



ABAC Adjudication Panel Determination No 201/20

Products: Jimmy Brings/Carlton Dry and Great Northern/Thirsty Camel
Companies: Endeavour Drinks/Asahi Beverages/Australian Liquor Marketers and Liquor Alliance
Media: Digital Live Stream of Commercial Television
Date of decision: 1 February 2021
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”) arises from a complaint received on 21 December 2020. It concerns advertising for Products by the following Companies on both 10 Play during live streaming of The Project and 7 Plus during live streaming of Sunrise.

Company	Product
Endeavour Drinks	Jimmy Brings
Asahi Beverages	Carlton Dry and Great Northern Beer
Liquor Alliance and Australian Liquor Marketers	Thirsty Camel

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 21 December 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 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 content of the advertising as follows:

Company	Product	ABAC Approval Nos.
Endeavour Drinks	Jimmy Brings	19059
Asahi Beverages	Carlton Dry	18776, 18784
Asahi Beverages	Great Northern	17527
Australian Liquor Marketers and Liquor Alliance	Thirsty Camel	N/A

The Placement

10. The complaint relates to advertising for the Products by the Companies as follows:
 - On 10 Play during live streaming of The Project which is shown between 6:30pm and 7:30pm
 - On 7 Plus during live streaming of Sunrise, which is shown between 6:00am and 9:00am.

The Complaint

11. The complainant raised the following concerns about the advertising:
- *During the morning period there is a constant barrage of alcohol company advertisements.*
 - *I don't know if this is the same from regular tv broadcast as I only use streaming apps. I stream these apps on the Apple TV.*
 - *I frequently see chains of 2-3 consecutive advertisements promoting alcohol.*
 - *It's too early for this type of advertising, and many families/kids are awake getting ready for school at this time.*
 - *I specifically noticed the advertising when using the 7plus app and watching the morning 'Sunrise' program between the times of 6am and 9am.*
 - *I noticed a similar pattern when watching 'The project' on the 10play app.*
 - *I took a note of some advertisements that appeared during the 6am -9am time block on the 7+ streaming app. These 3 advertisements came in at 6:13am:*
 - *Seltzer*
 - *Great northern beer*
 - *Sports bet*
 - *Carlton Dry is a frequent one that appears from 6am-8am*

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:

- (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 Companies Responses

14. Endeavour Drinks responded to the complaint by letter emailed on 19 January 2021. 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 addition to the above, Jimmy Brings has adopted industry-leading initiatives including:
 - a self exclusion service that allows Jimmy Brings' customers to exclude themselves from the service should they identify they have a problem. When customers attempt to place their next order, this will not go through the ordering system and will be cancelled automatically; and
 - an automated system which reviews customer order data to detect potentially harmful consumption by flagging repeated and/or large alcohol orders. This is a revolutionary step in being the most responsible alcohol retailer in Australia.
- 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 Ads do not breach Part 3(b)(iv) or any other parts of the Code.

Alcohol Advertising Pre-vetting Service Approval

- Jimmy Brings received Alcohol Advertising Pre-vetting Service Approval in relation to the Ads under number 19059 on 7 December 2020.

Responsibility toward Minors

- The ads shown during live streaming of The Project on 10 Play and Sunrise on 7 Plus were not shown during the broadcast of these programs on traditional free-to-air television.
- The Ads were only broadcast via the 10 Play and 7 Plus on demand services as the users have to log in to these services via age restriction controls. This means that the Ads were not displayed to those individuals who are minors. For the avoidance of doubt, the Ads were not broadcast on free-to-air TV during the Sunrise and The Project programs as this may result in a breach of the Commercial Television Industry Code of Practice 2015.

