



ABAC Adjudication Panel Determination No. 3/20

Product: XXXX Gold
Company: Lion – Beer, Spirits & Wine Pty Ltd
Media: Television
Date of decision: 30 January 2020
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 an advertisement for XXXX Gold by Lion – Beer, Spirits & Wine Pty Ltd (“the Company”) with the Australia v NZ Test Match on 29 December between 10am and 1pm on Channel 7 and arises from a complaint received on 2 January 2020.
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 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 meeting the standards contained in the ABAC.
 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 Ad Standards under the AANA Code of Ethics and the ABAC Panel under the ABAC if issues under both Codes are raised.
 6. The complaints raise concerns under the ABAC Code and accordingly are within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaints were received on 2 January 2019.
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 complaint was determined within this timeframe.

Pre-vetting

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 of the advertisements and product placement within the Backyard Banter segment.

The Marketing Communications

10. The complaint raises two promotions for XXXX Gold. The first was an advertisement broadcast at various times during the Boxing Day cricket test match played from 26 to 29 December 2019. The advertisement is described as follows:

- The advertisement opens with a man standing outdoors smiling and slowly lifting a can of XXXX Gold to his mouth when a tennis ball bounces on his head causing him to turn quickly spilling some of his beer;
- A group of people stand in a backyard setting (three holding cans of XXXX Gold and one holding a cricket bat) looking at the man as a voiceover says “Beer and cricket didn’t always go down so well.”
- We then see a series of balls being hit that the fielders don’t catch as they are holding or sipping on cans of XXXX Gold.
- Then a higher ball is hit that bounces and is caught in one hand by one of the fielders who questions “one hand, one bounce?”. This is repeated by the other participants and a neighbor most of which are holding a can of XXXX Gold.
- The group are shown cheering “one hand, one bounce” and holding up cans of XXXX Gold as the voiceover says “And ever since XXXX Gold and cricket have gone hand in hand.” In the final scene we see 6 cans of XXXX Gold on an esky with the XXXX Gold logo superimposed to the side and the text “Grab your 6 classic edition cans today while stocks last” superimposed under the cans.



11. The second promotion was in the form of the placement of XXXX Gold in a segment screened during the lunch break of the test on day four- 29 December 2019. The segment is entitled 'Backyard Banter' and involves a number of former Australian test cricket players. The segment is outlined below:

- The segment is introduced with a cricket ball and clear stumps and then the headline “Backyard Banter” followed by the text “Presented by XXXX Seven’s Telecast Sponsor”.
- Footage with the “Get the Facts Drinkwise” logo on the bottom left corner of Glenn McGrath bowling a tennis ball in a backyard setting, and bowling out Greg Blewett as Jason Gillespie is wicket keeper with the men using a light, plastic backyard wicket set and bat. The camera then moves to Damien

Fleming holding a can of XXXX and clapping and pointing and then to a group of men sitting at an outdoor table in a backyard with a XXXX table and can in the foreground. The footage is accompanied by a voiceover “Ah how good is this we are catching up under the Australian sun for some beers and some laughs..”

