

ABAC Adjudication Panel Determination Nos 95, 96, 97, 102, 105, 106, 108, 109 & 147/21

Products: Vodka Cruiser Spritz, Jack Daniels, Cellarbrations & BWS
Companies: Asahi Beverages, Brown-Forman, Australian Liquor Marketers & Endeavour Drinks
Media: Television
Date of decision: 8 June 2021
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
 Ms Jeanne Strachan
 Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from nine complaints received in relation to the placement of alcohol marketing during Lego Masters and The Surgeon, both on free-to-air and on-demand television, as well as the content of Asahi Beverages’ advertisement for Vodka Cruiser Spritz seen during these programs. The following is a summary of the complaints received.

Complaint No.	Date Received	Company	Product	Placement
95/21	27/4/2021	<ul style="list-style-type: none"> Asahi Beverages 	<ul style="list-style-type: none"> Vodka Cruiser Spritz 	<ul style="list-style-type: none"> TV - Free to Air 7:30pm during Lego Masters on Channel 9.
96/21	27/4/2021	<ul style="list-style-type: none"> Brown-Forman Australian Liquor Marketers 	<ul style="list-style-type: none"> Jack Daniels Cellarbrations 	<ul style="list-style-type: none"> TV - On Demand Lego Masters, 9Now 8:45pm Sunday 25 April
97/21	18/4/2021	<ul style="list-style-type: none"> Asahi Beverages Brown-Forman 	<ul style="list-style-type: none"> Different types of whiskies and spirits. 	<ul style="list-style-type: none"> TV - On Demand Lego Masters, Channel 9 Sunday 25 April to Tuesday 27 April; Sunday 18 April to

Complaint No.	Date Received	Company	Product	Placement
				Wednesday 22 April
102/21	3/5/2021	<ul style="list-style-type: none"> Asahi Beverages 	<ul style="list-style-type: none"> Vodka Cruiser Spritz 	<ul style="list-style-type: none"> TV - On Demand Lego Masters Sunday 2 May, 7:30pm - 8:15pm
105/21	3/5/2021	<ul style="list-style-type: none"> Asahi Beverages 	<ul style="list-style-type: none"> Vodka Cruiser Spritz 	<ul style="list-style-type: none"> TV - On Demand The Surgeon, 7plus 3 May 2021, 4:03pm
106/21	5/5/2021	<ul style="list-style-type: none"> Asahi Beverages 	<ul style="list-style-type: none"> Vodka Cruiser Spritz 	<ul style="list-style-type: none"> TV - Free to Air Lego Masters (Channel 9)
108/21	6/5/2021	<ul style="list-style-type: none"> Asahi Beverages 	<ul style="list-style-type: none"> Vodka Cruiser Spritz 	<ul style="list-style-type: none"> TV - On Demand Lego Masters 6:30 -7:30pm
109/21	10/5/2021	<ul style="list-style-type: none"> Asahi Beverages 	<ul style="list-style-type: none"> Vodka Cruiser Spritz 	<ul style="list-style-type: none"> TV - On Demand Lego Masters 7:30pm
147/21	24/5/2021	<ul style="list-style-type: none"> Endeavour Drinks 	<ul style="list-style-type: none"> BWS 	<ul style="list-style-type: none"> TV - On Demand Lego Masters Friday 21 May 2021 at approximately 7:30pm

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 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 complaints raise concerns under the ABAC Code and accordingly are within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaints were received on 27 April, 28 April, 3 May, 5 May, 6 May, 10 May and 24 May 2021.
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 complaints were 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 not obtained by any of the Companies for placement of their marketing with Lego Masters or The Surgeon. Further, Asahi Beverages did not obtain approval for the content of its advertisement for Vodka Cruiser Spritz.

The Placement

10. The complainants are concerned that alcohol marketing was seen:
 - During Lego Masters, on free-to-air television, before 8:30pm.
 - During Lego Masters, when live streamed or watched on demand via 9Now.
 - During The Surgeon, when watched on demand via 7plus.

The Marketing

11. In addition to the placement of alcohol advertising, some complainants also expressed concern that the Asahi Beverages television advertisement for Vodka Cruiser Spritz had Strong or Evident Appeal to Minors. The following is a description of this television advertisement:

The television advertisement is set at a party and is accompanied by the song "You're So Hung Up On My Colours" by Juno Disco. It opens with a shot of a hand holding a can of Vodka Cruiser Spritz.

The advertisement then proceeds to a number of scenes as follows:



First, we are shown a shot of two people standing together, one wearing yellow and the other bright blue.



The person wearing bright blue says (quizzically), “Vodka Cruiser Spritz?”

The person wearing yellow and holding a can of Vodka Cruiser Spritz in their left hand responds “Yeah” before looking to her right and saying “Spritz me”.

The camera then pans to the viewer’s left to show a person sitting amongst a number of cushions, holding a can of Vodka Cruiser Spritz in their right hand, who then raises their left arm as they say “Spritz me”.



A sign behind them saying “Spritz Me!” then lights up.

The camera again pans to the left to show a person wearing light blue who twirls around before saying “Spritz me”, after which the camera once more pans to the left to show a person predominately wearing red who sings “Spriiiiitz meeee” into a hanging microphone.



