



ABAC Adjudication Panel Determination No 272/21

Product: Grey Goose Vodka
Company: Bacardi-Martini
Media: Television Advertisement
Date of decision: 21 December 2021
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns the placement of a television advertisement for Grey Goose Vodka (the “Product”) by Bacardi-Martini (the “Company”) during LEGO Masters Bricksmas on 9Now. It arises from a complaint received on 30 November 2021.
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:
 - Commonwealth and State laws:
 - Australian Consumer Law – which applies to the marketing of all products or services, and lays down baseline requirements, such as that marketing must not be deceptive or misleading;
 - legislation administered by the Australian Communications and Media Authority – which goes to the endorsement of industry codes that place restrictions on alcohol advertising on free to air television;

- State liquor licensing laws – which regulate the retail and wholesale sale of alcohol, and contain some provisions dealing with alcohol marketing;
 - 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 meet the standards contained in the ABAC.
 4. For ease of public access, Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the Ad Standards, a copy of the complaint is supplied to the Chief Adjudicator of the ABAC.
 5. The complaint is independently assessed by the Chief Adjudicator and Ad Standards and streamed into the complaint process that matches the nature of the issues raised in the complaint. On some occasions, a single complaint may lead to decisions by both the Ad Standards Community Panel under the AANA Code of Ethics and the ABAC Panel under the ABAC if issues under both Codes are raised.
 6. The complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaint was received on 30 November 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 complaint was completed in this timeframe.

Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverage marketing features an 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 the marketing communication (Approval Number 20388).

The Placement

10. The complaint concerns the placement of the marketing on 9Now during LEGO Masters Bricksmas.

The Complaint

11. The complainant objects to the Instagram post as follows:
 - *I object to the timing of the advertising, it was shown during a family show rated PG, it was being watched during the daytime and having an alcohol ad during that show and at that time of day is inappropriate.*

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 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).

The Company's Response

14. The Company responded to the complaint by letter emailed on 10 December 2021. Its principal comments were:

Alcohol Advertising Pre-vetting Service Approval

- The marketing communication referred to in the complaint received Alcohol Advertising Pre-vetting Service Approval – number 20388.

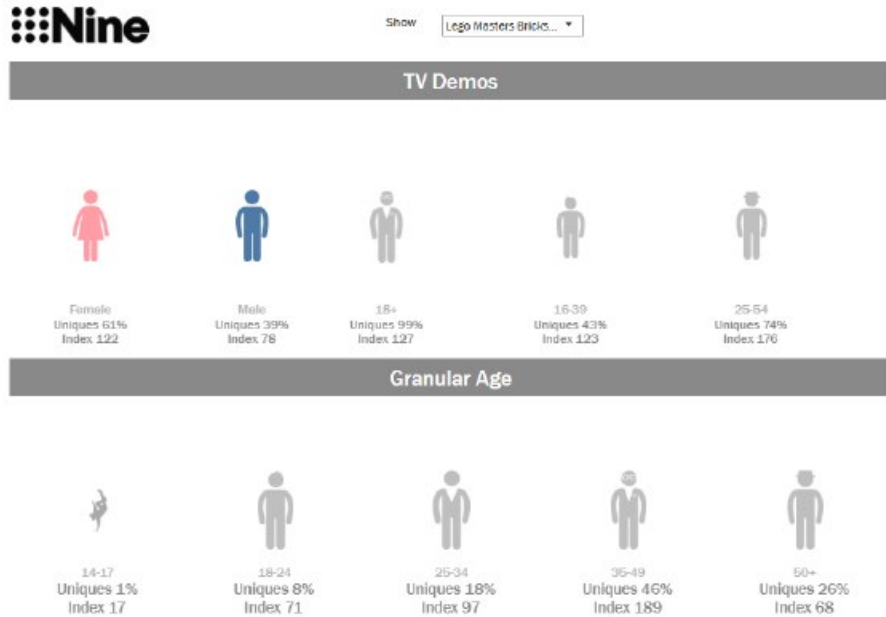
Responsibility toward Minors

- Kids content is always excluded from our activity, regardless of how Legomasters is identified
- Age restrictions of 25-49 were applied to all targeting on 9 Now, see below for evidence within the platform:

DMP Segments any of...

AgeGroup-25-34 (combined) AgeGroup-35-49 (combined) AgeGroup-25-39 9now only AgeGroup-35-44

- Network data on the age of logged-in users who viewed LEGO Masters Bricksmas:



- Below shows on-demand viewership for Lego Masters Bricksmas Specials Episodes 1 & 2 for the 7 day period of 28th Nov – 4th Dec.
 - Episode 1 registered a 7% (2,940) audience of children 0-17, while Episode 2 registered a 5% (3,400) audience of children 0-17.
 - It is worth noting that, as a result of our 25+ age targeting we would not have reached any of those individuals in the 0-17 age bracket



OzTAM Video Player Measurement (VPM)

Report coverage 28/11/2021 - 04/12/2021
 Total BVOD VOD minutes 908.0 million
 Total BVOD Reach 5.4 million