- The camera then focuses on 6 men sitting at the table with food and cans of XXXX Gold in front of them as the following dialogue continues with relevant cricket footage interspersed:
 - ..some backyard banter with some of the best in the business, here to tell us where did the holding the ball up when you take a 5- come from, was that a you making it all about you thing? (James Brayshaw)
 - No, well I'm here with two other card carrying members of the FBC, fast bowling cartel (Glenn McGrath)
 - Flems not, he's medium (James Brayshaw)
 - Did you clock 144 in a test match big boy? (Damien Fleming)
 - Did you outclock him in a test match? (James Brayshaw)
 - Both of them, yes (Greg Blewett)
 - [banter]
 - So we're in England, 2001 and so we're just chatting and we think. We're sick and tired of batsman, batsman raise their bat everything they get, 50, 100, when they walk off they're raising their bat. Fast bowler what's he get, he gets 5- he gets nothing, or 10 wickets, as he walks out the gate, oh thanks, no worries, off you go. We said we're sick of this, from now on whenever a bowler takes 5 wickets, raise the ball to the crowd, get a little bit of acknowledgment which we think's fair enough. So we decided, ok this test series, whoever gets 5- raise the ball. Off we go to Lords and I was lucky enough to jag 5 in the first innings so I get the ball off the umpire I'm standing there I'm raising it to the crowd like this, Dizzy and the boys are standing around clapping and the batsman are going what's he doing. (Glenn McGrath)
 - And the crowd aren't into it yet, you know what I mean? But now everyone does it. (Damien Fleming)
 - That's my favourite thing now when I watch cricket, and they get 5 they get the ball and they raise it.. Glenn McGrath)
 - But early on it was a bit of a thrill, but you'd do it and you'd get like..I remember you looking really sheepish though... (Damien Fleming)
 - So pitch, didn't it occur to you that the great D.K. Lillee probably took 20 5- and never raised the ball and sort he got through alright. (James Brayshaw)
 - But we thought something for the bowlers set a new tradition and its been carried forward from all the bowlers now, so now you see a batsman get 50, raise his, who cares, bowler gets 5- [I like it], well done (Glenn McGrath)
- The segment concludes with a cricket ball and clear stumps and then the headline “Backyard Banter” followed by the text “Presented by XXXX Seven's Telecast Sponsor”.



The Complaint

12. The complainant is concerned about:

- a) an advertisement depicting a group of men playing backyard cricket with cans of XXXX Gold in their hands due to:
 - the frequency of the advertisement;
 - children viewing the cricket being exposed to the advertisement; and
 - the actors being made to look more socially attractive and with increased sporting prowess as they play backyard cricket with a beer in their hands.

- b) a Panel discussion following the ad where eminent cricketers are discussing their sporting highlights with XXXX Gold cans clearly displayed and set up around the table in front of each player due to:
 - failing to make it clear it is a sponsored segment;
 - placing the cans in front of each player while discussing their sporting brilliance clearly sets up an association with beer and the achievement of sporting success;
 - the frequency of the promotion; and
 - children viewing the cricket being exposed to the promotion.

The ABAC Code

13. 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
 - (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

14. 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

The Company's Response

15. The Company responded to the complaint by letter dated 23 January 2020. The principal points made by Lion were:
 - a) We reiterate our commitment to the ABAC Scheme and take our obligations to responsibly promote our products very seriously. However, for the reasons set out below, and with respect to the complainant, we submit that there has been no breach by Lion – Beer, Spirits & Wine Pty Ltd ("**Lion**") of Part 3(b)(iv) or Part 3(c)(ii) of the Code and ABAC Complaint 3/20 should be dismissed by the ABAC Panel.
 - b) Lion, through its brand XXXX GOLD, has worked with its partners, Cricket Australia and Channel 7, to produce the 'Backyard Banter' series, which aired during the live broadcast of the Australia v New Zealand Test Series on Channel 7. This broadcast segment is part of Lion's sponsorship arrangement with Cricket Australia and as Channel 7's telecast sponsor. The segment is about great moments in Australian cricket, first and foremost, rather than being an advertisement for XXXX GOLD.

