



ABAC Adjudication Panel Determination Nos 89, 95 & 102/22

Product: Jimmy Brings
Company: Endeavour Group
Media: Stencil on Footpath
Date of decision: 28 November 2022
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 three complaints received on 25 October, 3 November and 12 November 2022 about marketing by Jimmy Brings (“the Company”) using stencils on footpaths.
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:
 - 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;
 - 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

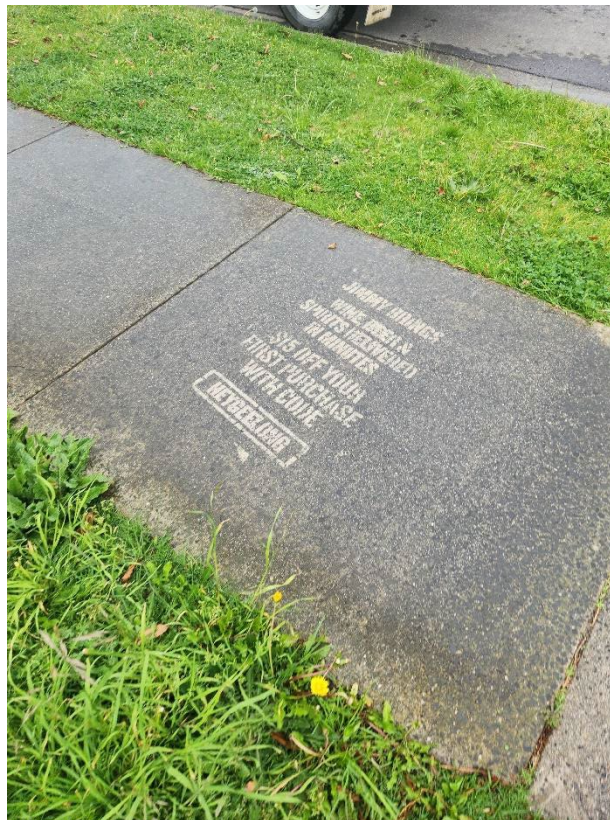
7. The complaints were received on 25 October, 3 November and 12 November 2022.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene 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 not obtained for the content of the marketing (Approval Number 3767).

The Marketing Communication

10. The complaint relates to marketing by Jimmy Brings using stencils on footpaths:



The Complaints

11. The complainants object to the marketing as follows:

Complaint No	Concern
89/22	<i>The advertisement is clearly designed to evade marketing laws as it will eventually wash away and is temporary. However, it is almost certainly not legally approved advertising and is inappropriate and mischievous.</i>
95/22	<i>I assume it's illegal, it was destroying the natural environment, I felt forced to see it as I was walking, there were like 8 of them repeated in a row and for alcohol of all things is despicable. They should be prosecuted for criminal damages.</i>
102/22	<i>They have vandalised the footpath outside my house without my permission, encouraging people to get alcohol home delivered. I had to explain to my six-year-old what it meant. I am a recovering alcoholic and I demand that this is removed.</i>

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 Company's Response

14. The Company responded to the complaint by email on 22 November 2022. The principal comments made by the Company were:

- Endeavour Group has a media agreement with Dentsu Aegis Network Australia Pty Ltd ABN 57 147 291 674 (Dentsu) and Carat Australia Media Services Pty Ltd ABN 37 081 739 979 (Media Agency) (the Agreement) which governs the supply of certain media services to Endeavour Group.
- Pursuant to the Agreement:
 - the Media Agency provides certain Services to Endeavour Group, including identifying media opportunities and master media buying and planning services;
 - the Media Agency is responsible for arranging the placement of Advertising Materials, which includes material which advertises, promotes or communicates Endeavour Group, such as the Advertisements;
 - Endeavour Group is ultimately responsible for the content of the Advertising Materials, however;
 - the Media Agency must ensure that Key Personnel are aware of the need for the Advertising Materials to comply with all laws and self-regulatory codes in Australia, including (but not limited to), the Code and the Outdoor Media Association (OMA) advertising codes of practice;

