

ABAC Adjudication Panel Determination No. 127/15

Product: XXXX
Company: Lion
Media: Television
Complainant: Confidential
Date of decision: 21 December 2015
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 XXXX beer by Lion (“the Company”) and arises from a complaint received 17 November 2015.
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”) – 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 – which places restrictions on the location of alcohol advertisements on outdoor sites such as billboards.
3. Within this framework, some of the requirements go to the placement of alcohol marketing, while others go to the content of the marketing. The ABAC is a content code, which means the standards of good marketing practice within the Code apply irrespective of where the marketing occurs (e.g. in print, in digital formats, or by broadcast mediums). Equally, the fact that the marketing is placed in a particular medium or in a particular location will not of itself generally be a breach of the ABAC. In contrast, the placement codes applying to outdoor sites or free to air television don’t go to what is contained within alcohol marketing but the codes will be potentially breached if the marketing occurs at particular timeslots or is placed near a school.
 4. For ease of public access, the Advertising Standards Bureau (ASB) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the ASB, 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 the ASB 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 ASB 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 17 November 2015.
8. The Panel endeavor 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 has been determined within 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 (14459).

The Marketing Communication

10. The advertisement opens with a small gathering in a private backyard. A man is shown walking off the deck and collecting a stubby of XXXX from an ice bucket and opening it. He walks to and opens the lid of the barbecue and we see a cut of meat and skewers cooking. As he prods the meat it catches fire, he says “ooh” looks at his stubby of beer and moves it toward the burning meat as if to douse the flames but then shakes his head and moves it away.
11. We see a woman looking at the man uncomfortably from behind the barbecue and he looks back at her. He then blows softly toward the flames, shakes his head and takes a sip from his stubby as he stands there watching the flames.
12. We then see the man serving the burnt piece of meat, still with a small flame on it to his friends. One male friend waves his hand as if to put out the flame. The man says “Special recipe”. Two male friends are staring at the meat as one says “Definitely not mooing” and the other laughs. A voiceover says “Introducing XXXX Gold Australian Pale Ale. The final scene shows a stubby of the product being poured into a glass as the voiceover continues “mid strength, crisp finish” as the name of the product and the final part of the voiceover appears superimposed on the scene.

The Complaint

13. The complainant objects to the marketing for the following reasons:
 - a) It implies that it is safe and a better choice to be drinking XXXX than to attend to a Barbecue that had caught alight;
 - b) It suggests that XXXX contributes to a person being so relaxed that they can leave a barbecue fire continue to burn and not have to act to regain control of the fire;
 - c) Encourages drinking an alcohol beverage while performing a task that requires constant attentiveness and due care, operating a barbecue;
 - d) Implies that fire safety is less important than drinking XXXX.

The ABAC Code

14. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (c)(iv) suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation;

- (d) 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

15. The Company responded to the complaint by letter dated 25 November 2015. The principal points made by the Company were:

- a) The Advertisement that is the subject of this complaint is a TVC for XXXX Pale Ale. This Advert highlights friends and family coming together at a social occasion, in this instance a backyard BBQ. The TVC depicts a number of couples at the backyard BBQ. The host of the BBQ wanders over to tend to the meat which is cooking away nicely. Feeling the need to contribute to the cooking process, he gives it a little poke, releasing some fat into the BBQ which flares the meat. Our host thinks briefly about putting the flame out with his beer but instantly recognises that this would be a bad idea – a thought shared by his partner, who gives him a wary look. He delivers the charred meat to the table and he and his mates have a laugh about the fact it is now very overdone.
- b) Lion does not consider that the Advertisement breaches any section of the ABAC Responsible Alcohol Marketing Code (ABAC Code) or any other advertising code. Lion takes its advertising responsibilities extremely seriously and has a strong compliance track record, has a number of strict internal and external processes against which any proposed advertisement is considered and the advertisement was approved through each of these processes prior to Lion's decision to broadcast it.
- c) Throughout the advertisement, the presence or consumption of alcohol is never depicted as a contributor to, or cause of, a change in mood or environment. At no point is it suggested that alcohol has made the main character relaxed/more relaxed. The presence and consumption of alcohol does not result in a change in mood and does not make the man attending the BBQ more at ease about the situation at hand nor the company he shares. The man does not change once he picks up the XXXX or consumes it.
- d) At no point is anyone at risk of being burnt or hurt by the BBQ. The meat flare up is clearly positioned as a typical BBQ experience and causes no panic from the main character tending to the meat or among guests – everyone continues socialising as before. When we say consume, the character in the TVC is seen taken two drinks from the stubby. This is a mid-strength beer so two drinks from a mid-strength stubby is far below

ABV of one standard drink. He drinks his stubby in a responsible and moderate manner. Again the man tending the BBQ is alert and capable and in no way looks out of control or in danger. There is no panic amongst the guest and everyone is socializing normally.

e) As a responsible advertiser, Lion has demonstrated a long-standing commitment to supporting the ABAC and AANA Codes and adhering to the decisions of the ABAC Adjudication Panel and AANA/ASB . Lion maintains strict internal and external processes to ensure compliance. As part of Lion's marketing approvals process, this Advertisement was subject to:

- Campaign development from external creative agencies trained on the requirements of the ABAC and AANA Codes;
- Independent legal review and advice from an external legal firm specialising in FMCG marketing and advertising compliance and interpreting the relevant advertising codes and legislation;
- Review by Lion's internal marketing compliance team to ensure adherence to the ABAC, AANA Codes and Lion's internal policies;
- Review and approval through the external AAPs pre-vetting service at both concept and final stages to ensure compliance with the ABAC.

