

ABAC Adjudication Panel Determination No. 56/20

Product: Wine
Company: Jimmy Brings
Media: Television
Date of decision: 3 June 2020
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 a television advertisement for Jimmy Brings (“the Company”) and arises from a complaint received 18 May 2020.
2. Alcohol marketing in Australia is subject to an amalgam of laws and codes of practice, that regulate and guide the content and, to some extent, the placement of marketing. Given the mix of government and industry influences and requirements in place, it is accurate to describe the regime applying to alcohol marketing as quasi-regulation. The most important provisions applying to alcohol marketing are found in:
 - (a) Commonwealth and State laws:
 - Australian Consumer Law – which applies to the marketing of all products or services, and lays down baseline requirements, such as that marketing must not be deceptive or misleading;
 - legislation administered by the Australian Communications and Media Authority – which goes to the endorsement of industry codes that place restrictions on alcohol advertising on free to air television;
 - State liquor licensing laws – which regulate retail and wholesale sale of alcohol, and contain some provisions dealing with alcohol marketing;
 - (b) Industry codes of practice:
 - AANA Code of Ethics – which provides a generic code of good marketing practice for most products and services, including alcohol;

- ABAC Responsible Alcohol Marketing Code (“ABAC Code”) – which is an alcohol specific code of good marketing practice;
 - certain broadcast codes, notably the Commercial Television Industry Code of Practice – which restricts when advertisements for alcohol beverages may be broadcast;
 - Outdoor Media Association Code of Ethics and Policies – which place restrictions on the location of alcohol advertisements on outdoor sites such as billboards.
3. The codes go either to the issue of the placement of alcohol marketing, the content of alcohol marketing or deal with both matters. The ABAC deals with both the placement of marketing i.e. where the marketing was located or the medium by which it was accessed and the content of the marketing irrespective of where the marketing was placed. The ABAC scheme requires alcohol beverage marketers to comply with placement requirements in other codes as well as meeting the standards contained in the ABAC.
 4. For ease of public access, Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the Ad Standards, a copy of the complaint is supplied to the Chief Adjudicator of the ABAC.
 5. The complaint is independently assessed by the Chief Adjudicator and Ad Standards and streamed into the complaint process that matches the nature of the issues raised in the complaint. On some occasions, a single complaint may lead to decisions by both the Ad Standards Community Panel under the AANA Code of Ethics and the ABAC Panel under the ABAC if issues under both Codes are raised.
 6. The complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaint was received on 18 May 2020.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint was completed in this timeframe.

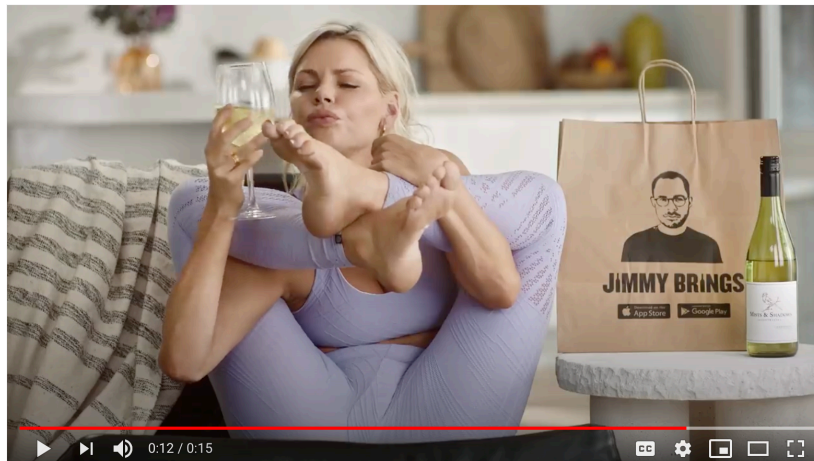
Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was obtained for this marketing communication (18384).

