



ABAC Adjudication Panel Determination No. 32/18

Product: XXXX
Company: Lion
Media: Outdoor
Complainant: Ms Edmunds, Public Health Advocacy Institute of WA
Date of decision: 9 April 2018
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Jeanne Strachan
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns the content and placement of XXXX advertising during a One Day International cricket match on 28 January 2018 by Lion (“the Company”) and arises from a complaint received on 22 February 2018.
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. 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 the other codes as well as meeting the standards contained in the ABAC.
4. For ease of public access, Ad Standards (AS) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by AS, 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 AS 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 22 February 2018.
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 determined within this timeframe.
9. The quasi-regulatory system for alcohol beverage marketing features independent examination of the content of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was obtained for the content but not placement of the marketing communications.

The Marketing Communications

10. The complainant refers to promotional activity for XXXX Gold occurring at the Optus Stadium during a one day international cricket match.
11. The first activity was the screening of video explaining a 'crowd catch' promotion:
 - a) The video opens with former Australian Cricket player, Adam Gilchrist standing on a beach wearing a white polo shirt with the XXXX Gold logo on his left chest and a gold coloured XXXX Gold cap. He says "XXXX Gold is giving you the opportunity to win \$10,000 this summer. All you've got to do to win is get yourself a goldie cap (a gold panel with a XXXX Gold cap slides onto the left side of the screen), wear your goldie cap to an Australian men's test or one dayer (The text "Test or ODI" appears below the cap and the gold panel with the cap and text slides to the right of the screen) and when a batsman smacks a 6 (The text below the cap is replaced with "6!") be the one to catch it wearing your goldie (the gold panel slides off the right off the screen and appears again on the left of the screen just with the cap) and XXXX Gold will give you \$10,000 (a fan of \$100 notes appears under the visor of the cap with the text "\$10,000"). How good is that (the gold panel slides to the right of the screen and then off).
 - b) To get yourself in the mood check out some of the best and worst crowd catches over the years. The XXXX Gold logo flashes up and disappears as the screen changes to snippets of cricket footage and in between each snippet with the XXXX Gold logo appearing in the top right corner throughout.
 - c) At the conclusion of the footage of the cricket, Adam Gilchrist reappears and says, "So get your goldie on and get to a match". The final screen is a cricket ball against a gold background with the XXXX logo and the text "Take in the Gold Official Beer of the Australian Cricket Team" across the ball and with terms and conditions in small print below.
12. The second activity involves electronic hoarding advertising around the boundary of the stadium including:
 - a) XXXX Gold logos next to the text "WICKET" and an image of a ball hitting a wicket, displayed when a wicket was taken during the game.
 - b) XXXX Gold logo with the text "Australia's #1 Beer".

The Complaint

13. The complainant is concerned that:
 - a) The first activity:
 - Appeals to minors as it features Adam Gilchrist, a loved cricket icon and it is encouraging an activity that anyone can be part of – catching a ball at a cricket game; and

- Implies that alcohol is linked to the achievement of success through wearing the XXX cap and making the crowd catch.
- b) The second activity being visible to large numbers of minors in breach of the ABAC Placement Rules.

The ABAC Code

14. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:

(b)(i) have Strong or Evident Appeal to Minors

(b)(iv) be directed at Minors through a breach of any of the Placement Rules

(c)(ii) show (visibly, audibly or by direct implication) the consumption or presence of an Alcohol Beverage as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success.

15. Part 6 of the ABAC Code includes definitions including:

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 Alcohol Guidelines).
- (ii) If a media platform on which a Marketing Communication appears has age restriction controls available, the Marketer must utilise those age restriction controls to exclude Minors from the audience
- (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

Strong or Evident Appeal to Minors means:

- (i) likely to appeal strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;

- (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

The Company's Response

16. The Company responded to the complaint by letter dated 7 March 2018. The principal points made by the Company were:

- a) The advertisement does not breach Part 3 (b)(iv) of the Code by directing the marketing at minors by a breach of the placement rules. The live cricket ratings for the 2016-2017 season indicate approximately 90% of viewers watching the Big Bash, Test cricket, One Day International and 20/20 were over the age of 18. Furthermore, Oztam data states that of the majority of the test cricket audience (92%) who are over the age of 18, almost 50% of these are 55+. On the basis of these statistics, we do not believe the XXXX advertisements featuring Adam Gilchrist at the One Day International cricket test match were in breach of the code.
- b) Lion abides by the ABAC code by ensuring its promotions and marketing material are not targeted at, or likely to appeal to people under the age of 18. Consumers could only obtain the branded hat through the purchase of alcohol, all of which occurs in a licenced venue where you must be over the age of 18. Additionally, to order the hat you needed to download the XXXX App which has an age gate mechanic that prevents minors from downloading and installing it to their mobile device. Consumers also required a credit card to order the branded hat once they had access to the App.
- c) As part of the 10K catch video with Adam Gilchrist, it included abbreviated terms and conditions that directed viewers to the XXXX website where consumers would have seen that they must be over the age of 18 to be eligible for the prize. Also to be eligible for the prize, consumers needed to be a registered user wearing the hat, and considering alcohol was not required to be present for those to win, it is in no way suggesting that alcohol would be attributing to the success of a catch if it were to happen.
- d) The placements of these adverts within the Optus Stadium in Perth are also in compliance with the Outdoor Media Association Alcohol Guidelines.
- e) 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, the advertisements for XXXX were 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