- c) Lion is not the producer of the Backyard Banter segment and does not have any control over the format or the actual content or dialogue of the segment. We do not have any level of control over execution during broadcast. Product placement is one of the benefits provided to Lion and the XXXX Gold brand as a sponsor of Cricket Australia. Lion is cognisant of the unique challenge that television and product placement bring to the ABAC landscape. Although Lion is not a producer of the segment, we still take all possible steps to make sure that any material involving our product is marketed in a responsible manner in accordance with ABAC. In this instance, and whilst the XXXX GOLD brand appears throughout the segment in question, no consumption of the product takes place at any point and the product remains visibly unopened to ensure no irresponsible consumption is promoted.
- d) The 'Backyard Banter' segments were broadcast on a number of days throughout the Australia v New Zealand Test Series on Channel 7. For your reference, we have **supplied** a table showing the dates and times at which these segments were aired, as well as the corresponding audience composition data. Importantly, the audience composition was at least 80 per cent 18+ for each timeslot that the segment was broadcast.
- e) The segment is properly identified as a sponsored segment at numerous points – both by the commentator prior to the segment airing, who states: "Backyard Banter, thanks to XXXX", and with the on-screen message: "Presented by XXXX, Seven's telecast sponsor," at the beginning of the segment, and at its conclusion (each, a "**Sponsored Announcement**"). Lion claims the ABAC 'sponsorship' exemption in relation to the Sponsorship Announcements on the segment. However, having regard to the Panel's Determinations 78/17, 99/17 and 56/18, Lion accepts that the placement of XXXX Gold product on the segment is considered to be "marketing" under the remit of the ABAC Code and does not fall within the sponsorship exemption of the ABAC Code (despite it being a sponsorship arrangement in practical terms). However, for the reasons set out in this Letter, we do not believe the program depicted either alcohol use or branding of the product inconsistently with the Code Standards.
- f) Part 3 (b)(iv) of the ABAC prohibits marketing communications from being directed at minors through a breach of the Placement Rules. We refer the ABAC Panel to parts (i) and (iii) of the definition of 'Placement Rules' set out in Section 6 of the ABAC, and confirm that the broadcast of the Advertisements:
- complied at all times with the alcohol provisions in the Commercial Television Industry Code of Practice (the "**CTICP**"); and
 - appeared during programs that have a higher proportion of adults in their audience (at least 80%) than the proportion in the general population.
- g) The placement of the Backyard Banter segment and XXXX Gold backyard cricket TVC (together, the "**Advertisements**") during the broadcast of the Australia v New Zealand Test Series on Channel 7 each appeared in timeslots expressly permitted by the CTICP. Section 6.2.1 of the CTICP

provides that commercials for alcoholic drinks may be broadcast only during specified times which are:

- In the “M” and “MA15+” classification zones (except between 5.00 am and 6.00 am, and 7.30 pm and 8.30 pm);
- as an accompaniment to a Sports Program on a weekend or a public holiday; and
- as an accompaniment to the broadcast of a Live Sporting Event broadcast across more than one licence area if, relevantly, the licence area in which the Live Sporting Event being broadcast is held for an event taking place in Australia.

The Advertisements featured during the Australia v New Zealand Test Series sporting events that were played locally in Australia and all broadcast live-to-air by Channel 7 across more than one licence area. The Advertisements were therefore broadcast in accordance with the advertising restrictions for alcoholic beverages set out in Section 6.2.1(c) of the CTICP.

- h) In addition, Lion takes all reasonable steps to ensure our alcohol marketing is directed to adults and does not appear in media where children and young people make up a significant proportion of the audience. Before booking spots on television for the advertisement of our alcoholic beverages, Lion’s internal policy mandates that the program must have an audience profile of at least 80 per cent of people who are 18 years or older. The live cricket ratings for the time at which the Advertisement referred to by the complainant went to air (1.01pm AEST on Sunday 29 December 2019) indicate that 90.19 per cent of viewers watching the Australia v New Zealand Test Series on Channel 7 were over the age of 18. We attach audience composition data provided by OzTAM Pty Limited (“**OzTAM**”) to support this. As the Panel will be aware, OzTAM is an independent company owned by Australia’s major commercial television broadcasters (the Seven Network, Nine Network and Network 10) to provide reliable and up-to-date data to the industry, including data to help us understand viewer behaviour (including demographics).
- i) On the basis of these statistics, Lion does not believe the broadcast of these sporting events was primarily aimed at minors.
- j) The ‘Backyard Banter’ segment does not show or directly imply the consumption or presence of alcohol as a cause of or contributor to social or sporting success, and therefore does not breach Part 3 (c)(ii) of the Code. Lion makes the following submissions in this regard:
- Whilst XXXX GOLD product is present on the table at which the Cricket greats are seated, there is also food on the table;
 - No consumption of the product is depicted throughout the segment;
 - The cans of XXXX GOLD on the table are all unopened and ultimately stage props (serving a similar purpose to the food props also in the set);
 - The Australian Cricket greats are clearly discussing moments of sporting success from the past, which are of historical significance.

