



ABAC Adjudication Panel Determination Nos 186/20 & 208/20

Product: XXXX
Company: Lion
Media: Stadium and Subscription Television
Date of decision: 14 January 2021
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel concerns advertising for XXXX (the “Product”) by Lion (the “Company”) at the cricket. It arises from two complaints received as follows:
 - Complaint received 4 December 2020 – Advertising at the Sydney Cricket Ground (SCG) during the One Day International (ODI) between Australia & India and also during the broadcast of the ODI on KAYO Sports TV.
 - Complaint received 31 December 2020 – Advertising during the Test Match between Australia and India broadcast on free-to-air TV.
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 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 meeting 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 complaints raise concerns under the ABAC Code and accordingly are within the Panel's jurisdiction.

The Complaint Timeline

7. The complaints were received on 4 December 2020 and 31 December 2020.
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 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 content or placement of the XXXX advertisement.

The Marketing

10. The complaints relate to in stadium advertising for XXXX at the SGC during the ODI and advertising during broadcast of the both the ODI on Kayo TV and the Test on free-to-air television
11. The complaints both refer to a video advertisement for XXXX shown when a decision of the third umpire is required. The image is predominately static, showing a full glass of XXXX, communicating that a third umpire decision is underway and the nature of that decision (ie run out, no ball or clean catch). Once a decision has been made, a hand is shown moving in to pick up the full glass of XXXX, which is then removed from the screen. If the batsman is out, the hand then places an empty glass back on the screen with the word "OUT" superimposed on the glass. If they are not out, the hand then places a glass full of beer back on screen with the words "NOT OUT" superimposed.

The following screenshots are provided to assist with visualisation of the video.



The Complaint

12. The complainants object to the marketing as follows:

- *There are 100s of children watching cricket and it is disturbing to see the normalisation of beer drinking on the scoreboard.*
- *Normalising alcohol consumption during daytime Free to air TV.*
- *Showing a full glass of beer and making the audience wait for the results each time and then reflecting it inside an empty beer glass is encouraging children and adults to skull a glass of beer instead of drinking it slowly and in moderation.*
- *I believe this is getting around the advertising code of conduct and promoting beer drinking to children.*

The ABAC Code

13. Part 2 of the ABAC Code does NOT apply to:
 - (v) Sponsorship.
14. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (a)(i) show or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines;
 - (b)(i) have Strong or Evident Appeal to Minors;
 - (b)(iv) be directed at Minors through a breach of any of the Placement Rules.
15. Definitions in Part 6 of the ABAC provide:

Available Age Restriction Controls means age restriction, targeting or affirmation technologies available to restrict a Marketing Communication to Adults, but this does not require a third party platform, website or account that is not primarily related to alcohol to be age restricted in its entirety before it can be used to place a Marketing Communication.

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 Placement Policy).
- (ii) A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.
- (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.

- (v) A Marketing Communication must not be sent to a Minor via electronic direct mail (except where the mail is sent to a Minor due to a Minor providing an incorrect date of birth or age).

Sponsorship means any agreement or part of an agreement involving payment or other consideration in lieu of 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 also includes naming rights of events or teams and the inclusion of a brand name and/or logo at an event venue or on uniforms of participants (excluding branded merchandise).

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.

Company's Response

16. Lion responded to the complaint by letter emailed on 16 December 2020 and subsequent emails dated 17 December 2020, 21 December 2020 and 6 January 2021. The principal points made by Lion were:
- 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)(i), Part 3(a)(i) or Part 3 (b)(iv) of the ABAC Code and Complaint 186/20 should be dismissed by the ABAC Panel.
 - Lion would also like to preface its response to this complaint by confirming that this complaint relates to a sponsorship property in-stadium, as part of Lion's sponsorship arrangement with Cricket Australia. The ABAC does not apply to sponsorships, which, according to ABAC's own guidance notes, includes naming rights of events or teams and the inclusion of a brand name and/or logo at an event venue.