After again panning to the left, we see a person wearing pink, who, whilst looking at the camera, clicks the fingers of their right hand.



A hand then reaches into an esky to retrieve a can of Vodka Cruiser Spritz.

The advertisement then shows the person wearing pink, holding a can of Vodka Cruiser Spritz in their right hand, who looks into the camera and asks “Who wanted a Cruiser Spritz?”



The person wearing bright blue raises her right arm and says “me”.

We are then shown a series of images of the Vodka Cruiser logo and cans of Vodka Cruiser Spritz, as a voice over says:



“New light and refreshing taste, Vodka Cruiser Spritz.”

The advertisement closes with a shot of the person wearing pink, who looks into the camera and whispers: “Spritz me”



The Complaints

- The complainants have the following concerns about the marketing:

Complaint No.	Complainant Concern
95/21	[TV - Free to Air] - <i>It is being broadcast at 7:30pm during Lego Masters which has large audience under the age of 18 years. Children should not be exposed to the advertising of alcohol. It was shown repeatedly in quick succession.</i>
96/21	<i>During ad breaks on 9Now streaming of free-to-air content, "Lego Masters" (episode 2, season 3), two alcohol related ads were aired during a show with a clear child focus. I was watching this with my 10 year old daughter and was appalled to see this sort of advertising during a show focused for children and families. By contrast other advertising during the show was for the upcoming "Peter Rabbit 2" movie.</i> <i>Our children should not be exposed to alcohol advertising like this.</i>
97/21	<i>Lego Masters is geared for young people as well as adults. Most families watch it but the alcohol advertising during every break is inappropriate. We were watching the show on demand (who watches live nowadays?) with our 12 year old son. Don't know if the time has anything to do with it but after 9pm during the school holidays is not unusual for a 12 year old (or anyone under 18).</i>

Complaint No.	Complainant Concern
102/21	[TV – On Demand] <i>Making it fun. My four year old has just said "sprtiz me". Making a highly alcoholic drink like a fun soft drink. None of my three underage boys realised it was alcoholic but thought it was a fun soft drink. Only thing that showed it was alcoholic was teeny tiny print saying not for under 18. My 4yr old can't read. So so so wrong.</i>
105/21	<p><i>The ad came on during a show when the kids were around.</i></p> <p><i>I was logged into my account. It was a show called The Surgeon, the kids had come in from school while it was running.</i></p> <p><i>My understanding is that these shows shouldn't show this content during day-time hours.</i></p>
106/21	<p>[TV - Free to Air] <i>Played on repeat, six times in a row during a children's oriented program [Lego Masters].</i></p> <p><i>[My objection is] that an alcoholic drink that looks appealing to children was played during a show that would mostly be watched by minors.</i></p>
108/21	<p>[TV – On Demand] <i>Inappropriate ad choice for show [Lego Masters].</i></p> <p><i>Bright neon-coloured alcoholic drinks during a show that is directed at kids. Not a good choice.</i></p>
109/21	<p>[TV – On Demand] <i>These ads are being shown during a PG rated show with a huge following from children [Lego Masters]. These ads are praying on children.</i></p> <p><i>They are playing alcohol and gambling advertising not in the allocated times. They are playing alcohol ads during a PG kids' TV program, I don't not want kids associating Lego with alcohol and gambling ads. This is very disappointing that they are advertising alcohol and gambling during this kids' program.</i></p>
147/21	<p><i>My objection is about the advertisement's placement rather than its content. This ad was served to us on several ad breaks back to back about four times during an on demand cast on 9Now of Lego Masters, which is a program that is very popular with children. I have trouble finding an accurate classification of the show, but from my observation of it, this is a family program which would have a strong appeal to children, and a significant part of its audience would be children. Given this, alcohol advertising is not appropriate during such a program and 9 Now should not allow the placement of this ad during an on demand stream, perhaps in the same way that it would not allow its airing during a live TV broadcast.</i></p>

The ABAC Code

13. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (b)(i) have Strong or Evident Appeal to Minors;
 - (b)(iv) be directed at Minors through a breach of any of the Placement Rules.

14. Part 6 of the ABAC Code provides that:

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 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.
- (v) 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).

Strong or Evident Appeal to Minors means

- (i) likely to appeal strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
- (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; or

- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

The Company Responses

15. **Asahi Beverages** responded to the complaints by letter emailed on 21 May 2021. The principal points made by the Company were:

Alcohol Advertising Pre-vetting Service Approval

- The marketing referred to in the complaint did not receive Alcohol Advertising Pre-vetting Service Approval for its content and/or placement. Pre-vetting was sought and granted for the 'Spritz Me' tagline as relating to OOH assets. Given the AV asset was restricted to BVOD and online, pre-vetting was not sought.