They are reminiscing, rather than celebrating success in the moment. This is emphasised by the flashback footage and nostalgic tone of their conversation;

- showing alcohol product live on television while discussing sport is not irresponsible behaviour and does not suggest a link between alcohol and sporting success in the context shown;
 - In the flashback footage, there is no consumption of or reference to alcohol, nor is there any alcohol present;
 - The average person would not see the presence of XXXX GOLD in this context as a cause or contributor to social or sporting success, given the moments being discussed clearly took place many years ago.
- k) Similarly, Lion contends that the Backyard Cricket TVC does not breach Part 3 (c)(ii) of the Code for the following reasons:
- The “backyard cricket” segment shows a group of mates playing a game of backyard cricket with a can of retro XXXX Gold in one hand. The fieldsmen are comically depicted struggling to keep their XXXX Gold in hand and catch the ball to successfully get the batter out. When the ball bounces towards one player and he catches it in one hand (instead of two), the new rule of “One hand, one bounce” is announced and celebrated. This storyline makes it clear that the change in rules to “one hand, one bounce” shows the success of the fieldman successfully catching the cricket batter out, and not the consumption or presence of the XXXX Gold;
 - The TVC clearly shows XXXX Gold as incidental to a friendly and lively social game of backyard cricket. The product is present through the duration of the content, and is not shown to contribute to any success in the game of backyard cricket (in fact, it is comically shown as an inhibitor of the game);
 - the depiction of actual alcohol consumption is moderate, and it is not contrary to an ABAC standard to associate alcohol with a friendly and safe game of backyard cricket in the context shown.
- l) As a responsible marketer, Lion takes the placement of its advertisements very seriously and has demonstrated a long-standing commitment to upholding both the letter and spirit of the ABAC and AANA Codes. Lion maintains strict internal and external processes to help ensure this compliance.

The Panel’s View

16. Cricket is one of Australia's national sports and traditionally the coverage of cricket in the various formats of the game is a staple of Australian free to air television broadcasts over each summer. The 7 network holds the rights to broadcast cricket and this determination concerns the airing of two promotional activities for XXXX Gold during the Boxing Day test.
17. The first marketing communication is an advertisement which was screened at various points during the test match. The complainant recognises that it is permitted to broadcast alcohol marketing during live sports events and suggests that consideration should be given to changing the regulatory settings so that

alcohol marketing can't be shown during 'children's viewing times' regardless if a sporting event is being broadcast.

