



ABAC Adjudication Panel Determination No 78/23

Product: Jimmy Brings
Company: Endeavour Group
Media: Instagram
Date of decision: 19 June 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 10 May 2023 and concerns an Instagram post by the Endeavour Group (“the Company”) for Jimmy Brings (“the Product”).
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 10 May 2023.
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

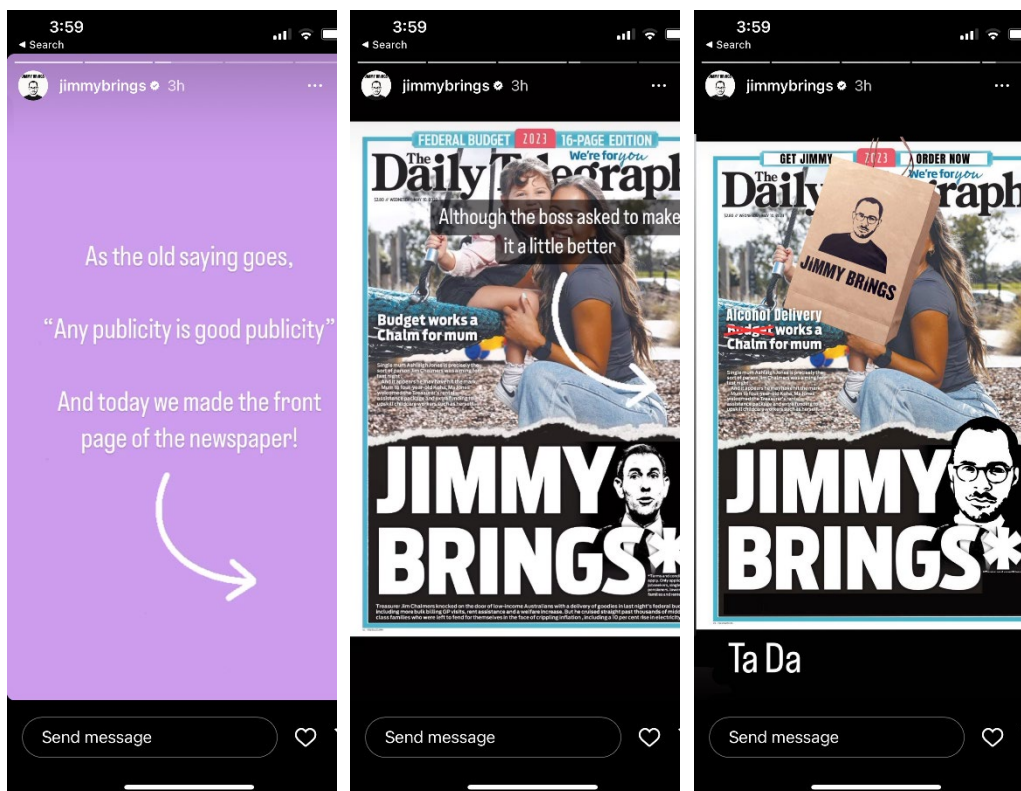
materials and advice and the availability of Panel members to convene and decide the issue. The complaint was completed in this timeframe.

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 marketing.

The Marketing Communication

10. The complaint relates to a post made to the Jimmy Brings Instagram page:



The Complaint

11. The complainant objects to the marketing as follows:
 - *One of the Instagram stories features a young kid, very clearly under the age of 18.*
 - *The story was a part of three in total, and when taken as a whole, clearly is promoting “alcohol delivery” as depicted in the third story.*

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (b)(ii) depict a person who is or appears to be a Minor unless they are shown in an incidental role in a natural situation (for example, a family socialising responsibly) and where there is no implication they will consume or serve alcohol.

The Company’s Response

13. The Company responded to the complaint by letter emailed on 22 May 2023. Its primary comments were:
 - Jimmy Brings thanks the ABAC Adjudication Panel (the Panel) for the opportunity to respond to the Complaint. Jimmy Brings understands that the Panel is considering whether or not the Advertisement breaches Part 3 (b)(ii) of the ABAC Responsible Alcohol Marketing Code (the Code).
 - At the outset, Jimmy Brings would like to note that:
 - 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.
 - 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.

Alcohol Advertising Pre-vetting Service Approval

- Jimmy Brings notes that the Advertisement did not receive Alcohol Advertising Pre-Vetting Service Approval.

Is sharing the front page a marketing communication?

- Under the existing Code, Marketing Communications are defined as: “marketing communications in Australia generated by or within the reasonable control of a Marketer (apart from the exceptions listed in Section 2(b)), including but not limited to brand advertising (including trade advertising), competitions, digital communications (including in mobile and social media), product names and packaging, advertorials, alcohol brand extensions to non-alcohol beverage products, point of sale materials, retailer advertising and Marketing Collateral”.
- Given the undoctored image included the words “Jimmy Brings” (albeit not with our prior knowledge or approval) and was re-posted by Jimmy Brings (being a Marketer for the purposes of the Code), we consider that a conservative interpretation of the definition is that it is likely to be a Marketing Communication within the meaning of the Code and therefore, subject to the Code’s requirements.
- However, for the reasons outlined below, we do not consider the undoctored image to be in breach of Code.