- Jimmy Brings is unable to advise whether advertisements for Jimmy Brings have been shown during, or immediately before or after The Project and Sunrise when live streamed on 10 Play and 7 Plus because it has purchased the right for the Ads to be broadcast on a “user targeting” basis which means that it is able to ensure that only adults are viewing the Ads.
- To ensure that the Ads are not broadcast during programs containing children’s consent, Jimmy Brings’ marketing purchasing platform (ie. Google’s Display and Video 360) flags that the Ads contain “alcohol content” which prevents the Ads being broadcast during programs containing children's content.
- Furthermore as a secondary protection, the relevant networks have similar systems in place. This includes age restriction controls used by 10 Play and 7 Plus ensuring the Ads being broadcast only to those individuals aged 18 and over.
- Jimmy Brings takes its obligations under the Code seriously. As such, Jimmy Brings requires age restriction controls to be in place for all its advertisements where applicable (including the Ads) which are broadcast via on demand services such as 10 Play and 7 Plus.
- Jimmy Brings has techniques and processes in place which are consistent with best industry practice and are designed to ensure that its advertisements (including the Ads) are not broadcast to minors. These include a two pronged approach:
 - the Ads are clearly flagged for “alcohol content” and Jimmy Brings’ marketing purchasing platform (ie. Google’s Display and Video 360) will restrict the broadcasting of the Ads to individuals who it can verify as aged 18 and older, and
 - Jimmy Brings further flags that the Ads should only be viewed by individuals aged 18 and older.
- In circumstances where Google cannot determine the age of the audience, the Ads are not broadcast.
- Up-to-date age of audience composition data for The Project and Sunrise is not available to Jimmy Brings. Jimmy Brings does not purchase the right for the Ads to be broadcast during The Project or Sunrise specifically. It, therefore, does not have access to requested data for this program.
- In relation to The Project and Sunrise, Jimmy Brings submits that:
 - The programs and their content are aimed to be viewed by adults.

- The Project and Sunrise predominantly discuss serious news and current affairs topics by using advanced English language that attract an adult audience.
- The content is not aimed to be viewed by minors since it could upset them given the seriousness of the content.
- The Project and Sunrise are not programs and do not have content which is primarily aimed at minors. The programs and their content are intended to be viewed by adults only.
- The Project and Sunrise are news and current affairs programs which are aimed to be viewed by adults.

Final remarks

- Jimmy Brings finally submits that the Ads do not appeal to minors for the following reasons:
 - the Ads promote Jimmy Brings' delivery services during the summer months. As mentioned previously, Jimmy Brings has in place a range of industry-leading initiatives to ensure that minors are not served alcohol and to encourage responsible drinking practices. These initiatives continue to be in place at all times;
 - the (main) actors in the Ads are adults and use advanced English language that does not appear to minors;
 - the actors in the Ads neither display any signs of intoxication nor encourage irresponsible consumption of alcoholic beverages. At most, the actors hold one alcoholic beverages in their hands which is not consumed in the Ads;
 - no activities are undertaken in the Ads that appeal or have an evident appeal to minors; and
 - the Ads were not broadcast during programs that were targeting or appealing to minors for the reasons outlined above.
 - For the reasons outlined above, we believe the complaint should be dismissed on the basis that the Ads are not in breach of the Code.
15. Asahi Beverages responded to the complaint by letter emailed on 15 January 2021. The principal points made by the Company were:

Alcohol Advertising Pre-vetting Service Approval

- The alcohol marketing communication referred to in the complaint (the marketing) received Alcohol Advertising Pre-vetting Service Approval.
 - Carlton Dry was submitted under AAPS Application 97/20. Final approvals were received on 6 October 2020 and 8 October 2020 with approval numbers 18776 and 18784.
 - Great Northern was submitted under AAPS Application 51/19. Final approval was received on 22 August 2019 with approval number 17527.

