



ABAC Adjudication Panel Determination No 72/24

Product: Tooheys
Company: Lion Beer Australia
Media: TV On Demand – 9Now
Date of decision: 7 June 2024
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 6 May 2024 in relation to television advertising for the Tooheys product via the 9Now app, when watching Lego Masters.
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 6 May 2024.
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 Advice

9. A component of the ABAC Scheme is an advice service by which an alcohol marketer can obtain an independent opinion of a proposed alcohol marketing communication against the ABAC standards prior to public release. Pre-vetting advice is separate from the complaint process and does not bind the Panel but represents best practice on behalf of alcohol marketers. Pre-vetting advice was not obtained for placement of the marketing.

The Marketing

10. The complaint relates to advertising via the 9Now app, during Lego Masters.

Complaint

11. The complainant objects to the marketing as follows:
 - *Tooheys ads should NOT be playing during ad breaks for Lego Masters on Channel 9.*
 - *This is a show that children watch, and alcohol advertising to children is inappropriate and WRONG, and I believe this violates ... the Code.*

The ABAC Code

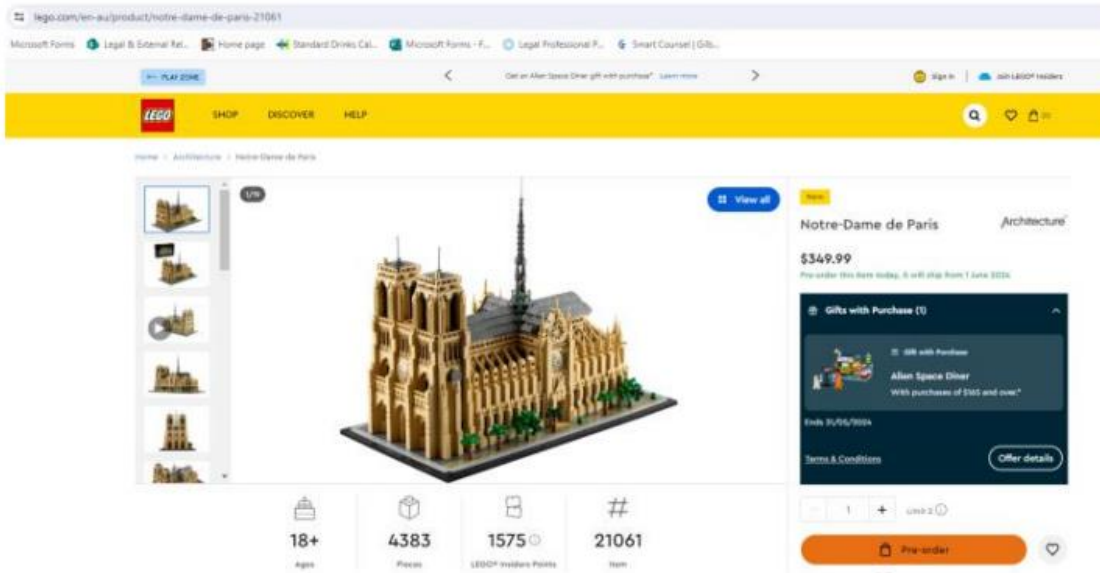
12. Part 4 of the Code provides that:
 - (a) An Alcohol Marketing Communication must comply with code provisions regulating the placement of Alcohol marketing and an Alcohol Alternative Marketing Communication must comply with code provisions regulating the placement of Alcohol Alternative marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy).
 - (b) Available Age Restriction Controls must be applied to exclude Minors from viewing an Alcohol Marketing Communication and an Alcohol Alternative Marketing Communication.
 - (c) If a digital, television, radio, cinema or broadcast print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, an Alcohol Marketing Communication and an Alcohol Alternative Marketing Communication may only be placed where the audience is

reasonably expected to comprise at least 80% Adults (based on reliable, up-to-date Australian audience composition or social media follower data, if such data is available).