Responsibility toward Minors

- The 30 second advertisement begins with a close shot of the Vodka Cruiser Spritz can; the Vodka Cruiser logo device and the word 'vodka' are very clearly visible as text, and the text is reinforced by the question posed by the protagonist, who clearly states the words 'Vodka Cruiser Spritz' within the establishing five seconds of the advertisement.
- The can is then shown in the majority of the following frames, maintaining the identification established at the beginning of the ad. The final seven seconds reinforces that the advertisement is for an alcoholic product, with both text and voiceover reinforcement of the words 'Vodka Cruiser Spritz'. The prominent repetition of the word 'vodka' throughout the course of the ad very clearly establishes that the product is alcoholic.
- The tagline 'spritz me' is clearly initially posed as a request for a beverage; this is a common vernacular construction often employed in the construction of requests for beer (beer me). The use of various repetitions of the words 'spritz me' is intended as a device to creatively establish the fact this is a new 'spritz' offering from Vodka Cruiser, increasing the name ID of the product for consumers. None of the characters in the advertisement who say the line hold any specific appeal to children – they are, respectively, a woman drinking the product, a man seated on a fancy couch, a woman standing at a bar, and a woman with a microphone.
- With respect to the colours, movement and general environment of the advertisement, the setting clearly depicts either a backyard or beer garden, with adults socialising and having a good time around a structure resembling an outdoor bar. Care has been taken to ensure that clearly

visible Vodka Cruiser products are present in every shot, to reinforce the fact this is an adult party environment where alcohol is served. The colours and movement, while vibrant, are clearly not childlike – there are references to the indoor plants, neon light slogans and decorative design items that are popular with older millennials.

Placement Rules

- The advertisement was not shown on free-to-air television during Lego Masters. Free-to-air broadcast is not part of the media plan for this product, it has been shown on social media, YouTube and BVOD only.
- Available Age Restriction controls were utilised to exclude Minors from viewing the Marketing Communication whilst streaming Lego Masters and/or The Surgeon on 9 Now or 7 Plus. We have controls in place that ensure our advertisements are only shown to people over the age of 18 on 7 Plus and 9Now.
- CUB purchases BVOD advertising instances through our programmatic partner Adobe. Adobe provides the capability to access video inventory across a range of environments; CUB and Asahi use Adobe services to access inventory with the major TV networks’ catch-up/streaming services in desktop/mobile/tablet environments or via connected TV.
- We apply 18+ targeting instructions to Adobe, ensuring our advertisements are shown to people who have positively identified they are over the age of 18 and are logged into their accounts.
- The networks have confirmed to CUB that they also apply 18+ targeting at their end, and do not allow alcohol advertising to be shown to minors or within programs featuring content primarily aimed at minors.
- Network data on logged-in users, Oztam BVOD data, and free-to-air linear broadcast data for Lego Masters is located below.

	Network logged-in	OzTam BVOD	FTA linear
0-17	4%	5%	21.5%
18-24	9%	10%	3.2%
25-39	36%	37%	19.5%
40-54	34%	33%	29.3%
55-64	10%	9%	14.1%
65+	7%	6%	12.3%

- 7Plus have provided the following OzTam BVOD data for The Surgeon, and have noted that this series forms part of their “nostalgia” category on 7Plus and does not air on linear TV.

OZTam Demo	Mins	Demo %
C13-17	6,645	1.03%
F18-24	9,807	4.00%
F25-39	49,717	15.20%
F40-54	89,699	27.42%
F55-64	60,009	18.35%
F65+	37,386	11.43%
M18-24	5,048	1.54%
M25-39	16,385	5.01%
M40-54	18,305	5.60%
M55-64	14,504	4.43%
M65+	13,059	3.99%

- Lego Masters and/or The Surgeon are not programs primarily aimed at Minors, and do not have content primarily aimed at Minors.
- The Surgeon is an M-rated 2005 Australian drama series set in an operating theatre. 7Plus describes the series as focused on “Eve Agius, The Surgeon, a highly skilled woman alone in a male world. Medical cases filled with twists, turns and surprises test the limits of her skill and knowledge.”
- Notwithstanding Lego is commonly marketed as a children’s product, the program Lego Masters is focused on adult Lego enthusiasts. 9Now describes the program as “pitting eight pairs of Brick heads against each other in a quest to impress with their creativity, design and flair.” This has previously been established by the Panel in ABAC Adjudication 59/20, which states that Lego Masters’ “reality program format, the nature of the scenarios which contestants must grapple with, the age of the contestants and actual audience of the program tend to indicate the program has a family focus which certainly captures minors but is not primarily aimed at them.”
- Diageo noted that the program appears to have been incorrectly categorised as 'General Entertainment' by the Nine Network as opposed to 'Family'. Similarly, our advertisements are also excluded from programs in the 'Family' category, indicating this potential categorisation error still exists. With the significant programming diversity that exists on BVOD services, we rely on the networks to correctly categorise their programs. Should the panel find this season of Lego Masters constitutes

a breach of the placement rules, we would request that consideration be given to recording a no-fault breach for Asahi Beverages.

- I note that the linear broadcast demographic data shows that 21.5% of viewers of Lego Masters are under the age of 18. While this meets the ABAC standard of a 75% 18+ audience, we have internally taken the decision that it is inappropriate for a Vodka Cruiser Spritz advertisement to appear in this context, and I have instructed our media buying team to request that 9 Now exclude instances of Lego Masters across the portfolio.
- Asahi Beverages is committed to ensuring our promotional and marketing material does not promote or encourage any irresponsible consumption of alcohol. Our goal is for consumers to enjoy our products responsibly and in moderation, and to uphold community standards when it comes to the placement and content of our advertising.