The Marketing Communication

10. The complaint relates to a television advertisement for Jimmy Brings alcohol delivery service.

11. The advertisement opens with Sophie Monk sitting down on her couch and ordering a bottle of wine using the Jimmy Brings app on her mobile phone as the voiceover says, “Jimmy Brings delivers cold drinks in 30 minutes”.
12. We then see Ms Monk outside on a yoga mat placing her legs in a yoga pose that requires her legs to be placed behind her shoulders as the voiceover says “faster than you can master the Aussie pretzel” and Ms Monk says “I am pretzel, I am [doorbell].”
13. The next scene shows a man delivering a bag with the Jimmy Brings logo and looking down as the camera then shows Ms Monk sitting in front of her door in her yoga pose and smiling as the voiceover says “Jimmy Brings what you seek”.
14. In the final scene Ms Monk is shown sitting in the same yoga pose on her couch and sipping from a glass of white wine and saying “Mm complex” and swishing the wine around in her glass. The advertisement closes with the caption “Jimmy Brings Wine, Beer & Spirits in 30 minutes” followed by the Google Play and App Store logos and a mobile phone with the Jimmy Brings logo.



The Complaint

15. The complainant objects to the marketing due to explicit sexual imagery and showing alcohol with exercise, in this case yoga.

The ABAC Code

16. Part 3 of the ABAC Code provides that:
 - (d) A Marketing Communication must NOT show (visibly, audibly or by direct implication) the consumption of an Alcohol Beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical co-ordination, such as the control of a motor vehicle, boat or machinery or swimming.

The Company's Response

17. The Company responded to the complaint by letter dated 29 May 2020. The principal points made by the Company were:

- a) Endeavour Drinks' aim is to be Australia's most responsible retailer of alcoholic beverages. In 2013, we formalised our status as a signatory to the Alcohol Beverages Advertising Code (ABAC) Scheme. Prior to becoming a signatory, Endeavour Drinks demonstrated a long-standing commitment to supporting and adhering to ABAC and Advertising Standards Bureau principles. Endeavour Drinks maintains strict internal and external processes in addition to those required by the ABAC Scheme, which are relevant in this context. As part of our community charter, 'Our Community, Our Commitment', Endeavour Drinks 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:
 - i. ID25 (ask for ID from anyone who looks under 25);
 - ii. Don't Buy It For Them (stopping secondary supply to minors);
 - iii. our Intoxication Policy (refusal of service to anyone who may be intoxicated); and
 - iv. Staff training that exceeds legal requirements, including "Don't Guess, Just Ask", team talkers, regular refresher and reminder courses, and implementation of the award-winning training program "Safe".
- b) In marketing alcoholic products, Endeavour Drinks is fully aware of the Code's requirement not to show the consumption of alcohol before or during an activity that, for safety reasons, requires a high degree of alertness or physical coordination. It is our view that the Advertisement does not breach Part 3(d) of the Code.
- c) In considering Part 3(d) of the Code, the Panel has previously acknowledged that its intent is focussed on "the carrying out of hazardous activities that might result in physical injury" and found that the phrase "high degree of alertness and physical coordination" recognises that most everyday activities have some element of residue risk of injury, and that the activities envisaged by Part 3(d) are ones which require close or continuous attention in order to be performed safely. The Panel also acknowledged that "whether an activity for safety reasons requires a high degree of alertness or co-ordination is to be assessed on the inherent nature of the activity and the manner in which it is portrayed in the marketing communication". . <http://www.abac.org.au/wp-content/uploads/2015/12/127-15-Determination-XXXX-21-December-2015.pdf>
- d) We submit that home-yoga of the kind portrayed in the Advertisement does not require a "high degree of alertness or physical coordination" as contemplated by Part 3(d) of the Code, but rather, is an everyday activity which carries only a nominal degree of residual risk. The relative benignness of yoga is supported by findings that:

- i. yoga is practiced by millions of people across Australia, including people in older age groups (Roy Morgan research, as at December 2017, indicated that approximately 2.1m Australians participated in yoga <http://www.roymorgan.com/findings/7544-yoga-pilates-participation-december-2017-201803290641>);
 - ii. yoga is not inherently an unsafe activity (Health Direct Australia states that “most studies suggest that yoga is a safe and effective way to increase physical activity, especially strength, flexibility and balance” <https://www.healthdirect.gov.au/yoga-guide>); and
 - iii. even in the category of sporting activities, yoga is not associated with a material number of serious injuries (Yoga is not in the list of top ten sports associated with injury hospitalisations, for either gender, and yoga is not in top 20 list of participation-based and population-based rates of sports injury hospitalisations, by type of sport - Australian Institute of Health and Welfare, Hospitalised sports injury in Australia, 2016–17 , Published February 2020 <https://www.aihw.gov.au/reports/injury/hospitalised-sports-injury-australia-2016-17/contents/table-of-contents-at-pg-3-4>)
- e) Certainly, by comparison with the specific examples provided in Part 3(b) (i.e. controlling a motor vehicle, boat or machinery and swimming), the risk of personal injury or harm inherent in home-yoga is extremely low. This interpretation is consistent with previous Panel determinations which have considered Part 3(d) (and its predecessor section in the earlier version of the Code):
- i. complaints upheld:
 - alcohol consumption and surfing, and in deep water - Determination 43/07
 - alcohol consumption and a backyard construction task - Determinations 9-12 and 32/13
 - alcohol consumption and mountain bike riding/racing - Determinations 74 & 86/19
 - ii. complaints dismissed:
 - alcohol consumption and a game of golf - Determination 76/08
 - alcohol consumption and fishing - Determination 151/08
- f) The smaller margin of error (and therefore lower risk) in performing yoga (as opposed to, say, surfing in deep water) is in part due to the fact that one can only stretch and position their own body unassisted within the bounds of their own flexibility. Indeed, although the Advertisement’s protagonist, Sophie Monk, might appear to become “stuck” in the pretzel position (a humorous and highly implausible situation), this in no way suggests that she is inflexible or in jeopardy of injuring herself, as she is clearly not distressed by her situation, and, comically, is able to manoeuvre herself around the house

whilst in this position. We further note that Ms Monk is only depicted doing yoga on either solid ground or on the cushioned surface of her couch.

- g) Notwithstanding the above, the Advertisement is clearly intended to be humorous, and is not intended to be taken seriously. In assessing whether an advertisement is consistent with an ABAC standard, the Panel is to have regard to the probable understanding of the advertisement by a reasonable person, taking its content as a whole. Given the absurdist overtones of the Advertisement, we do not believe that a reasonable person would seriously interpret the Advertisement as an endorsement of drinking wine whilst doing yoga. This is consistent with previous Panel determinations in which it has been found that scenarios which are 'clearly fantasy' would not be taken as advocating that it is acceptable to drink while performing certain activities (<http://www.abac.org.au/wp-content/uploads/2016/12/120-122-125-16-Determination-Hahn-21-11-16.pdf> >, at [31] & <http://www.abac.org.au/wp-content/uploads/2013/04/Final-Determination-XXXX-Gold-15-Sep-2008.pdf> >, at [21-23]).
- h) Endeavour Drinks takes the feedback of the community seriously. However, for the reasons stated above, we do not believe that the Advertisement is in breach of Part 3(d) of the Code. Accordingly, we request that the complaint be dismissed. Finally, we note that the Advertisement is also being reviewed by the Ad Standards Community Panel for compliance against the Codes it administers, specifically Parts 2.2 and 2.4 of the Code of Ethics which relate to sexual appeal and sex, sexuality and nudity. We do not believe the Advertisement breaches any of the Codes administered by Ad Standards and are confident the Ad Standards Community Panel will agree.

