



## **ABAC Adjudication Panel Determination No. 137-8/16 & 1-17, 19-22 & 24-27/17**

**Product:** XXXX Gold  
**Company:** Lion  
**Media:** Television & Cinema  
**Complainants:** Confidential & Phillip Bell, Sandra Ross, Adam Lynagh, Leisa Smith, Tim Prowse, Michael Monahan, Judith Underwood, William Daley, Robert Turnbull, Dion Gale, Wayne Forward, Margaret Stevenson, Robert Amott, Jason Parsons & Jason Booth  
**Date of decision:** 14 January 2017  
**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 a television and cinema advertisement for XXXX Gold by Lion (“the Company”) and arises from complaints received 22 December 2016 and 3, 4, 5 and 6 January 2017.
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 complaints were received on 22 December 2016 and 3, 4, 5 and 6 January 2017.

8. The Panel endeavour 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 have 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 the marketing communication (15158).

### **The Marketing Communication**

10. The television advertisement opens at a wharf and we see a man that appears to be the owner of the boat and car walking alongside a boat named “Good as Gold” on a boat trailer hooked up to a car and running his hand along the boat smiling as a song starts and we hear the lyrics “Ooh Yeah”.
11. We then see the boat owner standing in the boat and catching a bag of ice that is thrown to him and the man pouring ice over an esky in the boat that contains 6 cans of XXXX Gold.
12. In the next scene the boat owner is standing in the boat and coiling a piece of rope.
13. In the next scene we see a boat’s motor being lowered and then the boat owner throwing a set of keys to another man wearing a white cap and saying “Thanks Cap”.
14. We then see the boat owner reversing the car with trailer and boat attached down a boat ramp as the man in the white cap stands in the boat wearing a life jacket. As the boat slides into the water two men and two women on shore cheer and clap and one says “He’s done that before”. One of the men is holding a fishing rod.
15. In the next scene the boat is on the water. We see two people opening cans of cold XXXX Gold and then the boat owner handing a bowl of food to a man holding a can and saying “Look at this” as the man in the white cap seated at the steering wheel of the boat looks on holding a bottle of water. The bowl of food is handed to one of the women and a can of the product is thrown to the boat owner who takes a sip as someone says “It doesn’t get any better than this”. Each of the five passengers are holding a can of the product and the Captain is holding a bottle of water.
16. In the next scene the boat is seen from a distance where it appears to be moored in calm water. The camera moves up so we no longer see the boat and the text “TAKE IN THE GOLD” appears in the sky below the XXXX Gold logo with the drinkwise logo in the top right corner, “XXXX.COM.AU” in the bottom left corner and “GOOD AS GOLD” in the bottom right corner.

## **The Complaints**

17. The complainants raise the following concerns:
- The driver/person in control of the boat is consuming alcohol which is unsafe and illegal;
  - The passengers in the boat are consuming alcohol which is unsafe as:
    - Weather conditions can change quickly;
    - No-one is wearing a life jacket;
    - Maritime safety organisations have been campaigning to convince boaters to refrain from drinking alcohol whilst on water and to always wear a lifejacket for safety reasons; and
    - The ad shows six people on a boat that appears to be designed to carry 4 people, thereby showing an overloaded boat which is dangerous.
  - Unsafe boat launching procedures are shown with someone on board the boat while the boat is being reversed down the boat ramp and still on the trailer;
  - Beer is loaded onto the boat before food;
  - The ad shows a man “pay off” another person with a beer in a public place, with an indication the men are about to open and drink the beer in a public place, which is not allowed in most states in Australia.
  - The owner of the boat and car that it was launched from is shown drinking beer with others on the boat. It is reasonable to assume that the members of the boating party will load the boat back onto the trailer and drive home after having consumed alcohol, therefore also promoting drinking and driving.
  - The depiction of consuming alcohol while boating is encouraging irresponsible behaviour, namely consumption of alcohol during water activities, which is dangerous and irresponsible.