Responsibility toward Minors

- Broadcast video on demand (BVOD) advertising does not replicate free-to-air advertising, even when the program is being livestreamed.
- CUB purchases BVOD advertising instances through our programmatic partner Adobe. Adobe provides the capability to access video inventory across a range of environments; CUB and Asahi use Adobe services to access inventory with the major TV networks' catch-up/streaming services in desktop/mobile/tablet environments or via connected TV.
- We have controls in place that ensure our advertisements are only targeted to people over the age of 18 on streaming services.
- Advertisements for Great Northern or Carlton Dry could be seen during, before and after The Project and Sunrise when livestreamed on 10 Play and 7 Plus, however we note neither the ABAC nor the Commercial Television Industry Code of Practice deal with the instance of livestreaming via Connected TV.
- When placing ads in livestreamed content, both we and the networks utilise age restriction controls that ensure alcohol advertisements are only shown to people over the age of 18.
- Age targeting controls are available for both livestreaming and catch-up content, as per other digital advertising media. CUB applies two levels of controls: age targeting and exclusion of under 18s. Our programmatic partner Adobe has confirmed in writing that all CUB digital advertising activity with 10 Play in 2020 was age-targeted to 18+ viewers. As an added level of control, we also apply exclusions where the viewer is below 18 or the inventory does not specify if the viewer is 18+.

- The networks have confirmed to CUB in writing that they also apply 18+ targeting and exclusions at their end.
- For an ad buy that applies age targeting, anyone who's not logged in will be excluded from being shown the ads.

Up-to-date audience composition

- Online audience data is unavailable (and of limited relevance given our advertisements only appear for online livestream viewers who have confirmed they are over the age of 18), however I have attached broadcast audience data as an appendix to this response.
- Please see below for audience composition data from 10 Play.

Audience Profile 2020	The Project (10 Play)
C00-04	3%
C05-12	3%
C13-17	2%
F18-24	4%
F25-39	18%
F40-54	20%
F55-64	8%
F65+	6%
M18-24	2%
M25-39	10%
M40-54	14%
M55-64	6%
M65+	4%

- Broadcast audience data confirms the 2020 average 18+ audience for The Project is 90.84%.¹ The lowest 18+ audience share in any ratings week was 88.66% w/c 13/12.
- For Sunrise, online audience data is unavailable, however, broadcast audience data confirms the 2020 average 18+ audience for Sunrise is 94.13%.² The lowest 18+ audience share in any ratings week was 91.43% w/c 26/07.

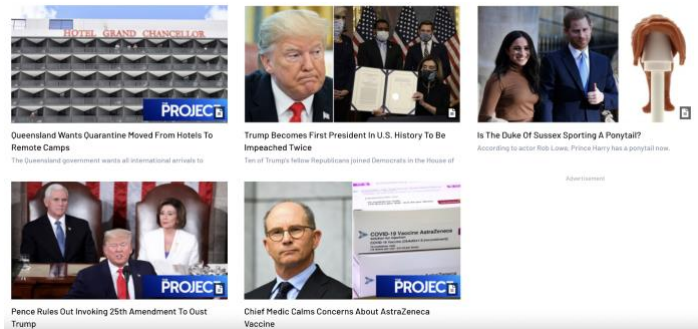
¹ Nielsen AQX, Jan-Dec 2020, Metro Projections.

² Nielsen AQX, Jan-Dec 2020, Metro Projections.

- The Project and Sunrise are not programs and do not have content primarily aimed at minors. This is consistent with Clause (iv) of the placement rules:
 - *A Marketing Communication must not be placed with programs or content primarily aimed at Minors.*

The Project

- The Project is an evening news and current affairs program that is described as providing “Australian television viewers with their dose of ‘news delivered differently’, six nights a week serving up thought-provoking news, current affairs, entertainment and comedy.”
- The Project website provides an example of the sort of news content covered on the program – the stories are clearly presented in a mature way, and deal with topics that are of primary interest to adults.