Introduction

17. On 28 January 2018, a one day international cricket game was played at the new Perth sports stadium known as the Optus stadium. During the match, the Company engaged in promotional activity for its product XXXX Gold. This activity consisted of electronic hoardings that were located around the stadium as well as the conduct of a promotion, whereby it was possible for a spectator at the game to win \$10,000 if a cricket ball hit into the crowd was successfully caught.
18. The complainant, Ms Melinda Edmunds, is a senior coordinator with the Public Health Advocacy Institute of Western Australia located within Curtin University. The Institute is a public health advocacy body which promotes projects and research to improve public health advocacy practice and to strengthen the evidence base for health advocacy activities in Western Australia. One of the Institute's priority areas is alcohol use in the community with a particular focus on adult use of alcohol. The Institute advocates that alcohol sponsorship of sport and alcohol advertising during live sports telecasts should be prohibited.
19. The Institute is concerned about the Company's promotional activities at the one day cricket game and poses questions as to whether these activities are consistent with provisions of the ABAC. As a result, this determination will consider the following matters:
 - a) The sponsorship of sport by alcohol companies and the ABAC requirements;
 - b) The placement of advertising at the stadium and its consistency with the ABAC Placement Rules; and
 - c) Whether the crowd catch promotional activity is in breach of the ABAC content standards.

Alcohol sponsorship of sport

20. Consistent with the Institute's public position, the underlying argument advanced by the complaint is that the sponsorship of sport by alcohol companies is contrary to the public interest and should not be permitted. The issue of the desirability or otherwise of permitting alcohol companies to be associated with sports and cultural activities is a legitimate issue of public debate. It is, however, a question which is

well beyond the remit of the ABAC Adjudication Panel to decide. Ultimately an issue of this nature is a matter to be resolved by Australian governments and parliaments.

21. For its part, the ABAC states that the standards contained in the Code do not apply to sponsorship. Sponsorship is defined as any agreement involving payment by a marketer to support a sporting or cultural property, event or activity, in return for which the sponsored party agrees to be associated with or promote the sponsor's alcohol beverage or outlet. Sponsorship includes naming rights of events or teams and the inclusion of a brand name and/or logos at an event venue or on uniforms of participants.
22. This means that the relationship between the Company and Cricket Australia which goes to the association of XXXX Gold and the one day international cricket series is beyond the scope of the Panel's jurisdiction. Further, the direct manifestation of the existence of the sponsorship agreement, such as brand logos on uniforms or the placement of a brand name at an event venue is not subject to the Code requirements.
23. This does not mean however that the ABAC provisions have nothing to say in relation to sponsorship. Specifically, any marketing which flows from the existence of a sponsorship arrangement does not fall within the sponsorship exclusion. Accordingly, it means that the Panel can assess the video played at the ground promoting the crowd catch competition as this is not a sponsorship agreement or the direct manifestation of the agreement, but rather a marketing promotional activity.

Stadium advertising and the Placement Rules

24. The complainant argues that the Company's placement of its branding on electronic hoardings located at the ground is in breach of the ABAC Placement Rules. The Placement Rules have been introduced into the Code relatively recently in November 2017. In broad terms, the aim of the Placement Rules is to have better direction of the marketing of alcohol beverages towards predominantly adult audiences. This complements the long standing ABAC content standards that apply to alcohol marketing irrespective of where the marketing communication might be located.
25. The Rules lay down requirements for the placement of alcohol marketing through various mediums such as outdoor advertising, print platforms, traditional electronic media such as television and radio, as well as digital media. The marketing activity which occurred at the stadium could fall within the categories of outdoor marketing in relation to the electronic hoardings and the crowd catch video is also capable of being considered in conjunction with the Placement Rules.
26. It is arguable that the electronic hoardings on the boundary of the playing area fall within the definition of 'sponsorship' and hence are not subject to the Placement Rules. The Company however did not make this argument in responding to the complaint and the Panel has proceeded to assess both the hoardings and the crowd catch video against the Placement Rules.