## **The ABAC Code**

18. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (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

19. The Company responded to the complaint by letter dated 9 January 2017. The principal points made by the Company were:

- The advertisement that is the subject of this complaint is a TVC for XXXX Gold. The campaign is "Take in the Gold" and the TVC shows a man getting a boat ready to depart the dock. We see the man fill an esky of 6 beers full of ice and also reeling in the line. We then see the captain arrive and the man throws the keys of the boat to the captain and says thanks skipper. The captain is then in a life jacket managing the boat while the motor is on and being steered into the water. The TVC then shows the guests on the boat sitting down having one XXXX gold each and eating prawns and everyone is in a safe and social and relaxed environment. The driver of the boat is sitting there not drinking throughout the TVC. The campaign is all about taking in the golden, engaging and sociable moments with friends and family in the great Australian outdoors.
- Lion does not consider that the advertisements breach any section of the Alcohol Beverages Advertising Code (ABAC) or any other advertising code.
- Lion takes water safety very seriously as well as community concerns around water safety especially at this time of year. We understand that life jackets are a key safety feature in recreational boating and must be carried on board at all times, however; it is not a prevailing community standard for them to be worn in the circumstances featured in the advertisement subject to the complaint. During production of this advertisement, Lion worked closely with its legal counsel and external legal advisors, Baker & McKenzie, to ensure it complied with the maritime safety regulations for each Australian State and Territory and the Australian Association of National Advertisers Code of Ethics (Code). As this is a national campaign, and despite the laws governing the wearing of life jackets not being harmonised, we ensured that the advertisement complied with the regulations in each jurisdiction. Lion also worked closely with an ABAC/AAPS pre- vetter throughout the process.
- Maritime safety regulations across Australia require a life jacket to be carried in the appropriate size and type for each person on board the vessel. There is no legal requirement to wear a life jacket in circumstances where a recreational boat is stationary and in safe calm waters, as depicted in the ad. When the boat is being lowered into the water and the motor on, we do see the captain in the boat wearing a life vest. When we see the guests, the boat is stationary, the motor is off and the people are in a calm safe environment. In Lions opinion, prevailing

community standards in respect of the requirement to wear life jackets reflect the maritime safety laws in each jurisdiction. That is, the Australian community would reasonably require a life jacket to be carried for each adult on board but would not expect an adult to wear it when the motor is not on and the water conditions are calm. When we think of community standards, we must think of the thousands of boats that leave our shores every day similar to the one depicted in this advertisement and, while life jackets are stored on board those boats, in a safe calm social setting, life jackets to be worn are not mandatory and are only required to be on the vessel and used in dangerous conditions or in the case of an emergency.

- The advertisement shows the passengers of the boat engaging in a fun, sociable and safe environment. To show that the boat is still, the driver of the boat is visibly calm, at ease and sitting back in his seat with his hands removed from the wheel, drinking a bottle of water, while gazing out over the water while his passengers socialise and take in the golden moments with friends and family on board. The water is still and calm and there is no indication of any motion on the boat. No one is in danger and there is no sign of distress. No one is swimming or is intending to go swimming; No one consuming alcohol is operating heavy machinery, as the boat has a designated driver.
- Numerous complaints highlight that the driver is consuming alcohol. If you watch the TVC we see the guy throw the keys to the boat to the captain and then we see the captain sitting at the wheel drinking water. The driver is not drink driving and is not promoting drink driving. We also disagree that the advertisement undermines safety messaging around alcohol and water. There is nothing in this advertisement that alludes to irresponsible consumption of alcohol. The number of cans of mid-strength XXXX Gold depicted in the advertisement is limited to six cans (less than 1 standard drink per person), and a bottle of water is very clearly placed next to the steering wheel for the driver of the boat who is not drinking. No one on the boat is or looks drunk or acting in a dangerous or irresponsible way. They are in a safe environment enjoying a sociable moment with friends.
- Numerous complaints also mention that it can reasonably be implied that the driver and/or passengers will need to load the boat onto the trailer and drive home, thereby encouraging drink driving. The driver of the boat is responsible and is the designated driver. There is only six cans of beer on the boat for 6 people and food and they could be on the boat socialising for more than 4 hours. We are aware of the ABV volume that is designated for government and drink driving laws and in no way would we encourage people to drink on a boat and drive home.