I can confirm that each of the above checkpoints was met for this advertisement, prior to broadcast.

The Panel's View

16. The complaint concerns a television commercial for XXXX Pale Ale and is set against the backdrop of a backyard barbeque. The main character is shown drinking from a bottle of the product while attending to a rack of beef roasting on the barbeque. The beef alights and the man chooses to save his drink rather than pour it over the beef to douse the flames. The atmosphere of the advertisement is light-hearted and the scenario while familiar is somewhat exaggerated.
17. In the complainant's opinion the advertisement is troubling in several respects. Firstly, it is contended that the ad makes light of the care and attention needed to safely operate a barbeque and implies saving a beer is more important than attending to the obvious fire risk shown in the advertisement. Secondly, it is argued that the main character's demeanour suggests that the product has changed his mood and that he is so relaxed that the prospect of a fire does not concern him.
18. The ABAC has two standards of good practice in alcohol beverage marketing which go to the complainant's concerns. Section c(iv) provides that an advertisement cannot suggest that the consumption of an alcohol beverage offers any therapeutic benefit or is an aid to relaxation. Section (d) provides that an

advertisement must not show the consumption of alcohol before or during an activity that for safety reasons requires a high degree of alertness or physical coordination.

19. In response to the complaint the Company contends that the advertisement is consistent with these two standards. It argues that the ad displays very moderate alcohol consumption and that the scenario does not show any individual at risk of harm from the barbeque. It is stated that the main character is shown as being alert and capable and that the scenario created does not appear to be out of control or causing danger. It is noted that there is no panic amongst the guests and everyone is socialising normally.
20. 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. The reference to a “reasonable person” is drawn from the Australian Common Law System and means that the benchmark is the attitudes, opinions and values that are common in a majority of the community.
21. The Panel does not believe that the ad breaches Section c(iv). In reaching this conclusion the Panel has noted:
 - The ad makes no claim as to the product having any therapeutic benefits.
 - While the people attending the barbecue are shown in a relaxed mood, this is typical of a social event of this nature.
 - There is no realistic suggestion that the product is the cause of the relaxed mood being depicted.
 - Only moderate consumption is shown and no person depicted appears to be effected by alcohol use.
22. The purpose of Section (d) of the ABAC is to create a standard in relation to the portrayal of the safe use of alcohol in conjunction with potentially dangerous activities such as driving a motor vehicle or operating a piece of machinery. In essence the standard requires that an advertisement must not show consumption of a product before or during the undertaking of an activity that for safety reasons requires a high degree of alertness or coordination.
23. The Panel has considered the Section (d) standard in a number of decisions over time including :
 - Determination 43/07 – alcohol consumption while surfing and in deep water (complaint upheld).
 - Determination 76/08 – alcohol use during a game of golf (complaint dismissed).
 - Determination 151/08 – alcohol use while fishing (complaint dismissed).

- Determination 9-12 and 32/13 – alcohol consumption during a backyard construction task (complaint upheld).
 - Determination 2/14 – alcohol associated with completed tasks of using a lawn mower and power tools (complaint was dismissed but it was recognised that if consumption had been shown with these activities the standard would have been breached).
24. Each of these previous decisions turn very much on their own facts but it is possible to draw some high level guidance as to how Section (d) and its predecessor standard in an earlier version of the ABAC has been applied. The guiding principles might be summarised as follows :
- The intent of the standard is not to encourage or endorse behaviours where alcohol consumption occurs with the carrying out of hazardous activities that might result in physical injury.
 - 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.
 - The phrases ‘high degree’ and ‘alertness’ or ‘physical co-ordination’ recognise that most everyday activities might have some element of residue risk of injury but the activities envisaged by the standard are ones which require close or continuous attention to be performed safely such as control of a motor vehicle.
 - While the standard is based upon the impact alcohol consumption might have on alertness or physical co-ordination, it is not necessary to breach the standard to show actual physical impairment from alcohol use.
25. Consuming an alcohol product while tending to a barbeque would be a typical experience in many Australian households. It is also unfortunately the case that each year many people suffer some degree of injury resulting from the operation of barbeques. In fact, a quick internet search indicated in the United States for instance that over 18,000 people each year report to hospitals with injuries directly caused through the operation of a barbeque. Undoubtedly there would be a much larger number of minor injuries that are experienced that do not require any immediate treatment. It is reasonable to assume that the Australian experience would proportionately be on par with that in the United States.
26. Accordingly, it can be concluded that operating a barbeque does require attention to be conducted with a reasonable degree of safety. Equally however, common experience would indicate that the vast majority of occasions which occur involving alcohol use and use of a barbeque do not result in any physical harm.

27. On balance, The Panel believes that the ad does breach Section (d). While the ad is light hearted and humorous, it does:
- Depict alcohol consumption by the main character before or during the activity.
 - Tending to a barbeque is an activity which requires alertness and awareness of the inherent risk.
 - The inherent risk is shown as elevated by the extent of the flames engulfing the roast beef.
28. Accordingly the complaint is upheld in part in relation to section (d).