16. **Brown-Forman** responded to the complaints by letter emailed on 26 May 2021. The principal points made by the Company were:

- Brown-Forman Australia is committed, and takes very seriously our responsibility, to market our products responsibly to Australian consumers and in accordance with all applicable laws, as well as the ABAC Code. Therefore, it is always a matter of serious concern for us to receive any complaint that our efforts fall short of the high standards we set for ourselves in this regard.

Alcohol Advertising Pre-vetting Service Approval

- This advertisement in question was part of our marketing campaign for Jack Daniel's – "Make It Count", comprising a series of multiple advertisements. The series of advertisements was submitted to the AAPS for approval on 1 September 2020 and approvals for the submitted advertisements were issued on 10, 12 and 25 September, and 12 October 2020. The approval numbers are No. 18691, 18697, 18729 and 18796 respectively.

Responsibility toward Minors

- We respectfully disagree that the marketing communication has breached Part 3(b)(iv) of the Code for the following reasons we set forth below.
- As background, 9Now is a video on demand, catch-up TV service run by the Nine Network in Australia, and allows its subscribers control over their viewing choices, content upon demand, and viewing at the times they may choose at their discretion. It is subscription-based and since its launch in

2016, 9Now requires subscribers to provide their date of birth and email in order to access and view its content.

- We wish to assure ABAC that Brown-Forman Australia is committed and works to ensure that our communications are targeted to consumers above the legal drinking age. It is our corporate policy to place all advertisements in compliance with applicable codes and guidelines.
- The media purchase for the program in question, Lego Masters, was arranged by Starcom, our agency with 9Now. Placement of our advertisements with 9Now TV's on demand platform is subject to the following controls:
 - 9Now is subscription-based and access to the platform requires subscribers to log in with their date of birth and email address. In addition, 9Now's Terms of Use further require that subscribers exercise discretion when allowing children or minors use of their subscriptions and further that viewing of content that is targeted at 18+ requires confirmation of the subscriber's age. Therefore it is expected that subscribers will adopt such controls to exclude Minors from viewing any marketing communication they do not wish such Minors to view.
 - Brown-Forman Australia does not purchase media space where our marketing communications are placed next to or within programs primarily targeted at children. Programming that is deemed to be primarily aimed at children is classified by 9Now as 'Children programming'. Brown-Forman Australia does not purchase any media within this platform. Programming that is not primarily aimed at minors is categorized as 'general entertainment.' Lego Masters is rated PG and categorized as Reality TV.
 - Brown-Forman Australia's Responsible Marketing of Alcohol Beverages guidelines mandates placement of advertisements where the audience is at least 70%+ above the legal drinking age (LDA) and where demographic targeting of all placement to consumers above LDA can be applied. Starcom utilizes Publicis Screen to exclude all Children's programming in our media purchase, and only users who are above LDA are targeted.
 - Further, even though the majority of activity on 9Now is on-demand, we have also implemented time targeting to ensure that placement of our advertisements on BVOD platforms is between 8:30pm-5:00am.

- The demographic breakdown of logged-in users who viewed Lego Masters on 9Now's on demand is set out below:

Female:	60.70%
0-17:	0.40%
18-39:	31.90%
40-54:	23.60%
55+:	4.80%
Male:	39.30%
0-17:	0.70%
18-39:	18.00%
40-54:	17.80%
55+:	2.80%

- Approximately 1.1% of the logged in audience for Lego Masters was <18. However, as Publicis Screens also applies an additional layer of demographic targeting across the overall buy (which is executed cross network), these users would have been excluded from the activity anyway.
- Channel Nine has provided the below VPM audience profile of LEGO Masters across 9Now. It is important to note that whilst a small portion of this audience is under 18+, those users were not targeted in our activity due to the appropriate timing and other restrictions that are in place:

U18	6%
18-24	7%
25-39	37%
40-54	35%
55-64	8%
65+	6%

**Source: OzTAM Live + VOD VPM, Lego Masters Season 3, 19/04/2021 – 11/5/2021, includes co-viewing on connected tv devices*

- Based on Oztam data of Lego Masters free-to-air viewership we've received, the age of audience of this program is 79%+ above 18.

Profile Header	Profile	Profile %
Sex	Male	46.7%
	Female	53.3%
Age Groups	0-1	0.8%
	2-4	3.2%
	5-9	7.8%
	10-12	5.6%
	13-15	2.8%
	16-17	0.6%
	18-24	3.2%
	25-29	3.4%
	30-34	5.9%
	35-39	9.8%
	40-44	9.2%
	45-49	11.6%
	50-54	9.1%
	55-59	7.6%
	60-64	6.7%
65+	12.5%	

- Lego Masters is not a program or content primarily aimed at Minors. It is a reality TV show that has been recognized to be designed as escapism for adults, providing them with challenges to be creative using a childhood element. This has certainly been proven by the participants of the competitions in Lego Masters being adults and mostly in the 25+ age groups. Further, the audience composition for the program indicates that it is directed at an adult audience. Whilst this program is not primarily targeting Minors nor is it intended for viewing by Minors, we recognize that the program may have appeal across a wider demographic than 18+, and therefore may be a program that is enjoyed in a co-viewing format with families.