- As a responsible marketer, Lion has demonstrated a long-standing commitment to upholding both the letter and intent of the ABAC and AANA Codes. Lion maintains strict internal and external processes to ensure this compliance. As part of Lion’s marketing approvals processes, this commercial for XXXX Gold was subject to:
  - Internal 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 its adherence to all relevant advertising codes;
  - Review and approval through ABAC’s external and independent pre-vetting service (AAPS) at both concept and final stages, receiving approval before going to market.

### **The Panel’s View**

20. This determination concerns a television advertisement for XXXX Gold and is part of a wider campaign by the Company entitled “Take in The Gold”. The Panel has considered a complaint about a billboard as part of the same campaign in Determination 134/16 dated 20 December 2016.
21. The advertisement has attracted a large number of complaints, the majority of which express concerns that the advertisement is showing alcohol use in conjunction with the operation of a boat in a manner which may encourage unsafe practices and irresponsible behavior.
22. The concerns specifically go to the following points:
  - that a person in charge of a boat is consuming alcohol which is illegal and unsafe;
  - that the passengers on the boat are consuming alcohol which is unsafe;
  - the boat is of inadequate size to safely accommodate the number of passengers and the passengers are not wearing lifejackets;
  - the boat was unsafely launched;
  - the scenario depicted suggests that a motor vehicle will be used after the conclusion of the boating activity and since alcohol is being consumed on the boat, this promotes drink driving.

23. The Company has provided a detailed response to the complaints. It argues:
- that the skipper of the boat does not consume alcohol;
  - the passengers consume only a moderate amount of a mid-strength beer and this consumption is in conjunction with the consumption of food;
  - the use of the boat is depicted in a manner which is consistent with applicable Maritime Safety Regulations given the weather conditions;
  - the skipper who does not consume alcohol is the “designated driver” for the use of the motor vehicle after the boating activity which in turn would be well after any effects of alcohol consumed on the boat would have passed.
24. The relevant ABAC standard provides that alcohol consumption is not to be shown before, or during any activity that for safety reasons requires a high degree of alertness or physical co-ordination. The control of a boat and the use of a motor vehicle are clearly activities captured by this standard.
25. In assessing if a standard has been breached, the Panel is to have regard to the probable understanding of the advertisement by a reasonable person taking the contents of the ad as a whole. The reference to the “reasonable person” is drawn from the common law system and means that the attitudes, beliefs, values and opinions of the majority of the community is to be the benchmark.
26. It appears that a number of the complainants believe that the main character in the advertisement, who is seen tending the boat on land and launching the boat from a ramp into the water, is subsequently shown in control of the boat on the water. This character is shown drinking the product on the boat at sea and, naturally enough, this has caused concern amongst the complainants. The advertisement however does not show this. In fact, it shows the main character throwing the keys of the boat to another man, who he calls ‘Cap’ and it is this man who has control of the boat on the water. This man does not drink alcohol and is shown (albeit in a very brief scene) with a bottle of water.
27. Once the apparent misapprehension about who has control of the boat on the water is corrected, then many of the points made in the complaints cannot be sustained.
28. The Panel appreciates that the complaints are genuine and that boat safety is every bit as important as road safety. That said, the Panel does not believe the advertisement to be in breach of standard 3(d) or to be encouraging irresponsible behavior in breach of standard 3(a)(ii). In reaching this conclusion, the Panel has noted:
- the advertisement is set on a sunny clear day and the conditions shown at sea are calm;



- alcohol use is depicted on the water while the boat is anchored. No alcohol use is implied prior to the launch of the boat;
- the main character who is seen launching the boat does not consume alcohol before or during the launch of the boat;
- it is established that the “Captain” of the boat on the water is not the main character but another man who is called “Cap” and given the keys to the boat prior to the launch of the boat;
- on the water, moderate alcohol consumption occurs, established by the loading into the boat’s esky of only 6 cans of beer and one can per person is shown consumed on the boat;
- the person in control of the boat on the water does not drink alcohol and is shown with a bottle of water;
- prevailing weather conditions at sea do not suggest life jackets are required as per State Maritime regulations;
- it is not clear who drove the car and boat trailer to the ramp and nor is it clear if a motor vehicle will be used and if so by who after the boating trip is concluded. As a result, it cannot fairly be concluded that the main character will drive the vehicle.

29. Accordingly, the complaints are dismissed.