- more generally, the Media Agency must comply with all laws and self-regulatory codes of conduct related to the provision of the Services under the Agreement.
- For the purposes of the Complaint, Jimmy Brings notes that the Media Agency was responsible for the placement of the Advertisements in accordance with the Agreement. The Media Agency, with Jimmy Brings' consent, subcontracted the placement of the Advertisements to a third party marketing service provider (Media Provider).
- At the outset, Jimmy Brings would like to note that it recognises that the Advertisements are problematic and that Endeavour Group will be working with our marketing teams to remind them of our ABAC responsibilities and to ensure that advertisements using chalk stencils or similar tactics are subject to additional internal discussion and approval prior to deployment (if they are to be deployed at all).
- We also note that Jimmy Brings instructed the Media Agency to arrange for the removal of the Advertisements. We understand that this was completed between 8 12 November 2022, resulting in the relevant campaign ending earlier than planned.

Alcohol Advertising Pre-vetting Service Approval

- Jimmy Brings, as part of Endeavour Group, is committed to maintaining our position as an industry leader in the responsible service of alcohol. This is highlighted by the fact that Endeavour Group formalised its status as a signatory to the Alcohol Beverages Advertising Code Scheme in 2013 and it prepares all advertising within its reasonable control in accordance with the Code. As a signatory to ABAC, Endeavour Group commits to the objectives of the Code to ensure that alcohol advertising does not encourage irresponsible or unsafe consumption, or consumption by persons under 18 years of age, and does not target young people.
- The importance of ensuring all necessary marketing communications (involving Jimmy Brings brand name or logo) are reviewed from a Code compliance perspective (and pre-vetted where appropriate), has been reinforced with the marketing team, even in circumstances where that material is controlled by a third party.
- Furthermore, Jimmy Brings maintains strict internal and external processes in addition to those required by the Code. As part of our community charter 'Our Community, Our Commitment', Endeavour Group has in place a range

of industry-leading initiatives to ensure that minors are not served alcohol and to encourage the responsible consumption of alcohol. These include:

- ID25; we ask for ID if a shopper looks under the age of 25;
 - Our Refusal of Service Policy (Secondary Supply, Intoxication and School Uniform); and
 - Staff training that exceeds legal requirements, including our 'Leading in Responsibility' training module, team talkers, regular refresher and reminder courses.
- The processes outlined above provide Jimmy Brings with a compliance framework to ensure that it serves customers in accordance with its obligations under the various applicable laws.
 - The content of the Advertisements in Wollongong and Tasmania received Alcohol Advertising Pre-Vetting Service Approval (Pre-Vetting Approval) on 5 October 2022 pursuant to approval number 3767. Jimmy Brings did not seek Pre-Vetting Approval for the Advertisements in Geelong on the basis that the content depicted in those Advertisements and the medium within which they would be displayed, was identical to those submitted under approval number 3767 (Approved Advertisements). In accordance with the ABAC Pre-Vetting Service Guide, Jimmy Brings did not consider that the addition of a further location for the Advertisements was a change that 'materially changed' the creative element of the Approved Advertisements and therefore did not feel as though a resubmission was required.
 - The Advertisements did not receive Pre-Vetting Approval in respect of its placement on the basis that placement of the Advertisements was determined by the Media Provider. Notwithstanding this, Jimmy Brings has reinforced with the marketing teams as a matter of urgency, that all Out of Home (OOH) should receive Pre-Vetting Approval for content and placement, particularly in the context of OOH.

Responsibility toward Minors – Placement Rules

- Part 3(b)(iv) of the Code prohibits a marketing communication from being directed at minors through a breach of any of the placement rules.
- As the Advertisement is an outdoor placement, the only applicable placement rule is Placement Rule 1 of Part 6 of the Code (Placement Rule

1) as ‘the remaining Placement Rules relate to digital electronic and broadcast media and not to outdoor placement’¹.