Concluding observations

- We would like to emphasise that BVOD activity by nature, is on demand and therefore less accessible to minors. In addition, 18+ targeting as well as time-targeting restrictions are imposed to ensure minors are not being targeted. We rely on such restrictions we have in place to further mitigate risk of under 18s viewing alcohol advertising (although we acknowledge a very small proportion may be viewing under an adult login).
- As noted above, Brown-Forman is committed to maintaining the highest standards in its marketing activities.

17. **Australian Liquor Marketers (Cellabratings)** responded to the complaints by email on 4 June 2021. The principal points made by the Company were:

Alcohol Advertising Pre-vetting Service Approval

- Yes, the alcohol marketing communication referred to in the complaint received Alcohol Advertising Pre-vetting Service Approval.

Placement Rules

- Publicis Screens applies an additional age filter which excludes any identifiable <18 audiences. This data is gathered either via 1st party (logged in) or 3rd party data.
- Network data on age of logged in users who viewed Lego Masters:

Female: - 60.7%

0-17: 0.4%

18-39: 31.9%

40-54: 23.6%

55+: 4.8%

Male: - 39.3%

0-17: 0.7%

18-39: 18.0%

40-54: 17.8%

55+: 2.8%

- Please note that although 1.1% of audience was <18, Publicis Screens applies an additional age filter which excludes any identifiable <18 audiences.
- VPM data for age of audience of Lego Masters:

U18	6%
Female 18+	55%
Male 18+	39%
18-24	7%

25-39	37%
40-54	35%
55-64	8%
65+	6%
25-54	73%

Source: OzTAM Live + VOD VPM, Lego Masters Season 3, 19/04/2021 – 11/5/2021, includes coviewing on connected tv devices

- OzTAM data on the age of audience of the free to air linear broadcast of Lego Masters:

Profile Header	Profile	Profile %
	Male	46.7%
	Female	53.3%
Age Groups	0-1	0.8%
	2-4	3.2%
	5-9	7.8%
	10-12	5.6%
	13-15	2.8%
	16-17	0.6%
	18-24	3.2%
	25-29	3.4%
	30-34	5.9%
	35-39	9.8%
	40-44	9.2%
	45-49	11.6%
	50-54	9.1%
	55-59	7.6%
	60-64	6.7%
65+	12.5%	

- Lego Masters is not a program primarily aimed at Minors, and does not have content primarily aimed at Minors. LEGO Masters is PG rated and categorised as Reality TV.

18. **Endeavour Group** responded to the complaints by letter emailed on 2 June 2021. The principal points made by the Company were:

- BWS thanks the ABAC Adjudication Panel (the Panel) for the opportunity to respond to the Complaint. BWS understands that the Panel is considering whether or not the Advertisement breaches Part 3(b)(iv) of the ABAC Responsible Alcohol Marketing Code (the Code).

- For the reasons outlined below, BWS's position is that the Advertisement does not breach any Part of the Code and it, therefore, requests the Panel to dismiss the Complaint.

Alcohol Advertising Pre-vetting Service Approval

- BWS submits the following:
 - It is BWS's aim to be Australia's most responsible retailer of alcoholic beverages. This is highlighted by the fact that BWS formalised its status as a signatory to the Alcohol Beverages Advertising Code Scheme in 2013 and it prepares all its advertising in accordance with the Code.
 - Furthermore, BWS maintains strict internal and external processes in addition to those required by the Code. As part of our community charter 'Our Community, Our Commitment', BWS has in place a range of industry-leading initiatives to ensure that minors are not served alcohol and to encourage responsible drinking practices. These include:
 - ID25 (ask for ID from anyone who looks under 25 years of age);
 - Don't Buy It For Them (stopping secondary supply to minors);
 - our Intoxication Policy (refusal of service to anyone who may be intoxicated); and
 - staff training that exceeds legal requirements, including 'Don't Guess, Just Ask', team talkers, regular refresher and reminder courses, and
 - e) implementation of the award-winning training program 'Safe'.
 - The processes outlined above provide BWS with a compliance framework to ensure that it serves customers in accordance with its obligations under the various applicable laws.
 - The Advertisement received Alcohol Advertising Pre-Vetting Service Approval on 21 April 2021 with approval number 19512.

Responsibility toward Minors

- BWS submits the following:

- Part 3(a)(iv) of the Code prohibits a marketing communication from being directed to minors through a breach of any of the Placement Rules.
- The Complaint seems to suggest that the Advertisement does not comply with Placement Rules 2-4, each of which is considered in turn below. For completeness, the remaining Placement Rules do not apply to the Advertisement:
 - Placement Rule 1, as there is no code published by an Australian media industry body that regulates the placement of alcohol marketing on a 'video on demand' platform; and
 - Placement Rule 5, as the Advertisement was not placed in an electronic direct mail.
- Placement Rule 2 requires available age restriction controls to be utilised to exclude minors from viewing a marketing communication. An available age restriction control includes 'targeting ... to restrict a marketing communication to adults'.¹
- Age targeting of users who are aged 18 and over is applied to the Advertisement on the 9Now platform. As such, the Advertisement would only be available to those users who have indicated that they are adults.
- As such, BWS believes that the Advertisement does not breach Placement Rule 2 given that the Advertisement utilises available age restriction controls.
- Placement Rule 3 requires that, if a digital media platform does not have age restriction controls available, a marketing communication may only be placed where the audience is reasonably expected to comprise at least 75% adults.
- As stated in above, the Advertisement does utilise available age restrictions controls on the 9Now platform. As such, Placement Rule 3 would not apply to the Advertisement.
- Even if Placement Rule 3 did apply, the requested audience composition data (network data, VPM data, and OzTAM data, as shown below) indicates that the audience of Lego Masters is comprised of significantly more than 75% adults.

