



ABAC Adjudication Panel Determination Nos. 151/20 & 154/20

Product: Jimmy Brings' Home Delivery Service for Jim Beam
Company: Endeavour Drinks
Media: TV - Free to Air
Date of decision: 10 November 2020
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel ("the Panel") concerns free to air television marketing for the Jimmy Brings' delivery service of Jim Beam by Endeavour Drinks ("the Company") and arises from two complaints received on 19 October 2020 and 26 October 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 complaints raise concerns under the ABAC Code and accordingly are within the Panel’s jurisdiction.

The Complaints Timeline

7. The complaints were received on 19 October 2020 and 26 October 2020.
8. The Panel endeavours to determine complaints within 30 business days of receipt, 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 obtained for the content of this marketing communication (Approval Number 18773).

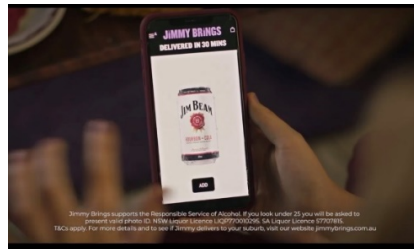
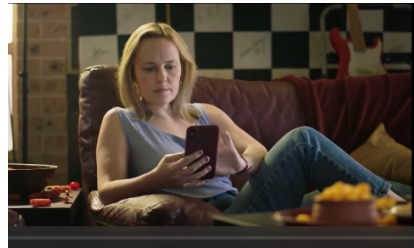
The Marketing Communication

10. The complaints relate to similar television advertisements for Jimmy Brings to deliver Jim Beam, both of which were aired by Channel 7, the first on 16 October 2020 at about 10:00pm and the second during the coverage of the AFL Grand Final on 26 October 2020 at about 7:15pm.
11. The following is a description of the advertisement aired during the grand final coverage:
 - The advertisement opens with a domestic scene showing a person sitting on a couch looking at their phone and another person standing, playing pool. Their surroundings are typical of a garage where an adult has added recreational/relaxation items such as a lamp, pool table, couch and dart board. There are also many other items that would normally be stored in a garage.
 - The television commercial then shows the person on the couch who asks “Almost game time – anything from Jimmy Brings?”
 - The shot changes to the person playing pool who says “Well, how much Jim Beam would Jimmy Brings bring if Jimmy Brings could bring Jim Beam?”, following which we again see the person sitting on the couch who quizzically replies “What?”
 - The person playing pool then says “What do you reckon Tim?”, as a roller door opens to introduce a third person who poses the question

“How much Jim Beam would Jimmy Brings bring if Jimmy Brings could bring *Tim* Jim Beam?”

- We then see the person playing pool who says “Well as much Jim Beam as Jimmy Brings could bring”, and then in unison with Tim he continues “For Tim and team if Jimmy Brings could bring Jim Beam”.
 - The person on the couch then clicks on the “Add” button on an ordering application on their phone. The phone application shows a picture of Jim Beam above the “Add” button.
 - The person playing pool and Tim continue in unison, with a happy and jovial tone, “Because, Jimmy Brings does bring Jim Beam, in thirty minutes, so we can watch our team”. At the same time a doorbell is heard and a roller door opens to show a Jimmy Brings delivery driver with Jim Beam. The person who was originally sitting on the couch stands at the roller door showing what appears to be their identification and proof of age.
 - The video closes with a static image of the names of Jimmy Brings and Jim Beam, along with the caption “The Official Spirit of Footy Delivered in 30 Minutes”.
12. The advertisement aired on 16 October 2020 was very similar to that described above but was edited to be shorter. The most significant difference was that Tim was not included.

13. The following selected screen shots are provided to assist with visualisation of the television advertisements:



The Complaints

14. The complainants object to the marketing as:
- The television advertisement shows adults singing an adaptation of a popular children’s nursery rhyme, which contains the lines “If a woodchuck could chuck wood, how much wood would a woodchuck chuck if a woodchuck could chuck wood”. It is not appropriate to use a children’s nursery rhyme to sell alcohol; and
 - The ad is based on a nursery rhyme/tongue twister beloved of children and it is selling alcohol. It is trying to appeal to kids and young people under drinking age.