- Placement Rule 1 requires that a ‘Marketing Communication must comply with codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies (for example ... Outdoor Media Association Placement Policy).’ The relevant provision of the OMA Placement Policy is that ‘OMA members will not advertise alcohol products ... within a 150-metre sightline from the boundary of a school’².
- The OMA Placement Policy applies to fixed outdoor signage advertisements, as indicated in the relevant guidance materials:
 - ‘OMA members will not place any advertising for certain products on fixed and digital OOH signs located within a 150 metre sightline of a primary or secondary school’; and ‘school’ is defined as an ‘official Australian primary or secondary school which is registered with the appropriate state authority’;³ and
 - ‘[the OMA Placement Policy] requires OMA members and ABAC signatories to ensure alcohol advertising is not placed on fixed signs that are located within a 150 metre sight line of a primary or secondary school (save licensed premises).’⁴
- The Advertisements were chalk stencils that generally only lasted up to a week. Whilst there is no guidance from OMA as to what fixed signage means, we consider that a chalk stencil could not by any ordinary interpretation be regarded as “fixed” or a “sign”.
- However, we recognise that there is a likelihood that some stencils may have been placed within 150m of a school. Unfortunately this cannot now be verified as the stencils have been removed. It is also therefore not possible to confirm whether any of the Advertisements were within the line of sight of a school. Jimmy Brings would like to reiterate that under no circumstances would it have approved the placement of the Advertisements in breach of the Placement Rules if it had known that any would be placed near a school.
- As aforementioned, in the present case, the specific placement of the Advertisements was not selected or approved by Jimmy Brings. Rather, the

¹ ABAC Adjudication Panel Determination No. 127/17 para 19

² OMA Placement Policy, section 3.1.

³ OMA Community FAQs: Placement Policy, section 1.

⁴ Guidance Notes ABAC Responsible Alcohol Marketing Code, section 3(b).

Media Provider was responsible for the placement of the Advertisements. Jimmy Brings was not aware of the specific locations of the Advertisements, other than the fact they would be placed in various locations throughout Wollongong, Tasmania and Geelong.

- Jimmy Brings, having worked with the Media Agency on numerous occasions, had a reasonable expectation that the Advertisements would not be placed in locations in breach of the Placement Rules. Since being made aware of the Complaint, Jimmy Brings has engaged with the Media Agency to understand the measures that were in place to ensure compliance with the Code. We have been instructed that the Media Provider was aware of the applicable Placement Rules and had instructed their teams to target areas “P18 ” (meaning 18 years and over), which Jimmy Brings understood to mean that the stencils would be strategically placed outside of a 150m radius of schools. This is Jimmy Brings’ expectation for all activity booked with the Media Agency, regardless of the specific advertising tactic deployed.
- In view of the above, Jimmy Brings respectfully submits that there is no technical breach of the Code as the Advertisements are not fixed signs for the purposes of the OMA Policy and therefore do not breach any placement rules. Jimmy Brings does however understand that the Advertisements, in the way that they were ultimately placed, are not consistent with the policy intent of the Placement Rules.
- Should ABAC form a different view, Jimmy Brings’ submits that the Panel should find a “no fault breach” on the part of Jimmy Brings on the basis that the placement of the Advertisements were not selected or approved by Jimmy Brings and was therefore outside of our reasonable control.
- Notwithstanding this, Jimmy Brings does not seek to diminish the concerns of the complainants and would like to reiterate that we take our responsibility as an industry leader in the responsible service and marketing of alcohol incredibly seriously. To that end, we have invited our agency partners to our next ABAC refresher session, which we feel is an appropriate measure to ensure that a situation of this nature does not arise in the future.

The Panel’s View

15. This is a novel case involving alcohol advertising in the form of chalk stencils placed on footpaths in three suburbs of the Victorian regional centre of Geelong. The stenciled message read - Jimmy Brings - wine beer & spirits delivered in minutes - \$15 off your first purchase with code Hey Geelong.

