



ABAC Adjudication Panel Determination No 54/23

Product: Penfolds
Company: Treasury Wine Estates
Media: TV – Digital
Date of decision: 28 April 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Jeanne Strachan

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 27 March 2023 and concerns a television commercial for Penfolds (“the Product”) by Treasury Wine Estates (“the Company”). The marketing was accessed via the 7Plus app with the program “Australian Idol”.
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 the 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 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 13 April 2023.
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 (Approval number 20489).

The Marketing Communication

10. The complaint relates to a commercial for Penfolds, seen while watching "Australian Idol" on 7Plus.

The Complaint

11. The complainant objects to the marketing as follows:
 - *I do not believe that alcohol should be advertised before 9pm when children may be watching TV.*
 - *alcohol is a dangerous substance and it is illegal for young people under 18 years so please do not advertise substances that are illegal for that age group.*

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:

Placement Rules means:

- 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).
- A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.
- 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).

- A Marketing Communication must not be placed with programs or content primarily aimed at Minors.
- 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 13 April 2023. The principal comments made by the Company were:

- TWE is committed to the ABAC Scheme and takes its obligations to responsibly promote its products very seriously.
- We note ABAC pre-vetters reviewed and provided approval for this particular TVC on 24 November 2021 (Application no. 797/21), as part of TWE's strict internal compliance process. The pre-vetter did not raise any concerns with the final content.
- For the reasons set out below, we submit that there has been no breach of Part 3(b)(iv) of the ABAC Responsible Alcohol Marketing Code (ABAC Code) by TWE and the Complaint should be dismissed by the ABAC Panel.

Complaint

- The consumer complaint states: 'I do not believe that alcohol should be advertised before 9pm when children may be watching TV'. TWE has been asked to consider whether the TVC raises issues under Part 3(b)(iv) of the ABAC Code, which prohibits an alcohol advertisement from being directed at minors through a breach of the "Placement Rules" as defined in Part 6 of the Code.

Placement Rules

- As identified by the ABAC Panel in determination no. 22/23, there are four relevant questions which apply to alcohol advertising via connected television. These are:
- Does the advertisement comply with any relevant media industry codes regulating placement?
- Does the media platform on which the TVC appeared have age restriction controls to exclude minors, and if so, were they used?

- Was the audience of the program within which the TVC was placed > 75% adults? and
- Was the program (Australian Idol) 'primarily aimed' at minors?

Relevant media industry codes

- Unlike linear television, there are no time-of-day restrictions applying to when alcohol ads can be shown on Broadcast Video On Demand (BVOD) over 7Plus (i.e. connected TV). As there are currently no time-of-day restrictions applying to alcohol advertisements on connected TV, there was no breach of any applicable media codes.

Age restriction controls

- Whilst there are no media codes directly applicable to connected TV (BVOD), there is still a requirement to ensure that all available age restriction controls are utilised to exclude minors from the audience.
- In this regard, TWE notes that:
 - to set up a 7Plus account, users are required to provide their date of birth. Advertising on the 7Plus platform is restricted based on the date of birth provided by users;
 - advertising via 7Plus can only be purchased based on a “target audience” and not for specific content. As a result, the content that is paired with advertising is outside of TWE’s control; and
 - TWE’s purchase order for the TVC reveals that the user age range for this particular TVC was between 25 to 40 (please see relevant extract below).

	PENFOLDS AUDIENCES
AUDIENCE DESCRIPTION	AUDIENCE 2 New Luxurian
AGE	25-40
GENDER	Both (skews Female)
INTERESTS	Luxury Experiences, Fashion, Lifestyle, Restaurants, Art, Music & Live Entertainment, Weekends Away, Travel
INCOME LEVEL (HIGH TO LOW)	Medium/High Affluent
WINE INVOLVEMENT	Low/Medium
OTHER	This is a recruit/growth audience. They are currently a small DTC /ecomm audience for Penfolds.

- Our in-house media buying team is highly trained and very familiar with the ABAC Placement Rules. As such, the team has confirmed that it did indeed utilise the age restriction facility available via 7Plus to exclude minors (under 18’s) from the target audience.

Audience data

- Demographic information supplied by Channel 7 on 12 April 2023 confirms that only 4.1% of the Australian Idol viewers are 18 years of age or under. Hence the relevant 'audience' comfortably exceeds the 75% adult benchmark.
- Please see a detailed breakdown of the audience profile for the program below.