The ABAC Code

15. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:

(b)(i) have Strong or Evident Appeal to Minors

16. Part 6 of the ABAC Code provides:

A **Minor** means a person who is under 18 years of age and therefore not legally permitted to purchase an alcohol beverage in Australia.

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's Response

17. The Company responded to the complaints by emailed letter dated 29 October 2020.

18. The principal points made by the Company were:

- 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:
 - ID25 (ask for ID from anyone who looks under 25);
 - 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.

- In marketing alcoholic products, Endeavour Drinks is fully aware of the Code's requirement not to have a strong or evident appeal to minors. It is our view that the Ad does not breach Part 3(b)(i) or any other parts of the Code.

- In relation to Part 3(b)(i) of the Code, we respond as follows:
 - The Ad is centred around a tongue-twister, constructed using the phrases "Jimmy Brings" and "Jim Beam", which plays on the alliterative nature of the phrases. A tongue-twister is a sentence, phrase or sequence of words, often including alliteration, that is intended to be difficult to say, especially when repeated quickly and often.
 - Arguably, the most well-known tongue-twisters are "She sells seashells on the seashore" and "Peter Piper picked a peck of pickled pepper". It appears from information available online that, as a linguistic device, tongue-twisters have been used across a multitude of contexts, featuring a multitude of themes, for many years. This use appears to extend to popular culture such as movies. However, there does not appear to be any indication that tongue-twisters, in themselves, are predominantly used in relation to minors or have a strong or evident appeal to minors, beyond their general appeal to adults.

- The complaints reference one particular well-known tongue-twister “How much wood would a woodchuck chuck if a woodchuck could chuck wood?”. The Woodchuck tongue-twister is an American tongue-twister. It appears to have its origins in a song titled ‘The Woodchuck Song’ from a musical titled ‘The Runaways’, in the early 1900s, and has been adopted by others since then, most notably in a 1976 documentary film titled ‘How Much Wood Would a Woodchuck Chuck’.
- There appears to have been many less prominent and less well-known adaptations of the Woodchuck tongue-twister over the years - these many adaptations do appear to include use in relation to children, such as a youtube video titled ‘The Woodchuck Song, Tongue Twister for Kids’ 3, however, it is clear that its adaptation for use targeted at children is not the predominant adaptation or use of the Woodchuck tongue-twister and it is not reasonable to characterise the Woodchuck tongue-twister as a children’s tongue-twister or as tongue-twister that has a strong or evident appeal to minors (importantly, it does not have a particular attractiveness to minors beyond the general attractiveness to adults).
- It is certainly not accurate to - as both complainants have - refer to the Woodchuck tongue-twister as a children’s nursery rhyme.
- It is arguable that the Jimmy Brings Jim Beam tongue-twister in the Ad has similarities in style to the Woodchuck tongue-twister, but even if this was accepted, it is not reasonable to say that because of its similarities to a widely-used tongue-twister (which is not predominantly used in relation to minors), the Jimmy Brings Jim Beam tongue-twister has a particular attractiveness to minors beyond the general attractiveness to adults or has a strong or evident appeal to minors - we do not believe that the reasonable or average audience would form this view either. It is also worth noting that there are no other elements in the Ad which have a strong or evident appeal to minors, which could as a whole, result in the Ad having a strong or evident appeal to minors.
- For the reasons outlined above, we believe that the complaints should be dismissed on the basis that the Ad is not in breach of the Code.