¹ Part 6 of the Code

Network Data

0-17:	1.1%
18-39:	49.9%
40-54:	41.4%
55+:	7.6%

OzTAM BVOD Data

0-17:	6%
18-39:	45%
40-54:	35%
55+:	14%

OzTAM Linear Data

0-17:	20.8%
18-39:	22.3%
40-54:	30.1%
55+:	26.8%

- As such, BWS believes that the Advertisement does not breach Placement Rule 3 given that the Advertisement utilises available age restriction controls and nevertheless has an audience comprised of greater than 75% adults.
- Placement Rule 4 requires that a marketing communication must not be placed with programs or content primarily aimed at minors.
- BWS did not instruct Nine to place the Advertisement during an episode of Lego Masters on the 9Now platform. Rather, this placement of the Advertisement was part of the incidental placements offered by Nine. These incidental placements involve Nine, at its discretion and based on its ratings of the shows available on the 9Now platform, placing the Advertisement with age appropriate content. It would appear that Nine considers Lego Masters to be a program that is age appropriate for alcohol advertisements to be placed with it.
- BWS notes that the Panel has previously considered whether Lego Masters is a program that is primarily aimed at minors, concluding

that the program has a family focus which certainly captures minors but is not primarily aimed at them ². This position is consistent with Nine's understanding of the program, with Nine's director of television stating that Lego Masters is 'one of those rare programs to resonate with people of all ages' ³. The audience composition data of the program greatly supports these positions.

- Additionally, based on a high-level viewing of Lego Masters, it is not a program that is primarily aimed at minors, for reasons including:
 - the genre of the program would best be described as a game show or reality TV show that involves a prize of \$100,000 (which the contestants refer to quite regularly throughout the program), and as such the program would generally resonate more with adults;
 - the program involves the building of intricate and complex Lego structures of mature designs, which require high levels of detail that would generally be beyond the interest of minors;
 - the host and contestants of Lego Masters appear to be adults, and so the program would likely have less connection with minors; and
 - the program frequently uses dramatic and tense orchestral music, which draws similarity to other adult game shows and reality TV shows.
- As such, BWS believes that the Advertisement does not breach Placement Rule 4 as Lego Masters is not a program primarily aimed at minors.
- For the reasons outlined above, BWS believes that the Advertisement does not breach any of the Placement Rules or any Part of the Code. Therefore, BWS requests that the Panel dismiss the Complaint.
- Notwithstanding BWS's position as to the Advertisement's compliance with the Code, the placement of the Advertisement during Lego Masters does not fit BWS's brand position. BWS has accordingly instructed Nine that its advertisements should not be placed with Lego Masters.

² ABAC Adjudication Panel Determination No. 59/20.

³ <https://www.mediaweek.com.au/hamish-blake-to-host-lego-masters-on-nine-until-2023/>.

The Panel's View

Introduction

19. While this is a long and complex determination because of the sheer number of complaints and the different alcohol companies involved, the actual questions to be decided by the Panel are relatively straightforward and can be summarised as follows:

- Does the placement of various alcohol advertisements with the TV show 'Lego Masters' breach the ABAC Placement Rules?
- Does the placement of an advertisement for Vodka Cruiser Spritz with the TV show 'The Surgeon' breach the ABAC Placement Rules?
- Does the content of the Vodka Cruiser Spritz advertisement have strong or evident appeal to minors in breach of the ABAC standard?

20. Before answering these questions, it is helpful to provide some brief context about the scope of the ABAC and its application to the current issues. The ABAC:

- regulates alcohol marketers and not media platforms or media companies. This means that the 9 Network and its placement of alcohol ads with particular programs like Lego Masters is not directly regulated by the ABAC Scheme with responsibility to market consistently with ABAC requirements resting with alcohol marketers.
- has a key policy goal that alcohol marketing should be directed towards adults and, to the extent possible, away from minors. This means the content of alcohol marketing communications must not have strong appeal to minors and the marketing should not be placed where minors are likely to be a major audience of the marketing.
- relevant content standard is contained in Part 3 (b)(i) and provides that an alcohol ad must not have strong or evident appeal to minors. This might be breached if the ad:
 - specifically targets minors;
 - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; or
 - uses imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to minors.