16. The advertising has drawn three separate complaints that collectively believe the method of advertising to be highly irresponsible. Specifically, it is contended the stenciled ads:
 - are an attempt to evade usual controls on alcohol marketing;
 - damage the natural environment and are akin to vandalism; and
 - drew the attention of children and were triggering to a person dealing with alcohol dependency.
17. In response to the complaints, the Company provided background to how the advertising came to be employed. While it was argued there was no breach of ABAC standards, the Company did accept this method of advertising was somewhat problematic and advised the stencils had been removed and the campaign ended earlier than planned.
18. The Panel has not previously encountered this method of advertising. Accordingly, it is useful to set out how stenciled ads on footpaths are to be treated by the ABAC standards and Code requirements.
19. Firstly, the ABAC Scheme is based on providing standards for the content of alcohol marketing communication and rules on the placement of alcohol marketing to limit the exposure of minors to marketing. The Code does not provide a prescriptive list of the types of promotion that might be regarded as 'alcohol marketing communications'. Rather Part 2 (a) provides that the Code applies 'to all marketing communications' and then gives a non-exhaustive list of examples of marketing types.
20. There is no reason to conclude that a stenciled message on a public footpath is not captured within the intended scope of an alcohol marketing communication. Hence the ABAC standards and placement rules are capable of applying to this form of marketing.
21. In essence this means that the content of the stencil message must meet the standards of good practice and amongst other things must not:
 - encourage excessive or rapid alcohol consumption or offensive behaviour related to alcohol use;
 - have strong or evident appeal to minors;
 - suggest alcohol use is needed to succeed in life or that alcohol offers health benefits; and

- show alcohol use before or during an inherently dangerous activity.
22. The complainants don't argue that the content of the stenciled message is offensive as such and the message doesn't suggest irresponsible alcohol use but promotes the Company's home delivery service. While there might be differing views in the community as to whether alcohol marketing per se should be more restricted or even prohibited, this debate goes beyond the Panel's remit and is not really relevant to the content of the stenciled message.
 23. One complainant did submit that the ad captured the attention of a six year old child. While the novelty of seeing something written on the footpath can be accepted, the actual message cannot be fairly said to have strong or evident appeal to minors.
 24. The overarching concern of the complainants go more to the location of the ads i.e. on footpaths outside of private homes and that the method of advertising is objectionable of itself i.e. akin to vandalism.
 25. The ads mention the Company name, its home delivery service and that a discount on a first use of the service can be obtained by use of the 'HeyGeelong' code when ordering. This message does not suggest alcohol use in an irresponsible manner nor otherwise breach the ABAC content standards.
 26. The question of the 'legality' of placing a stenciled message on a footpath is not an issue for the ABAC Scheme. It is possible under Victorian law or the by-laws of the relevant local council that putting messages on a public footpath might be unlawful. If this is the case, then this would not be related to the stencils being about alcohol as such, but presumably would apply to messages of any type.
 27. Where the ABAC requirements might intersect with the type of advertising is in relation to the ABAC Placement Rules. Rule 1 imports into the Code the provisions of the Outdoor Media Association (OMA) Placement Policy. This policy in turn does not permit alcohol advertising on 'fixed Out of Home signs' that are located within 150 metres sightline from the boundary of a school.
 28. As noted by the Company, the OMA does not define the meaning of a 'fixed sign'. In its submission, the Company contends that a stencil on a footpath would not be intended to be captured by the OMA Policy.
 29. It is clear that the OMA policy captures sites such as billboards, bus shelter sheds and signs affixed to buildings. It may well be that a stenciled message on a footpath was not in mind in framing the OMA policy. In any event, it does not seem that the actual examples mentioned by the complainants were within 150 metres of a school. The Company however could not confirm the exact location of all of

the messages in the three locations - Geelong, Wollongong and Tasmania - the stencils were used on footpaths and conceded it was quite possible some may have been within a 150 meters of a school.

30. Drawing all this together, the Panel cannot find there to have been a breach of either the ABAC content standards nor Placement Rule 1 in relation to the Geelong examples raised by the complainants. That said, it was prudent for the Company to end its campaign, remove the messages and to reflect further before employing this marketing method again.
31. Accordingly, while the complainants have drawn attention to a legitimate issue, the Panel is obliged to dismiss the complaints given:
 - the content of the messages does not breach ABAC standards;
 - ABAC has no jurisdiction regarding the use of public footpaths for advertising, with this being a question for government agencies at the State and local level; and
 - while it is conceivable the ABAC Placement Rules do apply to the stenciled messages, in the three examples raised in the complaints, it is not suggested the messages were within 150 metres of a school.