- The alcohol marketing communication referred to in the complaints received Alcohol Advertising Pre-vetting Service Approval - refer to Application No. 468/20, approved on 6 October 2020 (Approval No. 18773).
 - For completeness, it is also worth noting that the Ad received ClearAds approval (ref. RA8J01AB).
19. Whilst in this instance the advertiser is Endeavour Drinks who owns Jimmy Brings, ABAC also contacted Beam Suntory in relation to these complaints, given that their product, Jim Beam, features prominently. The principal points made by Beam Suntory in their response of 28 October 2020 were:
- Beam Suntory takes its adherence to the ABAC code seriously. In this instance Beam Suntory and Jim Beam are not the advertiser, however we ensured that the correct due diligence was completed prior to and post production to ensure the advertiser (Jimmy Brings) acted in accordance with the alcohol marketing codes and ABAC guidelines. This included gaining AAPS approval (Approval #18773).
 - It was also not the intention of Beam Suntory and Jim Beam to appeal to minors by being included in an interpretation of a common English language tongue twister.
 - Jimmy Brings have confirmed that they will be responding to the complaints as the advertiser, however should you require any further information from Beam Suntory post receiving Jimmy Brings' response, please do not hesitate to reach out.

The Panel's View

20. Jimmy Brings is an alcohol retailer which provides a home delivery service accessible by phone and via an app. In the period leading to the 2020 AFL Grand Final and on Grand Final day itself the Company screened TV ads promoting its home delivery service. The ads were set in a suburban home and showed a light-hearted conversation between a couple (and in one version another man) in which a question is posed about whether anything was wanted from Jimmy Brings. This resulted in a verbal exchange modelled on a variation of the well-known tongue twister 'how much wood could a woodchuck chuck' using 'Jimmy Brings' and 'Jim Beam' in placed of 'woodchuck' and 'wood'. The complaints stem from the use of this alternate version of the tongue twister.

21. The complainants contend the alternate tongue twister is based on a “children's nursery rhyme” or a “nursey rhyme/tongue twister” and this means the ad would be appealing to children. The ABAC provides in Part 3(b) that alcohol marketing communications (which include TV ads) must not have strong or evident appeal to minors. This standard might be breached if the marketing material:
- targeted minors;
 - had a particular attractiveness for a minor beyond the general attractiveness it has for an adult; and
 - uses imagery, designs, motifs, animations, or cartoon characters that are likely to appeal strongly to minors or that create confusion with confectionary or soft drinks.
22. The Company contends the ads are consistent with the Code standard. It is argued:
- the ad is centred around a tongue twister (not a nursey rhyme);
 - tongue twisters, however, are not predominantly directed towards minors nor have an appeal to minors beyond the appeal they have to adults; and
 - the history and adaptations of the woodchuck tongue twister show it has not been used to target children as such.
23. In assessing the consistency of a marketing communication against a Code standard the Panel is to adopt the viewpoint of the probable understanding of the marketing material by a reasonable person taking the content of the marketing as whole. This means that the values, opinions, and life experiences found in a majority of the community is the benchmark. If the marketing communication can be interpreted in several ways, it is the most probable understanding which is to be preferred over a possible but less likely interpretation of the marketing message.
24. The Panel has considered the Part 3(b) standard on many past 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.
25. 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.
26. The woodchuck tongue twister had its origins in a 1903 American stage musical entitled 'The Runaways'. The Runaways was set on racecourse in the Californian town of Saratoga. The musical was written following the Broadway success of the Wizard of Oz but now is little remembered with the tongue twister being the only enduring component of the show. The musical and hence the woodchuck tongue twister was written for adult audiences and it is incorrect to attribute the tongue twister as being a children's nurse rhyme.
27. While the historical origins are of passing interest, the assessment required is how would a reasonable person most probably understand the TV ad. The Panel does not believe the ad breaches the Part 3(b) standard. In reaching this the Panel noted:
- the ad has a setting and involves an exchange between adults that is unlikely to be highly relatable to minors;
 - the play on the woodchuck tongue twister is recognisable given the cadence and pacing of the dialogue between the characters;
 - the wording used in the revised tongue twister is not considered strongly appealing to minors; and

- taken as a whole the ad is directed towards adults and is not considered as strongly appealing to minors.

28. The complaints are dismissed.