NINE - Top 5 Programs - Date: 28/11/2021 - 04/12/2021 - Number of Days: 7

Network	Series	Episode	BVOD Audience	Length	Minutes	BVOD Reach	Posted Date	C00-12	C13-17	F18-24	F25-39	F40-54	F55-64	M15-24	M25-39	M40-54	M55-64	M65+	
NINE	Lego Masters Bricksmas Specials 2021	Episode 2	53,000	73.5	3,872,000	68,000	28/11/2021	3%	2%	5%	23%	20%	6%	4%	2%	13%	15%	4%	3%
NINE	Lego Masters Bricksmas Specials 2021	Episode 1	38,000	78.3	2,353,000	42,000	21/11/2021	5%	2%	5%	23%	20%	5%	4%	2%	13%	15%	3%	3%
NINE	Snackmasters Season 1	Ep 1 Angry Whopper and Thick Cut Chaps	29,000	67.5	1,989,000	39,000	29/11/2021	2%	2%	7%	22%	23%	9%	4%	2%	10%	12%	4%	3%
NINE	Survivor Season 41	Do or Die	27,000	42.2	1,124,000	29,000	02/12/2021	3%	1%	4%	17%	22%	11%	5%	3%	12%	13%	6%	3%
NINE	Leve Island Australia Season 3	Episode 27	23,000	51.0	1,213,000	33,000	24/11/2021	2%	3%	10%	30%	17%	5%	2%	4%	8%	6%	2%	2%

- Below shows the Lego Masters Bricksmas Special free to air linear broadcast audience numbers for w/c 21st Nov and w/c 28th Nov.
 - In both weeks 17% of live viewers were aged 0-17. This is below the ABAC best practice guidance of at least 75% Adult viewership (as stated in the ABAC Responsible Alcohol Marketing Code Guidance Notes document).

Standard eTAM Report	Lego Masters Bricksmas Special Viewership Report
Period	19/04/2021 - 7/12/2021
Data Types	Projection, (Total People), (P 0-17), (P 18+)
Options	
Data Source	Metro 5 City Panel plus Subscription
Markets	Metro 5 Cap City, Sydney, Melbourne, Brisbane, Adelaide, Perth

	Projection			
	WC 21/11/2021	% of TTLPL	WC 28/11/2021	% of TTLPL
Total People	478,957		850,866	
P 0-17	81,706	17%	147,504	17%
P 18+	397,251	83%	703,362	83%

- Notwithstanding that Lego is commonly marketed as a children’s product, the program ‘Lego Masters’ of which Lego Master’s Bricksmas is a Christmas special, 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.

The Panel’s View

15. Alcohol advertising during Lego Masters has been the subject of two previous ABAC Panel Determinations – one in June 2021 encompassing complaint numbers 95, 96, 97, 102, 105, 106, 108, 109 & 147/21 ([click here](#)) and the other in June 2020 in relation to complaint number 59/20 ([click here](#)). In both determinations, the complaints were dismissed. The current complaint relates to a two-episode Christmas special of Lego Masters, entitled Lego Masters Bricksmas. Due to the different format whereby the winners of the past three Lego Masters seasons team with Channel 9 personalities to build Christmas

window displays, the Panel considered it appropriate to make a fresh determination.

16. It is helpful to provide some brief context about the scope of the ABAC and its application to the current determination. 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 Bricksmas are not directly regulated by the ABAC Scheme with the 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 that alcohol marketing communications should not be placed where minors are likely to be a major audience of the marketing.
 - has five Placement Rules which impose obligations on marketers, three of which are potentially relevant in the current case namely:
 - 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.
17. 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.
18. It is also useful to note the different ways it is possible to now view programming from an Australian television network. Each of the television networks has 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 that 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.

Lego Masters Bricksmas and the ABAC Placement Rules

19. The complaint is not about the content of the Company's ad, but argues that Lego Masters Bricksmas is a family show which is rated PG and is watched during the daytime when it is inappropriate for alcohol advertising to be shown. This concern requires an assessment of the ABAC Placement Rules.
20. Placement Rule 2, 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. The Company has advised this facility was used.
21. The ability to exclude minors is an effective means to target 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.
22. 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 the Company has supplied the ratings data. This data reveals that the audience for Lego Masters Bricksmas over both linear free to air TV and accessed 'on demand' meets the 75% adult benchmark. The highest audience of minors reported was 17% 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.
23. 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.

24. In the previous determinations in relation to Lego Masters, the Panel concluded that the program did not have evident appeal to minors as it is a reality TV competition between teams of two adults which is not primarily aimed at under 18-year-olds. As noted previously, Lego Masters Bricksmas has two characteristics that differentiate it from Lego Masters, being the Christmas theme and the inclusion of celebrities. The Panel has considered the revised format and has concluded that it does not have strong or evident appeal to minors, noting that:

- while Lego Masters Bricksmas does have a Christmas theme, and Christmas is an exciting occasion for children, the fundamental premise of adults competing in a reality TV format remains the same;
- the celebrities involved in Lego Masters Bricksmas were Scott Cam, Sophie Monk, Brooke Boney and Michael Wipfli. While some or all of them may be recognisable to minors, they are predominately involved in lifestyle and reality programming, reporting and radio. They are not children's entertainers, and their involvement in Lego Masters Bricksmas is unlikely to have strong or evident appeal to children;
- Lego Masters Bricksmas is not specifically targeted at minors; and
- it does not have a particular attractiveness for a minor beyond the general attractiveness it has for an adult.

25. Drawing all this together, there has not been a breach of the ABAC Placement Rules by showing alcohol ads with Lego Masters Bricksmas given:

- 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 Bricksmas did not exceed 17% under 18 which is within the 75% adult requirement of the Placement Rules; and
- Lego Masters Bricksmas has wide appeal, including to minors, but the program cannot be said to be primarily aimed at minors.

Concluding observation

26. The Panel recognises the genuine concern about alcohol advertising appearing with the Lego Masters and Lego Masters Bricksmas programs. Lego is a product that 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.