- has five Placement Rules which impose obligations on marketers, four of which are potentially relevant in the current case namely:
 - relevant media codes of practice must be complied with such as the Commercial Television Industry Code of Practice - Rule 1
 - if a media platform on which the ad appears has age restriction controls to exclude minors, then these controls must be used - Rule 2
 - if age restrictions controls cannot exclude minors, then an ad can only be placed where the audience is reasonably expected to comprise at least 75% adults - Rule 3
 - an ad must not be placed with programs or content primarily aimed at minors - Rule 4.
21. The benchmark applied when assessing if the ABAC requirements have been satisfied is the 'reasonable person' test. This means the Panel puts itself in the shoes of a person who has the life experiences, opinions and values commonly held by most Australians, and assesses how this reasonable person would probably understand the marketing communication and the message it is attempting to convey.
22. It is also useful to note the differing ways it is possible to now view programming from an Australian television network. Each of the television networks have a primary free to air channel as well as related digital channels and a Broadcast Video on Demand (BVOD) facility. In the case of the 9 Network:
- 9Now is the BVOD facility which enables a user to view 'catch-up' programs on demand but also live stream TV from the primary Channel 9 as well as related digital channels 9Gem, 9Go, 9Life and 9Rush; and
 - to access 9Now a consumer will need an internet connected device e.g., a smart TV or iPhone or tablet and to open an account. In opening an account, the account holder is required to provide their date of birth.
23. As the take up of facilities such as 9Now becomes commonplace in many households, it becomes difficult for a person to keep track of whether the program they are watching is being accessed via the linear free to air broadcast or live streamed via 9Now. This is because it's the same program content being seen at the same time, but the different transmission format means the Network can and will insert different advertising into the programming. This is critical for alcohol ads which might not be permitted at a particular time of day when shown with linear free to air broadcasts, but which are not restricted if transmitted over the digital broadcast via 9Now or the equivalent facility on the other networks.

Lego Masters and the ABAC Placement Rules

24. Most of the complaints have been about the broadcast of alcohol advertising with the program Lego Masters. While expressed slightly differently, the complaints have not been about the content of the various alcohol ads but have argued that Lego Masters is a family show which is being watched by children and it is inappropriate for alcohol advertising to be included with the show. This concern requires an assessment of the ABAC Placement Rules.
25. Placement Rule 1 requires compliance with relevant media industry codes. The applicable code is the Commercial Television Industry Code of Practice (CTICP) and in short this means that alcohol advertising cannot be shown with programs broadcast over linear free to air television prior to 8:30 pm. Series 3 of Lego Masters screened on free to air TV between 7:30 to 8:30 pm on Mondays to Wednesdays from 19 April to 17 May. Several complainants said they watched the program on free to air TV.
26. Alcohol ads did not screen with the broadcast of Lego Masters over the primary Channel 9 via linear free to air TV. The Panel does not doubt that those complainants who watched the show 'live' in fact were served with alcohol ads, but the show would have been accessed 'live streamed' over 9Now and this enables the 9 Network to insert digital ads which are different from those broadcast over linear TV. In other words, two households can be watching the same program at the same time with one household viewing by linear free to air TV seeing one set of advertisements, while their neighbour watching the program 'live streamed' will be served with different advertisements. It is contrary to the CTICP for alcohol ads to be shown in the broadcast over linear free to air TV at say 7:45 pm, but to insert alcohol ads into the 'live streamed' version over 9Now also at 7:45pm is not a breach of the CTICP as the code does not apply to that media platform.
27. This seemingly incongruous outcome leads to Placement Rule 2, which requires that alcohol marketers use available age restriction controls provided by a media platform to exclude minors from a viewing audience. There are no age restriction controls on linear free to air TV broadcasts, but digital transmissions via 9Now do have an age restriction capacity. This arises because to access 9Now an account has to be opened and the account holder provides a date of birth. With this information, both the 9 Network and alcohol marketers can exclude account holders aged under 18 years old from being served alcohol ads. Each of the alcohol companies advised this facility was used.

28. The ability to exclude minors is an effective means to targeting alcohol marketing towards adults on some media platforms like Instagram or YouTube. This is because many Australians from a relatively early age have their own internet capable device which is used to access the platforms and the device owner/user have their own accounts. The effectiveness of age restriction controls on platforms such as 9Now is much more limited as in a typical household with parents and children, the account holder will be an adult and programs will be co-viewed by multiple people including minors from the single account.
29. This means the most meaningful of the Placement Rules are 3 and 4 as these go to the reasonably expected audience and the nature of the program with which the alcohol ad was placed. Rule 3 provides 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 audience of TV programs through the ratings system and each of the alcohol Companies has supplied ratings data. This data reveals that the audience for Lego Masters over both linear free to air TV and accessed 'on demand' meets the 75% adult benchmark. The highest audience of minors reported was 21.5% for the linear free to air broadcast of the program. The data for 'on demand' indicates a much smaller audience of minors for the program.
30. Rule 4 provides an alcohol ad must not be placed with programs or content primarily aimed at minors. 'Primarily aimed' means the program must be more than being of interest to minors or even that the program has evident appeal to minors. It means that the program has minors as its primary focus. This can be assessed by considering factors such as:
- the subject matter of the program and whether the subject matter has themes likely to predominately 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;
 - the use of language and the presence of adult themes such as violence and the portrayal of sexuality; and
 - the actual audience of the program.
31. Consistently with its decision in Determination 59/20, the Panel believes Lego Masters does have evident appeal to minors but the show is a reality TV competition between teams of two adults (the winners of Series 3 was a team made up of a Project Manager and Engineer aged 41 and 36 respectively) which is not primarily aimed at under 18 year olds.