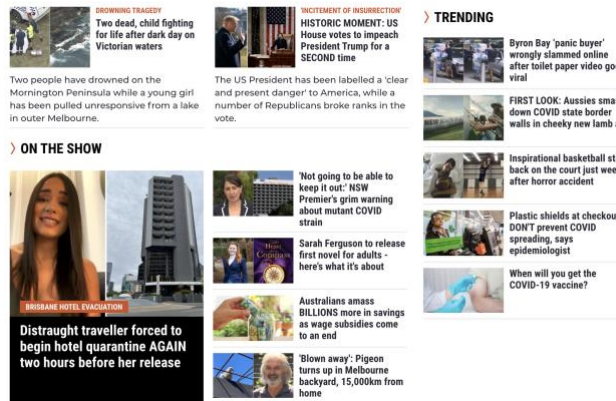
- It is also worth noting that The Project presenters are all clearly adults over the age of 25, who are not attired or presented in a way that would appeal to minors.



Sunrise

- Sunrise is a breakfast news program that is described as bringing the “latest breaking news, entertainment, weather and information to your mornings in a topical and relevant way.” The Sunrise website provides an example of the

sort of news content covered on the program – the stories are clearly presented in a mature way, and deal with topics that are of primary interest to adults.



- It is also worth noting that the Sunrise presenters are all clearly adults over the age of 25, who are not attired or presented in a way that would appeal to minors.



- Asahi Beverages is committed to ensuring our promotional and marketing material does not promote or encourage any irresponsible consumption of alcohol. Our goal is for consumers to enjoy our products responsibly and in moderation, and to uphold community standards when it comes to the placement and content of our advertising.

16. Liquor Alliance, who is responsible for Thirsty Camel advertising in Victoria, responded to the complaint by email on 27 January 2021. They advised that Thirsty Camel have not had any advertising on TV or catch up TV during this time.
17. Australian Liquor Marketers, who is responsible for Thirsty Camel advertising in South Australia, Queensland, and New South Wales, responded to the complaint by email on 25 January 2021. They advised that they have not placed any marketing communications in the programming outlined in the complaint.

The Panel's View

18. In the last decade there has been a virtual explosion in the number of options available to Australian consumers to access content via smart devices and communication platforms and channels. Free to air television (introduced in 1956) was first supplemented by subscription television in 1993. Digital television channels progressively became available in the 2000's and advances in communication technology has recently enabled a raft of internet delivered services to be accessed via mobile devices and internet enabled televisions e.g., streaming services such as Netflix.
19. A consequence of this expansion in options in how a consumer can access programming and content is that the same program can be potentially viewed through several different delivery platforms and channels. A second consequence is that regulatory regimes devised at a particular time or directed towards a particular communications medium can become strained when applied to different mediums. The current complaint highlights these issues.
20. The complaint concerns the viewing of a range of different alcohol advertisements by the complainant in conjunction with the programs 'Sunrise' and 'The Project'. Sunrise is the Seven Network's breakfast show which is broadcast on free to air television between the hours of 6:00am and 9:00am each weekday. The Project is a Ten Network current affairs/entertainment program broadcast on free to air television each weekday between 6:30pm and 7:30pm. The complainant accessed both programs via 'a streaming app on Apple TV'. The concern expressed is not about the content of the advertisements as such but that the ads were seen at a time of day/early evening when there would be a significant audience of children.
21. Overall regulatory responsibility for communications in Australia rests with the federal government. The national regulatory agency is the Australian Communications and Media Authority (ACMA). ACMA has approved a range of industry codes of practice with one code being the Commercial Television Industry Code of Practice (CTICP). The CTICP regulates free to air television with provisions going to the time of day in which alcohol ads can be broadcast. For current purposes, the CTICP does not permit alcohol ads between 6:00am and 9:00am or 6:30pm and 7:30pm. So, if the ads viewed by the complainant had been accessed via the primary free to air Network 7 and Network 10, this would be in breach of the CTICP.
22. The ABAC contains a series of Placement Rules which aim to have alcohol advertising directed towards adults and away from minors. Rule 1 adopts applicable media industry codes including the CTICP. This means a breach of the CTICP is also a breach of the ABAC. It is at this point that the differences in the platforms and channels used to transmit content come into play. As the CTICP

only applies to traditional free to air linear television broadcasts, the time restrictions in that code for alcohol advertising have no application to digital television accessed via 10 Play and 7 Plus. This is the case even if the programs are accessed via live streaming over the apps at the same time the programs are being broadcast on free to air television.