18. While the viewpoint of the complainant is a legitimate opinion, it is not the responsibility of the Panel to set the regulatory standards and framework. Rather the Panel has the specific task of applying the ABAC scheme requirements as drafted, and these requirements do permit alcohol ads to be aired at times during a live sports event when the rules would not otherwise allow the ad's broadcast. The ABAC Placement Rules do however have other requirements applicable to ads shown on television with live sports. These are:
 - the ad cannot be shown with a sports program reasonably expected to have less than a 75% adult audience; and
 - irrespective of the actual audience, an ad cannot be shown with content which is primarily aimed at minors.
19. Cricket does attract a wide demographic audience, but the public ratings data consistently show that television broadcasts of cricket are watched predominantly by adults. Specific data supplied by the Company demonstrated that the Boxing Day test attracted 80% and greater adult audiences. This is consistent with other data the Panel has accessed on previous occasions regarding advertising broadcast with cricket which has always revealed a strongly adult viewership of the sport.
20. Equally a cricket test match cannot be fairly said to be content 'primarily aimed' at under 18 year olds even if the sport has broad appeal. Accordingly, the ABAC Placement Rules have not been breached in relation the advertisement.
21. The complainant raises a second point about the advertisement which goes to the content and messaging of the ad. It is argued that the ad shows men playing in a backyard cricket game holding cans of beer and implies that the alcohol is contributing to their sporting prowess. Part 3 c (ii) of the Code provides that an ad must not show the consumption or presence of alcohol as a cause of or contributor to the achievement of sporting or other success.
22. The Company contends the ad is humorous and depicts how the 'one hand one bounce' catch backyard rule emerged so that players could dismiss a batsman while still consuming their beer. It is claimed it is the rule change, not the presence of alcohol lead to the success of catching the batsman out.
23. The Panel is to adopt the viewpoint of the probable understanding of the ad by a reasonable person in assessing if a Code standard has been breached. This means the life experiences, values and opinions common in a majority of the community is to be the benchmark. A person who has a different interpretation is not 'unreasonable' but possibly their take on the ad might not be shared by a majority of the community.
24. The Panel does not believe the ad is in breach of the standard. In reaching this conclusion the Panel noted:

- the ad is lighthearted and the game depicted is clearly not a serious competition in which sporting prowess of any level is being particularly displayed or expected;
 - the presence of the alcohol is shown humorously as an obstacle not an advantage to playing the game; and
 - a reasonable person would understand the whole scenario is quite fanciful and there is no serious implication that drinking beer will help a person be successful in playing cricket.
25. The second promotional item is the 'Backyard Banter' segment broadcast during the lunch break on day four of the test match. The segment features a number of former Australian test cricketers discussing an aspect of cricket. On this occasion former fast bowler Glenn McGrath takes the lead in explaining how he introduced the practice of bowlers lifting the ball to the crowd to have acknowledged the feat of taking five wickets in an innings as the equivalent of scoring a century as a batsman.
26. The Company believes the segment should be regarded as falling within the sponsorship exemption within the ABAC. That said, the Company recognised that based on previous determinations, the Panel would be unlikely to accept such an argument and it was not pressed. The Company therefore accepted that the segment was captured by the notion of a 'marketing communication' for ABAC purposes and hence the representation of alcohol within the segment must be consistent with ABAC standards.
27. The complainant believed the segment was inappropriate as it failed to identify as a sponsored segment and the placement of XXXX cans in front of the former players set up an association between the beer and the achievement of sporting success. The Company contended the segment was identified as being 'presented by XXXX, 7's telecast sponsor' and that the placement of cans of the product in the segment would not be taken as meaning that alcohol use lead to the achievement of sporting success.
28. The segment is an example of the marketing technique known as product placement. Product placement involves a commercial relationship where an alcohol product is embedded within the storyline or content of an apparently unrelated program. For instance, if within a James Bond movie the famous 'shaken not stirred' vodka martini was shown to be made with a branded as opposed to a generic vodka. In this case the product placement is hardly subtle with cans of XXXX clearly shown on the table with the former players and the segment itself identified as being presented by XXXX.
29. There is no doubt that the segment associates the product with the cricketers and the sport of cricket. This is however not a breach of the Code standard. What is not is not permitted is the suggestion that alcohol is a reason that someone achieves success in sport. The Panel does not believe the standard has been breached noting:
- the segment was introduced and tailed as being presented by XXXX contrary to the complainant's recollection;

- there is no suggestion that alcohol was used during the games and the events the players are talking about and recalling;
 - the dialogue does not reference alcohol use or suggest that alcohol was a factor in the achievement of success; and
 - a reasonable person may well interpret the presence of the product as an endorsement of the XXXX brand by the former players but it is unlikely that a link would then be drawn that the consumption or the presence of the product was a contributor to the achievement of success on the cricket field.
30. Finally, it is noted that the ratings data showed the segment was viewed by well over 75% adults and hence was not in breach of the Placement Rule.
31. Accordingly, the complaint is dismissed.