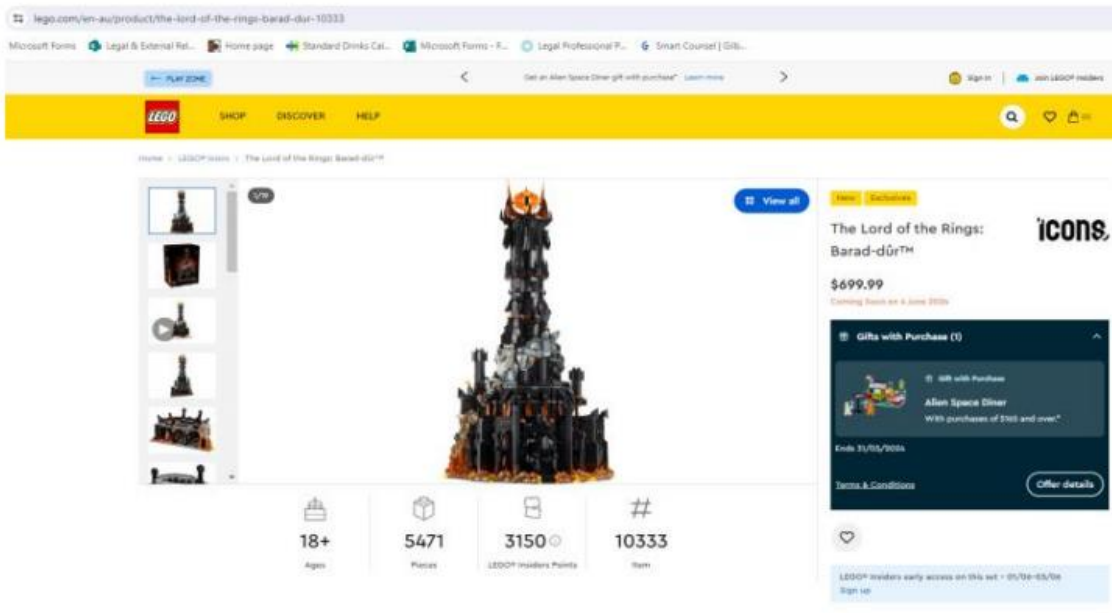
- (d) An Alcohol Marketing Communication and an Alcohol Alternative Marketing Communication must not be placed with programs or content primarily aimed at Minors.

The Company Response

13. The Company responded to the complaint by email on 27 May 2024. Its primary comments were:
 - Thank you for raising this complaint and providing the opportunity for us to respond to the concerns of the complainant. Lion – Beer, Spirits & Wine Pty Ltd (Lion) reiterates its commitment to the ABAC Scheme and that it takes its obligations to responsibly promote its products seriously.
 - For the following reasons, and with respect to the complainant, we submit that there has been no breach of Part 4 of the ABAC Code by Lion and the Complaint should be dismissed by the ABAC Panel:
 - the program is a reality TV show where contestants compete against each other to build LEGO structures that match the episode's theme to win prize money;
 - historically, LEGO products have been aimed at children, however, their product range is now targeted at and used by people of all ages – this is seen by the range of sophisticated and expensive products that are now sold by LEGO in Australia. LEGO products expressly targeted at adults include Lord of the Rings, Star Wars and architectural themed sets – see for example:



and



- for these reasons, we respectfully submit that the program is not a program or content primarily aimed at minors;
- we note that the ABAC Panel has considered the program in other complaints and found that it was not primarily aimed at minors nor that a breach of the placement rules had occurred by showing an alcohol advertisement during the program (see Adjudication No. 95, 96, 97, 102, 105, 106, 108, 109 and 147/21, and 272-21). Noting that these complaints were decided under the previous version of the ABAC Code, we submit that Part 4 of the revised ABAC Code is substantively the same;

- o UM, Lion's media agency have confirmed the following regarding the program's viewership:

free-to-air – based on eTAMS data for May 2024, the average reach is currently comprised of 87% over the 18 years of age:

Standard eTAM Report :	New File*				
Period :	1/05/2024 - 20/05/2024				
Data Types :	Projection (P 18+), Projection (Total People), Reach (P 18+), Reach (Total P				
Options :	With Guests, Viewing > 1mins C, Consolidated 7 (Last Consolidated 13/05/				
Data Source :	Regional Panel plus Subscription				
Markets :	Queensland, Nthrn NSW, Sthm NSW, Victoria, Tasmania, All RTV				
Media Filters :	FTA, STV, Other				
Info :	This report contains Grouped Items., R&F Apply Weighting to Seconds Vie				
			Reach (P 18+)	Reach (Total People)	Reach % (P18+ / Total People)
LEGO MASTERS AUSTRALIA VS REST OF THE WORLD · FINALE · ENCORE	12	13:59:31 · 15:30:57	170,767	184,939	92%
LEGO MASTERS AUSTRALIA VS REST OF THE WORLD*	15	19:32:33 · 20:50:04	729,506	839,555	87%
LEGO MASTERS AUSTRALIA VS REST OF THE WORLD · MON · ENCORE	7	12:02:45 · 13:17:52	77,298	80,904	96%
LEGO MASTERS AUSTRALIA VS REST OF THE WORLD · SUN · ENCORE	5	12:01:32 · 13:42:55	96,222	108,364	89%
LEGO MASTERS AUSTRALIA VS REST OF THE WORLD · TUE · ENCORE	10	14:34:35 · 15:47:51	154,844	171,062	91%

