set of obligations which aim to have alcohol marketers direct their marketing communications to adults and away from minors. The Company accepts that the placement of its advertisements with 10 Shake

programming was a breach of the ABAC requirements and a detailed explanation of how this occurred has been supplied. In short:

- through its advertising agency, the Company paid for advertising on the 10 Network with arrangements set prior to the launch of 10 Shake on 27 September (the Company states it wasn't aware of 10 Shake at this point);
- its instructions were that its advertising was to be targeted towards adults and in particular persons aged 25 to 45 and persons aged over 45; and
- due to a failure at the 10 Network, the advertising came to be placed with the programs Paw Patrol and Blue's Clues & You on 10 Shake accessed via 10 Play.

19. As accepted by the Company, the ABAC Placement Rules have been breached, specifically:

- Rule 2 - age restriction controls were not utilised i.e. available age targeting capabilities were not implemented;
- Rule 3 - the ad was placed where the audience was reasonably expected to exceed 25 % minors; and
- Rule 4 - the ad was placed with content (PAW Patrol and Blue's Clues & You) which is primarily aimed at minors

20. While accepting and apologising for the breach of the Placement Rules, the Company submits that the circumstances warrant a finding of a "no fault breach" pursuant to Part 4 of the ABAC. A "no fault" finding does not alter that the complainant's concerns have been vindicated and that a breach of Code requirements has occurred. However, the no fault finding recognises that an alcohol marketer acted with regard to its ABAC obligations, but the breach that occurred was outside the marketer's reasonable control.

21. The Panel believes it is appropriate to make a no fault finding. The Company and its agency did give express instructions as to the placement of its ads and the use of age targeting capabilities of the 10 Network digital channels. These instructions, if followed by the 10 Network, would not have had the ads shown with the children's programming. It is acknowledged by the 10 Network that the mistake occurred at their end and was a result of "human error" associated with the launch of the new 10 Shake channel.

22. The complaint is upheld and a no fault finding made.