Australian Idol 2023 Audience Profile

	Metro	Regional	National	BVOD
P 0-17	7.6%	7.4%	7.5%	4.1%
P 18-24	3.5%	3.8%	3.6%	8.2%
P 25-39	9.5%	9.8%	9.6%	28.5%
P 40-54	23.9%	23.7%	23.8%	33.1%
P 55-64	23.2%	19.6%	21.9%	16.5%
P 65+	32.4%	35.7%	33.5%	9.6%

Content

- The final question is whether the program (in this case, Australian Idol) can be said to be primarily aimed at under 18 year olds. This will depend on a number of factors, which the ABAC Panel has previously articulated (see determination no. 22/23):
 - the actual audience composition of a program;
 - the subject matter of the program and whether the subject matter has themes likely to predominantly 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; and
 - the use of language and the presence of adult themes such as violence and the portrayal of sexuality.
- It is TWE's view that the Australian Idol television program is not primarily aimed at minors for the following reasons:
- actual audience composition data for the program shows that the majority of viewers on BVOD (33.1%) fall within the 40 to 54 year old age bracket. The majority of viewers on linear television (33.5%) fall within the 65 years and over bracket;

- the program is a “talent quest” reality television series, which arguably has universal appeal and is equally appealing to adult viewers. The subject matter of the program is live musical performance, which is something that appeals to a wide range of age groups. In our view, whilst it may have some ‘incidental’ appeal to under 18s - this particular subject matter does not ‘predominantly’ appeal to children or adolescents;
- since first being aired on Channel 10 in 2003, Australian Idol has had a PG rating. This means it is not recommended for viewing by persons under the age of 15 without guidance from parents, teachers, or guardians;
- contestants on the Australian Idol program are aged from school aged children (who must be 15 or over) to adults aged 28 years and over. The judges on the program are all currently aged 25+ years;
- Australian Idol has broad appeal across a range of different age groups, as demonstrated by the actual viewer data. It cannot be fairly characterised as being primarily aimed at minors or adolescents.
- Further to the above, the Penfolds TVC is not currently running via any linear or connected television channels.

Final remarks

- As a responsible marketer, TWE demonstrates a long-standing commitment to upholding both the letter and the spirit of the ABAC Code, including by actively engaging in the pre- vetting process. TWE also maintains strict internal and external processes, including internal guidelines (in the form of a Responsible Marketing Handbook and Guidelines which specifically refer to the Code) to assist our marketing and communication teams to develop marketing campaigns that strictly adhere to the requirements of the Code. These teams are also trained regularly on the responsible marketing of alcohol.

The Panel’s View

Introduction

15. The TV program Australian Idol is a singing competition which involves a panel of judges auditioning performers throughout Australia for the chance to progress to the final series in Sydney. It originally aired on Channel 10 from 2003 until 2009, launching the careers of several widely recognised Australian performers including Guy Sebastian, Shannon Knoll and Jessica Mauboy. Following an extended hiatus, Channel 7 revived the program in 2023. The most recent series was shown on Channel 7 free-to-air

television and in addition, could also be watched via Broadcast Video on Demand (BVOD) on 7Plus, either 'live streamed' at the same time as the free-to-air broadcast, or at any other time at the choosing of the viewer with access to the 7Plus facility.

16. The complainant was live streaming the program on 7Plus when they saw alcohol advertising at approximately 8:00pm. They are concerned that alcohol was being advertised before 9:00pm when children may be watching TV.

ABAC Placement Rules

17. The point made by the complainant is not about the content of the advertisement but the placement of the alcohol ad before 9:00pm with Australian Idol. This brings into play the ABAC Placement Rules. The Rules have the policy aim that to the extent possible alcohol advertising should be directed towards adult audiences and away from minors.
18. There are four rules which could be of relevance to the complaint namely:
 - have media industry codes regulating placement been complied with - Rule 1;
 - does the media platform on which the ad appeared have age restriction controls to exclude minors, and if so, were they used - Rule 2;
 - was the audience of the program with which the ad was placed in excess of 75% adult - Rule 3; and
 - can the program i.e. Australian Idol be regarded as being 'primarily aimed' at minors - Rule 4.
19. Australian Idol was accessed by the complainant through a subscription to 7Plus and as a result the program was seen via a service with an adult's profile information. That said, it is of course a common practice in most households with children that streaming services will be held in an adult's name and programs will be commonly co-viewed by all family members including minors.
20. Rule 1 requires that all media codes applying to alcohol placement be complied with. The live free to air broadcast of Australian Idol commenced at 7:00pm. The requirements in the Commercial Television Industry Code of Practice (CTICP) mean that it would not have been permitted for alcohol ads to be broadcast during the program when broadcast on linear free-to-air TV. This is not because of the nature of Australian Idol as a program, but because alcohol ads generally cannot be screened prior to 8:30pm.
21. Linear TV might be described as traditional TV, and covers the primary channels of 7, 9 and 10 as well as the public broadcasters of the ABC and SBS. Since the 2000's, linear TV has been supplemented with digital TV