Responsibility toward Minors

The undoctored image of the front page

- Part 3(b)(ii) of the Code provides that a Marketing Communication must not: “depict a person who is or appears to be a Minor unless they are shown in an incidental role in a natural situation (for example, a family socialising responsibly) and where there is no implication they will consume or serve alcohol”.
- We consider that the only reasonable interpretation of the image is that the depiction of a mother with her child at a park is a natural situation and that there is no implication that the child will consume or serve alcohol. This is particularly so in circumstances where alcohol is not featured (either directly or indirectly) in the undoctored image.
- In addition, the image of the Minor is clearly an incidental part of the purpose of the Advertisement; that is, to draw attention to the Daily Telegraph’s unauthorised use of Jimmy Brings’ branding.
- The image does not breach Part 3 (b)(ii) of the Code.

The altered image of the front page

- Despite the fact that the Minor’s face and most of its body has purposefully been obscured by the Jimmy Brings delivery bag, we recognise that the image is to be viewed in the context of the whole Advertisement and accept that a reasonable consumer would likely draw the connection with the Minor in the previous frame.
- Notwithstanding this, we are of the view that the placement of the delivery bag and the surrounding text clearly establishes that the Minor is incidental to the overall intent of the Advertisement and there is absolutely no implication that the Minor will consume or serve alcohol.
- We draw the Panel’s attention to the findings in Determination 75-21 and Determination 37-23 (Post 2). The marketing communications, the subject of those determinations, can be clearly distinguished from this case. In Determination 75-21, the image was clearly staged so that the children were each holding a bottle of wine. Similarly, in Determination 32-23, the photo was staged so that the minor was wearing a branded T-shirt. In both cases, it would not have been reasonable to interpret the Minor/s as playing an incidental role.
- Here, Jimmy Brings has intentionally obscured the Minors face and body to further highlight the irrelevance of the Minor to the Advertisement.

- The altered image does not breach Part 3 (b)(ii) of the Code.

Concluding comments

- Jimmy Brings acknowledges the concerns of the complainant 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, the importance of ensuring all necessary marketing communications (involving the 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. We feel this is an appropriate measure to ensure that a situation of this nature does not arise in the future.
- However, in view of the above, we respectfully ask that the Complaint is dismissed by the Panel.

The Panel's View

14. This is a slightly unusual case involving what might be described as opportunist marketing from the Company. The opportunity arose from the adoption by the NewsCorp paper The Telegraph published in Sydney, of the Company's name in the headline for a story about the 2023 Federal budget delivered by Treasurer Jim Chalmers.
15. The front-page newspaper story was used by the Company to create a marketing communication on the Company's Instagram account. The post shows three images as follows:
 - Image 1 shows the words "As the old saying goes, "Any publicity is good publicity", and today we made the front page of the newspaper";
 - Image 2 shows the front page of The Daily Telegraph on the day after federal treasurer, Jim Chalmers, delivered the budget. The bottom third of the front-page shows, in large block letters, the words "Jimmy Brings", along with a black and white head shot of Jim Chalmers. It also shows a picture of a mother and child, along with the story title "Budget works a Chalm for mum". The child's face is partially, but not fully obscured by the following words "Although the boss asked to make it a little better".
 - In the third image, the front page has been altered, so that:
 - the faces of the mother and child are fully obscured by a Jimmy Brings paper bag;
 - the story heading has changed to show the word "Budget" crossed out and replaced with the words "Alcohol Delivery", so that it reads "Alcohol Delivery works a Chalm for mum"; and

- Jim Chalmers' face was replaced with the face of Jimmy Brings.
16. The complainant is concerned about the use of a photograph of a child in alcohol marketing. This concern raises Part 3 (b)(ii) of the Code which provides that an alcohol marketing communication must not depict a person who is or appears to be a Minor unless they are shown in an incidental role in a natural situation (for example, a family socialising responsibly) and where there is no implication they will consume or serve alcohol.
 17. The Company accepts that the use of the newspaper front page (which it had no part in writing or any prior knowledge) is an ABAC marketing communication to which the Code standards apply. The Company argues, however, that the depiction of a minor in the second and third images does not breach the Part 3 (b)(ii) standard.
 18. The Part 3 (b)(ii) standard does not prohibit outright the depiction of a minor in alcohol marketing provided each of the three conditions in the standard are met, namely that the minor is shown:
 - in an incidental role; and
 - in a natural situation (such as a family socialising responsibly); and
 - where there is no implication they will consume alcohol or serve alcohol.
 19. The assessment of whether a standard has been complied with is from the standpoint of the probable understanding of the marketing item by a reasonable person. This means the life experiences, attitudes and values shared by most people in the community is the benchmark.
 20. The Panel believes that a reasonable person would not consider the Instagram post in breach of the Part 3 (b)(ii) standard. In reaching this conclusion the Panel noted:
 - there is no suggestion that the minor would consume or serve alcohol;
 - the depiction of a child with her mother is a natural situation;
 - clearly the image of the child relates to the budget story in the newspaper and is purely incidental to the subsequent use of the story for the Instagram post i.e. the child was not posed with alcohol; and
 - taken as a whole, the post would be understood as relating to the newspaper story adopting the Company's name and the Company using that opportunity for its brand promotion rather than suggesting it is acceptable for minors to consume alcohol or to appeal to minors.
 21. The complaint is dismissed.