- The Advertisement referred to in the complaint did not receive Alcohol Advertising Pre-Vetting Service Approval for its content. The complaint refers to an electronic billboard activation sponsored by XXXX called the “THIRD UMPIRE”. This electronic billboard features a full schooner of XXXX, which appears when any “THIRD UMPIRE” decision is in progress. The billboard also has a static link to the DrinkWise website, which Lion is committed to including on all its marketing materials as part of its responsible marketing policy. This is in-stadium activation and therefore does not require AAPS approval for its content.
- The “THIRD UMPIRE” activation does not have strong or evident appeal to minors, and certainly does not encourage any sort of irresponsible consumption of an alcohol product. A single schooner of XXXX appears throughout this in-stadium activation, with no human subject present at any point. The emptying of the schooner is merely a measurement of time, and without any human subject present in this billboard activation, the average consumer would not perceive this as some suggestion of the time within which an individual should consume an entire schooner of beer, let alone an encouragement to “skoll” a schooner of beer.
- Part 3 (b)(iv) of the ABAC Code prohibits marketing communications from being directed at minors through a breach of the Placement Rules.
- There is no reliable, up-to-date age of audience composition data available in terms of actual individuals in attendance at the ODI between Australia and India at the SCG. However, it should be noted that due to COVID-19 restrictions on large gatherings, on 29 November 2020, the SCG was only allowed to hold 50% of its usual capacity. Lion believes the Panel should take this fact into consideration when assessing the likely audience composition of the ODI between Australia and India at the SCG.
- Cricket Australia advised by email on 18 December 2020 that 17,573 people attended the ODI on 29 November 2020, of which, 8% were children. Of the attendees, 4,390 were SCG Trust members, all of whom have been assumed to be adults.
- Lion contends that stadium patrons and live sport attendees are overwhelmingly over 18 years of age. The SCG is a licensed venue and given the nature of ODIs like the one in question are played over a long period of time, they generally attract an older audience. For this reason, the billboard activation that is the subject of the complaint was not primarily aimed at minors.

- KAYO TV is a paid subscription platform that can only be accessed by registered account holders. Individuals can only register for an account with a credit card. To apply for a credit card, you must be at least 18 years of age, and therefore the KAYO TV platform is only accessible to adults, and only those 18 years or over can consume content on the platform. There is no free version of the KAYO TV platform that can be accessed by those under 18 years of age.
- While reliable, up-to-date age of audience composition data for the broadcast of this ODI between Australia and India at the SCG on KAYO TV is not yet available, Nielsen data confirms that KAYO TV's audience composition is 100% 18 years of age, and therefore the match in question is also 100% 18 years of age.
- Foxtel audience data from the ODI on 29 November shows that 93% of the audience was 18+:

							Projection	Profile %
Total People	STV	LIVE: ODI AUS V IND GAM	10	16:01:00 - 19:45:59	1		308,307	100.00%
P 18+	STV	LIVE: ODI AUS V IND GAM	10	16:01:00 - 19:45:59	1		287,541	93.26%

- The advertising during the broadcast of the ODI between Australia and India at the SCG on KAYO TV was therefore not primarily aimed at minors.
- In relation to the Test Match from 26 December to 29 December 2020 broadcast on Channel 7, OzTam television audience data shows that the proportion of viewership made up of adults ranged from 89.29% to 93.59% (Metro 5 City Panel plus Subscription).
- 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% of people who are 18 years or older.
- 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

17. Lion, the owner of XXXX, is a sponsor of Cricket Australia. The sponsorship results in XXXX signage at the stadium during the playing of international cricket matches. The Indian team is touring Australia for the 2020/21 cricket season and this determination flows from two complaints regarding the content of an in-stadium activation referencing XXXX, seen during a One Day International and Test match. These matches were viewed in person and via free to air television and subscription television station Kayo Sports.
18. The in-stadium activation in question is a video display for XXXX shown on the stadium scoreboard when a decision of the third umpire is required. The activation moves from an image of a full glass of XXXX and communicates that a third umpire decision is underway and the question for decision. Once a decision has been made, a hand is shown removing the full glass of XXXX from the screen. If the batsman is out, the hand places an empty glass back on the screen with the word "OUT" superimposed on the glass. If not out, the hand places a glass full of beer back on screen with the words "NOT OUT" superimposed.
19. The complainants viewed the alcohol promotion on the cricket scoreboard at the SCG, via Kayo Sport and on free to air television and collectively are concerned that it:
 - normalises alcohol consumption;
 - is watched by 100s of children;
 - encourages children and adults to skoll a glass of beer, instead of drinking it slowly and in moderation; and
 - promotes beer drinking to children.
20. Complaints of this nature raise issues under both the ABAC content standards and placement rules, which will be examined in turn. The issues raised are:
 - does the in-stadium activation fall within the sponsorship exception of the Code;
 - if not, is the activation inconsistent with the ABAC content standards prohibiting alcohol marketing having strong appeal to minors and the encouragement of excessive consumption; and
 - does the marketing breach the ABAC Placement Rules.