23. The transmission of content via digital channels enables the insertion of digital ads. This means the advertising seen on a digital channel is different or at least potentially different from that seen on free to air television even when the digital content is live streamed as opposed to being watched later through Broadcast Video on Demand (BVOD) e.g., catch-up TV. The net outcome is that a person can be watching Sunrise at 7:00am via free to air television and not be served with an alcohol ad while their neighbour might be watching the same program via a digital transmission on 7 Plus and be served with an alcohol ad and both outcomes be consistent with the operation of the CTICP.
24. Beyond the requirement to comply with media codes such as the CTICP, the ABAC Placement Rules impose other obligations on alcohol marketers namely:
 - that available age restriction controls be utilised to exclude minors (Rule 2);
 - if there are no age restriction controls, then an alcohol ad can only be placed where the audience is reasonably expected to comprise at least 75% adults (Rule 3); and
 - alcohol ads must not be placed with programs or content primarily aimed at minors (Rule 4).
25. In responding to the complaint, the Companies contended that these rules have been complied with. Endeavour Drinks (Jimmy Brings) and Asahi both explain that their advertising for BVOD (including live streaming TV via the Network apps) was purchased 'programmatically' and not through a direct relationship with Networks 7 and 10. This means that the ads are placed on a variety of platforms such as BVOD but also platforms such as Facebook or YouTube channels in accordance with instructions. The instructions include applying age targeting so that the ads go to users aged over 18. It is further contended that the expected audience for both Sunrise and The Project exceeds the 75% adult threshold and both programs are not primarily aimed at minors. Liquor Alliance (Thirsty Camel) state that they don't advertise over TV.
26. The Panel accepts that neither Sunrise nor The Project are 'primarily aimed' at minors. Both programs have an adult focus, with The Project more clearly canvassing news and current affairs as well as entertainment. Sunrise is slightly less 'hard edged' than The Project, but it is not a 'children's program' like a Play School or teenage themed dramas. This means Rule 4 has not been breached.

27. Rule 2 requires that 'available age restriction controls' be utilised. There is no uniformity in the capacity of different platforms to exclude minors e.g., how Instagram works is different from a BVOD platform such as 7 Plus, and in this case the platforms allow targeting to over 18 years and the option that alcohol ads will not be served if a program is live streamed, and no identified user has been logged on. This means that the complainant or another adult in the household must have been the registered user of the platform. Of course, this makes no allowance for co-viewing occurring in a household where there are both adults and minors.
28. Rule 3 refers to the expected audience of programs with which alcohol advertising is placed. The Companies advised there is no specific data on the viewers of live streamed programs using the 10 Play and 7 Plus apps. Ratings data for Sunrise and The Project, however, show that both programs have predominately adult audiences more than the 75% benchmark required to comply with Placement Rule 3.
29. Drawing all this together, there has been no breach of the ABAC Placement Rules as:
- there are no time-of-day restrictions on alcohol advertising in conjunction with programs accessed via digital TV apps 10 Play and 7 Plus - this is even the case with live streamed programs with digitally inserted advertising;
 - the Companies applied available age restriction controls so that alcohol ads were served only to households where there was an adult registered user of the apps and other programmatic age targeting mechanisms were also applied;
 - the expected audience of Sunrise and The Project on digital TV exceeds 75% adults; and
 - neither Sunrise nor The Project can be fairly said to be programs aimed primarily at minors.
30. In dismissing the complaint, the Panel notes the incongruity between the time-of-day alcohol advertising restrictions applying to traditional free to air linear TV and the lack of comparable restrictions for live streamed digital content which matches what is being shown on free to air TV. The Panel recommends that the interplay between the different technologies be considered when the ABAC Placement Rules are next reviewed.