27. It would be fair to say that the Placement Rules envisage marketing occurring via media rather than promotional activities occurring within a sports stadium. It would seem the two rules which are relevant to the stadium based activities are:
- a) Rule 1 – which provides that outdoor advertising must comply with the outdoor media association guidelines; and
 - b) Rule 3 – which provides that a marketing communication may only be placed where the audience is reasonably expected to comprise at least 75% adults.
28. The interior of the sports stadium is not within 150 metres of a school and hence any advertising within the stadium is not in breach of the Outdoor Media Association Guidelines and therefore not in breach of Placement Rule 1. Placement Rule 3 requires an assessment of the likely audience demographics attending the one day cricket game.
29. The Panel has considered data regarding the audience of cricket games in Determinations 9/18 and 121/17. The data considered in those Determinations establishes that television audiences of cricket games are predominantly adult and in excess of the 75% threshold required by Placement Rule 3.
30. The Company supplied data which went to the age of the audience watching cricket including one day internationals on television. This also indicates that approximately 90% of viewers were aged over 18 years old. The Company did not supply data as to the age make up of persons actually attending the game, but rather it is assumed the spectators at the ground would match the television audience.
31. A search of publicly available information indicated that 53, 781 people attended the game on 28 January, but no age breakdown of the spectators could be located. On the basis of the available data, including Australian census data of the overall population, it seems reasonable to expect that the proportion of minors attending the game would have been well below 25% of the audience. Hence, Placement Rule 3 has not been breached.

The crowd catch promotion

32. The complainant has contended that the crowd catch promotion, and specifically the video screened at the stadium would breach the ABAC standard relating to appeal to minors. Section 3(b) of the Code provides that an alcohol marketing communication must not have strong or evident appeal to minors. Strong or evident appeal might arise if the marketing:
- a) Is likely to appeal strongly to minors;
 - b) Specifically targeted minors;
 - c) Had a particular attractiveness for a minor beyond the general attractiveness it has for an adult; or
 - d) Uses imagery, designs, motifs, animation or cartoon characters that are likely to appeal strongly to minors.

33. The points raised by the complainant are that:
- a) The video promoting the crowd catch activity featured the 'loved' cricket icon Adam Gilchrist;
 - b) The activity can be participated in by all ages i.e. catching a cricket ball; and
 - c) Catching the ball is linked to success and the achievement of a substantial prize i.e. \$10,000.
34. The Company has argued that the promotional activity is not targeted at or likely to appeal to minors and points out:
- a) The promotion was only open to adults;
 - b) The gold cap could only be obtained by an adult; and
 - c) The prize could only be claimed by an adult.
35. In assessing if an ABAC standard has been complied with, the Panel is to have regard to the probable understanding of the marketing item by a reasonable person taking the content of the marketing activity as a whole. The reference to a reasonable person means that the attitudes, opinions and sensibilities of the majority of the community are to be the benchmark.
36. It can be accepted that the actual promotion could not result in an under 18 years old person 'winning' the prize for taking a catch for the reasons outlined by the Company. This, however, is not the decisive issue. Rather, the Panel needs to assess the appeal of the promotional activity to minors.
37. In Determination 102/17, the Panel considered the strong or evident appeal of a competition using a smart device run at an AFL finals game. Some considerations in that decision were:
- a) The clarity of the message that the activity was not open to minors;
 - b) The presence of celebrities or concepts that could be fairly said to be directed to younger people; and
 - c) Whether the images used on the screen were visually exciting or contained elements strongly appealing to minors.
38. Obviously, each case has to be assessed on its own merits, with the earlier determination dealing with the adoption of a 'game' like feature on a smart device and the activity occurring at one discreet time. Here, the activity involves no electronic devices and the potential for a ball to be hit into the crowd arises at each delivery throughout the game and not at a single point.
39. On balance, the Panel does not believe that activity has strong or evident appeal to minors. In reaching this view, the Panel has noted:

- a) While Adam Gilchrist is a respected figure, his appeal would be stronger with an older audience given he last played international cricket in 2008, meaning under 18 year olds would have been 8 years or younger when Mr Gilchrist was last playing cricket for Australia;
 - b) The video explains the activity and does not contain elements likely to strongly appeal to children or adolescents; and
 - c) The activity requires the wearing of the cap, which apart from having some limitation on being accessible to under 18 year olds, is not considered to be of a colour or design to have particularly strong appeal to minors.
40. The second aspect of the complaint in relation to the ABAC standards goes to the argument that the crowd catch promotion is linking alcohol use with the achievement of success. Section 3(c) of the Code states that an alcohol marketing communication must not suggest that alcohol is a cause or contributor to the achievement of personal or social success.
41. The key concept in this standard is causation. It is permitted to associate alcohol with successful people and successful events. It is not permitted to suggest that the reason why a person is successful is because of the use of the alcohol.
42. In this instance, the crowd catch activity is being run by the Company and certainly the product name and brand is associated with the activity and the prospect that a person catching a ball struck into the crowd could win \$10,000. The success, however, derives from the skill of catching the ball and not from the consumption or presence of alcohol. It is not implied that alcohol use will lead to success in catching the ball.
43. Accordingly, the complaint is dismissed.