32. Drawing all this together, there has not been a breach of the ABAC Placement Rules by showing alcohol ads with Lego Masters given:
- alcohol ads were not screened with the show as broadcast on free to air linear TV prior to 8:30 pm (noting alcohol ads were digitally added to the 'live streamed' accessed version of the program);
 - the age restriction controls available on the 9Now BVOD platform were utilised to exclude account holders who are minors from being served with alcohol ads;
 - the audience for Lego Masters did not exceed 21.5% under 18 which is within the 75% adult requirement of the Placement Rules; and
 - Lego Masters has wide appeal, including to minors, but the program cannot be said to be primarily aimed at minors.

'The Surgeon' and the ABAC Placement Rules

33. The Surgeon is an Australian television drama set in a fictional Sydney hospital. The show originally screened on the 10 Network in 2005, but is now available on demand on the 7 Network BVOD platform 7Plus. One of the complainants was concerned when alcohol ads screened with this show when watched at 4 pm while children were present. It was contended that alcohol ads should not be shown at this time of day.
34. As explained earlier, there are no time of day constraints for alcohol ads served with programs accessed by BVOD platforms such as 7Plus. The issue turns on the expected audience of the Surgeon and whether the show is primarily aimed at minors. 7Plus does have age restriction controls and these have been applied in this case.
35. Ratings data for the Surgeon indicate that the program has a predominately adult audience with very few minors watching the show (although this does not fully account for co-viewing by children within families). Further the medical theme and human drama of the program makes it quite clear the program is not primarily aimed at minors. It is self-evidently an adult focussed drama. There has been no breach of the ABAC Placement Rules through the serving of alcohol ads with this show.

Vodka Cruiser Spritz advertisement and strong appeal to minors

36. One complainant raised a concern about the content of the advertisement of Vodka Cruiser Spritz arguing that the ad did not make clear the product was alcoholic and that the complainant's children thought the product was 'a fun soft drink'. Asahi Beverages, the producers of Vodka Cruisers, submitted that the ad was consistent with ABAC standards arguing:
- the ad repeatedly uses the term 'vodka' both in language and in text;
 - the talent in the ad are all mature adults and the ad is set in a clearly adult party; and
 - while vibrant colours are used, the imagery is adult and not childlike.
37. The Panel has considered what factors might give rise to a strong or evident appeal to minors on previous occasions. While each marketing communication must always be assessed individually, some characteristics within marketing material which may make it strongly appealing to minors include:
- the use of bright, playful, and contrasting colours;
 - aspirational themes that appeal to minors wishing to feel older or fit into an older group;
 - illusion of a smooth transition from non-alcoholic to alcoholic beverages;
 - creation of a relatable environment by use of images and surroundings commonly frequented by minors;
 - depiction of activities or products typically undertaken or used by minors;
 - language and methods of expression used more by minors than adults;
 - inclusion of popular personalities of evident appeal to minors at the time of the marketing (personalities popular to the youth of previous generations will generally not have strong current appeal to minors);
 - style of humour relating to the stage of life of a minor (as opposed to humour more probably appealing to adults); and
 - use of a music genre and artists featuring in youth culture.
38. It should be noted that only some of these characteristics are likely to be present in a specific marketing communication and the presence of one or even more of the characteristics does not necessarily mean that the marketing item will have strong or evident appeal to minors. It is the overall impact of the marketing

communication rather than an individual element which shapes how a reasonable person will understand the item.

39. Alcohol marketing might cause confusion with a soft drink if:
- the marketing fails to clearly identify the product as an alcohol beverage through use of an alcohol term like beer, ale, vodka, style of wine etc or reliance is made of more subtle alcohol references or terms understood by regular adult drinkers but less likely to be understood by minors e.g., IPA, NEIPA;
 - the marketing has a visual design that resembles a soft drink such as the display of fruit images, bright block colours and the use of a font style or iconography found typically on soft drinks or fruit juices;
 - the use of terms commonly associated with a soft drink or fruit juice e.g., orange, lemon, blueberry, pop, smash etc; and
 - the type of physical package used and whether this is like that used by soft drinks or fruit juices e.g., prima style juice box.
40. The Panel does not believe the ad breaches the ABAC standard. It was noted:
- the ad does establish the product is alcoholic through a combination of verbal references and depictions of the product packaging and logo which use the well recognised alcohol term of vodka;
 - the characters shown are all adults apparently aged 30 or more; and
 - while the backdrop is a bright and fast moving party, the tone is adult and is not considered highly relatable to children or adolescents.

Concluding Observations

41. The Panel recognises that a large number of complainants have raised a genuine concern about alcohol advertising appearing with the program Lego Masters. Lego is a product which is synonymous with children, and while Lego has pivoted in recent years towards more complex themes eg Stars Wars or other movie related sets, the product remains a staple for children. Lego Masters is a family show, and while the Panel could not find that the program is primarily aimed at minors, this does not mean that many under 18 year olds won't be drawn to the show. In the Panel's view alcohol marketing should not be occurring with this program.

42. It is noted that the manner of alcohol marketing across media platforms does not generally involve alcohol companies selecting individual programs with which ads are to be placed. Rather the placement occurs 'programmatically' according to automatic formulas where demographic characteristics are targeted. In fact, several of the alcohol companies responding to the complaints, while arguing the ABAC rules were not breached, more or less conceded that it was not desirable for their ads to have been placed with Lego Masters. The Panel calls on those companies and the 9 Network to take positive steps so that the same experience is not repeated if a Season 4 of Lego Masters occurs in 2022.