The Panel's View

- 18. As explained in paragraph 2, alcohol marketing is subject to a range of different regulatory requirements including the ABAC and the AANA Code of Ethics. The Code of Ethics applies to advertising and marketing irrespective of the product or service being marketed while the ABAC applies specifically to alcohol as a product. This means a marketing communication for an alcohol beverage or an alcohol retailer must meet the requirements of both the Code of Ethics and the ABAC.
- 19. The complaint concerns a TV advertisement for the alcohol retailer Jimmy Brings. The ad has attracted a number of complaints which largely raise issues as to whether the ad is exploitative or degrading and whether it treats sex and sexuality consistently with community standards. These issues fall within the ambit of the Code of Ethics and resulted in a decision by the Ad Standards Community Panel dated 27 May 2020. The primary concern of the complainant was also about issues of the ad being 'disgusting' and depicting Ms Monk posing in clothing which was argued to be highly revealing. These concerns are considered in the decision by Ad Standards and are not canvassed in this determination.
- 20. The complainant however raised a second issue concerning the consumption of alcohol while engaging in yoga and it is this matter which will be dealt with in this determination. The ABAC provides in Part 3(d) that an alcohol marketing communication must not show the consumption of alcohol during any activity that for safety reasons requires a high degree of alertness or physical co-ordination.

21. The Company responds to the ABAC concern by mounting two arguments. Firstly, it is contended that yoga is not an inherently dangerous activity but rather is an everyday activity which carries only a nominal degree of residual risk. Several papers or resources are cited by the Company which seek to illustrate that yoga is both widely practiced in Australia and has a low incidence of injury. The second line of argument is that the ad is clearly humorous and not intended to be taken seriously. The 'pretzel' position adopted by Ms Monk is not real and the ad is not seriously advocating that it is acceptable to drink while performing certain yoga activities.
22. In assessing the compliance of an ad with an ABAC standard the Panel takes the position of the probable understanding of the ad by a reasonable person taking its content as a whole. The 'reasonable person' test is drawn for the common law system and means that the benchmark is based upon the values, opinions and life experiences found commonly in a majority of the community. A reasonable person has a sense of humour and is able to identify when scenarios are depicted ironically.
23. The papers and resources cited by the Company are noted. That said, the Panel is not a research body, and the material provided by the Company doesn't really go to the question as to whether yoga is an activity which for safety reasons requires a high degree of alertness or physical co-ordination. A cursory internet search indicates the more common view amongst yoga teachers is that alcohol and yoga is not an ideal combination and those who hold a more relaxed view about consuming alcohol are expressing an opinion about alcohol use after yoga is completed and not during its practice. There are some reports of yoga classes during which alcohol is consumed, but these are at the novelty end of the spectrum rather than representing the mainstream. A common-sense conclusion is that yoga is both a physical and spiritual activity which requires concentration and a calmness of the mind, while building on physical attributes of flexibility and strength. It is an activity which requires increasing levels of physical co-ordination as more complex positions are attempted.
24. The ad is however light-hearted and wouldn't be taken by a reasonable person as accurately depicting the performance of yoga. The sequence of events in the ad commences with Ms Monk inside a home using an app to order the delivery of a bottle of white wine. She moves to an outdoor area where she has a yoga mat to perform her yoga. It is established she has with her a bottle of water and no alcohol is displayed. Ms Monk then adopts the 'Aussie pretzel' position when the door-bell rings. After this the ad becomes comical, as Ms Monk is then seen answering the door apparently stuck in the ungainly pretzel position with her drivers' licence between her toes. The ad ends with her still in the pretzel position, on a couch drinking a glass of wine. Obviously, the scenario depicted is fanciful and would be understood as such.
25. The Panel does not believe the ad is in breach of the Part 3(d) standard. In reaching this conclusion the Panel noted:
- the ad is effectively in two parts with the yoga scene occurring prior to the introduction of an alcohol beverage through the arrival of the delivery man;
 - when alcohol is introduced, the comic plot of the ad is fully revealed by showing Ms Monk frozen in the pretzel position and having to navigate the acceptance of the delivery;

- it is likely a reasonable person would conclude that the yoga had been completed by the time alcohol is consumed; and
- taken as a whole the ad would not be taken as actually encouraging alcohol consumption during an activity in which alcohol would increase physical risk.

26. The complaint is dismissed.