BVOD – based on 9Now data for April to May 2024, the average reach is currently comprised of 94% over the 18 years of age:



14 Apr 2024 - 20 May 2024 | Device Type | Market | Lego Masters Grouping LIVE FRIS... (1) | Note: LEMA2024_1, LEMA2024_2, LEMA2024_3 reflects episodes 1, 2, 3 and so on.

LIVE + VOD EPISODE SUMMARY

media_id	BVOD Audienc...	Total Minutes	Stream Starts	Under 18 Audience	P18-24 Audience	P25-39 Audience	P40-54 Audience	P55-64 Audience	P65+ Audience
1. LEMA2024_1	225,611	17,912,024	361,513	12,269	10,981	91,568	85,219	29,956	25,469
2. LEMA2024_2	211,893	12,617,127	278,521	12,095	9,729	37,802	79,771	28,067	23,856
3. LEMA2024_3	198,355	11,918,632	256,276	11,997	9,325	54,003	74,944	26,152	22,335
4. LEMA2024_4	168,571	12,514,484	261,468	9,915	7,875	45,195	62,769	22,728	19,056
5. LEMA2024_5	166,636	19,034,292	278,148	10,085	7,366	44,635	63,006	22,199	18,566
6. LEMA2024_6	161,495	9,759,712	207,145	9,680	7,384	43,368	61,041	21,718	18,284
7. LEMA2024_7	143,607	12,307,206	240,238	8,254	6,481	38,219	54,051	19,534	16,188
8. LEMA2024_8	141,214	8,520,325	191,335	8,222	6,430	37,604	38,465	19,395	13,887
9. LEMA2024_9	139,709	8,965,730	194,835	8,334	6,425	37,206	30,840	19,135	15,667
10. LEMA2024_10	128,862	10,306,481	195,842	7,292	5,727	33,032	48,726	18,524	15,581
11. LEMA2024_11	123,182	19,424,329	220,800	7,870	5,579	32,600	49,268	17,282	14,764
12. LEMA2024_12	119,129	7,414,017	171,886	6,872	5,356	31,142	43,083	16,982	13,973

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SEASON SUMMARY

Avg Aud Series	Total Minutes	Stream Starts	Under 18 Avg Aud S...	18-24 Avg Aud Series	25-39 Avg Aud Series	40-54 Avg Aud Series	55-64 Avg Aud Series	65+ Avg Aud Series
160,564	150,487,230	2,792,202	9,526	7,360	43,027	60,791	21,822	18,255

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- o further, UM have advised as follows:

- the following additional measures are applied for Lion's purchased BVOD advertising from 12.00pm to 12.00am:

deterministic targeting of P18+; and

exclusion of all children's and G-rated content (except sport); and

they do not believe that displaying the Advertisement during the program has breached media industry codes that regulate alcohol marketing, including but not limited to the Commercial Television Industry Code of Practice.

- We respectfully submit that the programming of the Advertisement on BVOD services is beyond Lion's reasonable control and any finding against Lion based on this Complaint should be a no-fault breach under Part 6 of the ABAC Code.
- Notwithstanding this, to comply with the spirit of the ABAC Code (and having regard to the ABAC Panel's historic comments on placements during the Program), we have instructed UM that our advertisements should not be placed during the Lego Masters program in future.
- As a responsible marketer, Lion has demonstrated a long-standing commitment to upholding both the letter and spirit of the ABAC and AANA Codes. Lion maintains strict internal and external processes to help ensure its compliance.

The Panel's View

Introduction

14. Lego Masters is a competition game show where teams of two people have to build elaborate models using Lego blocks. The series commenced in the United Kingdom in 2017 and an Australian version premiered in 2019. The series is hosted by media personality Hamish Blake. The 2024 Australian season pitted Australian teams against winners of the show from other countries.
15. The program is screened by the 9 Network and is shown on free to air 'traditional' TV (i.e. a linear broadcast requiring a TV aerial to be received) and through the 9Now app and delivered over the internet. This means the program can be accessed via different technologies and a household with a smart TV has a number of options of how and when the program could be watched. The different technologies also enable marketers to customise the delivery of advertising to some extent.