which has enabled each of the networks to have multiple channels in addition to their primary free to air channel. With smart TV's and smart devices such as tablets, it has been possible for a subscriber to join the services like 7Plus, and use this service to access all of the content available from the 7 Network at any time of day.

22. One consequence of digital technology is that the TV Networks can insert different ads into digital programming even when the one program is being broadcast 'live'. To put it simply, household A might be watching Australian Idol on linear free to air at 8:00pm and not get an alcohol ad, while their neighbour in household B can be watching Australian Idol at 8:00pm 'live streamed' over the 7Plus app and be served with an alcohol ad. It's the same program, at the same time, but with different ads.
23. There are no equivalent time of day restrictions applying to when alcohol ads can be shown on BVOD over 7Plus. As there are no time-of-day restrictions applying to alcohol ads inserted in BVOD, Rule 1 has not been breached.
24. Rule 2 requires that age restriction controls should be used when available. The complainant accessed the program via 7Plus and this service does have an age restriction capacity. This arises because 7Plus requires an account to be opened and the account holder to provide a date of birth. With this information, both the 7 Network and alcohol marketers can exclude account holders aged under 18 years old from being served alcohol ads. The Company confirmed this facility was used for their advertising.
25. It is fair to say that the impact of Placement Rule 2 is more meaningful when social media is accessed via internet-connected devices such as phones and tablets. This is because many people including minors have a personal device and personal social media accounts on platforms such as Instagram or YouTube. These platforms have quite effective age restriction controls to exclude minors from seeing alcohol marketing that rely not only on date of birth information but also analytic data on the patterns of an account holder's use of the platform.
26. In contrast, 7Plus has an age restriction capacity, but in practical terms the account will be held by an adult and the shows will be co-viewed by all people in the household including children. This means that Rule 2 has not been breached as Australian Idol was accessed via an account held in an adult's name and not an account held by a minor.
27. Rule 3 goes to the audience of a program. It provides that 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 'reasonably expected' audience of TV programs through the ratings system and the Company has supplied ratings data.
28. This data shows that the audience for Australian Idol when broadcast initially on free to air TV and then subsequently accessed 'on demand' on

7Plus comfortably exceeds the 75% adult benchmark. On this basis, Placement Rule 3 has not been breached.

29. Rule 4 goes to the content of programs and raises the question of whether Australian Idol can be said to be primarily aimed at under 18-year-olds. Some factors to be considered in assessing this question include:
- the actual audience composition of a program;
 - the subject matter of the program and whether the subject matter has themes likely to predominantly 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; and
 - the use of language and the presence of adult themes such as violence and the portrayal of sexuality.
30. The Panel is of the view that placement of alcohol advertising with Australian Idol would not breach Placement Rule 4 after considering that:
- the program had a PG rating;
 - the host of the most recent series was Scott Tweedie and the judges were Amy Shark, Megan Trainor and Harry Connick Jr, none of whom are primarily recognised as children's entertainers;
 - while some of the contestants may be minors, the majority are adults;
 - while the show has appeal across age groups, it cannot be fairly characterised as being primarily aimed at minors; and
 - accordingly, Placement Rule 4 has not been breached.
31. The Company made the point that there was no conscious decision on their part to actually select the program for advertising as such. Rather marketers including alcohol companies place advertising to target an audience of specified demographic features and not exact programs or content. Reliance is placed on the television network to properly classify programs and match advertising to the marketer's desired audience.
32. Drawing all this together, there has not been a breach of the ABAC Placement Rules by showing alcohol ads with Australian Idol given:

- the age restriction controls available on the 7Plus BVOD platform were utilised to exclude account holders who are minors from being served with alcohol ads;
- the audience for Australian Idol fell comfortably within the 75% adult requirement of the Placement Rules; and
- while Australian Idol has broad appeal it cannot be said to be primarily aimed at minors.

33. The complaint is dismissed.