16. The 2024 season of Lego Masters was broadcast on the primary free to air 9 Network channel at 7:30 pm on a Tuesday during April and early May. The complainant accessed the program via the 9Now app as a 'catch up' program i.e. the program was accessed over the internet and watched at a time chosen by the complainant. When viewing the program, the complainant was served with an ad for Tooheys beer.
17. It was contended that Lego Masters is a program watched by children and alcohol advertising should not be placed with it. This concern brings into play the ABAC Placement Standards which have the policy objective that alcohol marketing should be directed towards adults and to the extent possible away from minors.

The Placement Standards

18. The Placement Standards apply across different forms of media and the requirements imposed on alcohol marketers are linked to the technical capacity of the medium to exclude minors from the likely audience of an item of alcohol marketing. There are five standards, four of which potentially have application to the current case. These standards are:
 - all alcohol marketing communications must comply with the provisions regarding alcohol marketing placement contained in Australian media industry codes - Part 4 (a);
 - available age restriction controls must be applied to exclude minors from viewing an alcohol marketing communication - Part 4 (b);
 - if age restriction controls cannot exclude minors, an alcohol marketing communication may only be placed where the audience is reasonably expected to comprise at least 80% adults - Part 4 (c); and
 - irrespective of the audience, alcohol marketing cannot be placed with programs or content primarily aimed at minors - Part 4 (d)
19. Advertising on TV is regulated at the national level by a government body, the Australian Communications and Media Authority (ACMA). ACMA has approved several codes of practice applying to the different technologies by which TV content is transmitted. The Commercial Television Industry Code of Practice (CTICP) applies to traditional TV. The Subscription Broadcast Television Codes of Practice applies to TV subscription services.
20. For current purposes, the CTICP provides that alcohol advertising cannot be shown with programs broadcast over free to air traditional television prior to 8:30 pm. This means that alcohol advertising was not to be placed with Lego Masters when it screened between 7:30 and 8:30 pm on the primary Channel 9 and when the broadcast was received using a TV aerial.

21. The complainant however accessed the program via the 9Now app. In contrast to the CTICP, there is no time of day restriction for alcohol advertising in the subscription TV code. As the complainant accessed the program via 9Now and by means of 'catch up' TV, there is no applicable media code provision prohibiting alcohol ads being placed with the program.
22. 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 traditional 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. There is no suggestion that the program was accessed via an account held in the name of a minor and hence placement standard 2 has not been breached.
23. 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.
24. This means the most meaningful requirements when households are watching TV are Placement Standards 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 of a program is reasonably expected to comprise at least 80% adults.
25. It should be noted that in the revision of the ABAC Code which fully commenced on 1 January 2024, the adult audience threshold in the standard was increased from 75% to 80%. When the Panel reviewed advertising with Lego Masters in two previous determinations, the earlier and lower threshold of 75% was the benchmark, and given the newer and stricter 80% threshold, it was decided to seek fresh data on the audience of Lego Masters.
26. It is possible to assess the audience of TV programs through the ratings system and the Company has supplied ratings data for both the audience on traditional TV when the program was initially screened and the audience for 'catch up' TV. This data reveals that the average audience for Lego Masters for linear free to air TV was 87% adult and when accessed 'on demand' was over 90% adult. It is evident that Placement Standard 3 has not been breached.

27. 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.
28. The Panel does believe that Lego Masters will have appeal to minors given the enduring popularity of Legos with minors. That said, it is fair to note that Lego has in recent decades expanded its market to adults and model building has popularity amongst adults as well as minors. In relation to the Lego Masters TV show, the Panel believes the program cannot be considered to be primarily aimed at minors noting:
- the program contestants are all adults ranging from 21 to 59 years old with the winning team being aged 36 and 44 respectively;
 - the program has a 'PG' and not a 'C' or 'G' classification meaning that parent guidance is recommended in contrast to the lower classifications applied for programs aimed primarily at children under the age of 15;
 - the program host is known for radio and TV shows that are focussed towards adults rather than minors.
29. Drawing all this together, there has not been a breach of the ABAC Placement Rules by showing an alcohol ad with Lego Masters given:
- alcohol ads were not screened with the show as broadcast on traditional free to air linear TV prior to 8:30 pm;
 - the age restriction controls available on the 9Now platform were utilised to exclude account holders who are minors from being served with alcohol ads;

- the audience for Lego Masters on both traditional TV and 'on demand' catch up viewings exceeded the 80% adult benchmark of the Placement Standards; and
- while Lego Masters would appeal across age groups including to minors, the program cannot be said to be primarily aimed at minors.

30. The complaint is dismissed.