Sponsorship Exception

21. The Company advised that the activation is part of its sponsorship of Cricket Australia. Part 2 of the ABAC Code provides that “sponsorship” is excluded from the scope of the Code. The Code describes sponsorship as any agreement involving payment or other consideration by a marketer to support a sporting event or activity in return for which the sponsored party agrees to be associated with or promote the sponsor's alcohol beverage. Sponsorship includes naming rights of teams and the inclusion of a brand name and/or logo at an event venue.
22. The Panel has considered the sponsorship exception in previous decisions. The exception extends only so far as capturing the direct manifestation of the sponsorship but does not mean that subsequent marketing communications which reference or flow from the sponsorship do not have to meet ABAC standards. In this case the sponsorship exception would capture the inclusion of the XXXX name and logo on the cricket scoreboard, but it is a more finely balanced decision as to whether the activation which is based on an image of a glass of beer would be captured. The Panel believes the depictions of the full and empty glass of beer go beyond the scope of the sponsorship exception and therefore the in-stadium activation is a marketing communication to which the standards apply.

Consistency with the ABAC Content Standards

23. The first complainant argues the activation is promoting beer to children. Part 3(b)(i) of the ABAC provides alcohol marketing must not have a strong or evident appeal to minors. Strong or evident appeal might arise if a marketing communication:
 - is likely to appeal strongly to minors;
 - is specifically targeted at minors;
 - has a particular attractiveness to a minor beyond the general attractiveness it has to an adult; or
 - uses imagery, designs, motifs, animation, or cartoon characters that are likely to strongly appeal to minors.
24. In assessing if an ABAC standard has been complied with, the Panel is to have regard to the probable understanding of the marketing communication by a reasonable person taking the content of the marketing item as a whole. The reference to a reasonable person is drawn from the Australian Common Law system and means that the attitudes, opinions, and sensibilities of the majority of the community are to be the benchmark.

25. The Panel does not believe the activation breaches this standard. The activation is of interest to all spectators of the game because it is relaying the decision of the third umpire, but the actual marketing message featuring glasses of the product is not considered strongly appealing to the minors. The graphics are not sophisticated or elaborate and in an era of high impact video and computer games, it is not likely under 18-year-olds will be engaged by the activation.
26. The second content standard raised is Part 3(a)(i) which prevents alcohol marketing showing or encouraging excessive or rapid alcohol consumption. The complainant is of the view that showing a hand removing a full glass of beer while the third umpire is deliberating and returning an empty glass shortly after if the batsman is declared out is encouraging the skolling of a glass of beer.
27. The advertiser argues that a single schooner of XXXX appears throughout the activation, with no human subject present at any point. It is contended that the emptying of the schooner is merely a measurement of time, and without any human subject present, the average consumer would not perceive this as some suggestion of the time within which an individual should consume an entire schooner of beer, let alone an encouragement to “skoll” a schooner of beer.
28. The Panel does not believe that the activation would be understood by a reasonable person as portraying consumption of the product. The glass of beer is being used as a graphic with an empty glass meaning 'out' and a full glass meaning 'not out'. Most people would understand this depiction and would not take that a decision that the batsman has been given out by the third umpire implies that a glass of beer has been consumed, any more than a 'not out' decision implies no consumption has occurred because a full glass appears on the scoreboard. Use of graphics of this general kind are common in sports such as various football codes, and their meaning is understood in the community of spectators who are following the games.
29. Finally, the complainants argue that the advertising normalises alcohol use and that this is inappropriate. This is a legitimate viewpoint; however, this argument raises a question of public policy for government whereas the Panel's role is confined to assessing the consistency of the advertising against the terms of the ABAC. The ABAC contains no provision which can be interpreted as requiring that marketing must not imply that alcohol use is 'normal'. In fact, the Code assumes its use is 'normal', if normal means adults consuming alcohol at levels consistent with Australian Alcohol Guidelines issued by government and in a responsible manner. The Code sets out standards for marketing to model behaviours consistently with these goals.

Consistency with the ABAC Placement Rules

30. The first complainant is concerned that the marketing communication was seen by children during the One Day International (ODI) between Australia & India at the SCG and also during the broadcast of the ODI on KAYO Sports TV. The second complainant is concerned that alcohol advertising was permitted during daytime free to air television during the Test Match between Australia and India. The ABAC Placement Rules have the aim, to the extent possible, that alcohol marketing is directed towards adults and away from minors. The complainants' concerns raise Placement Rules 1, 3 and 4.
31. Placement Rule 1 provides that alcohol ads on free to air television must only be broadcast at times consistent with the stipulations within the Commercial Television Industry Code of Practice. This code does generally place time of day restrictions on the broadcast of alcohol ads, but the code expressly permits the broadcast of alcohol ads in conjunction with live sports events such as test cricket. This means Placement Rule 1 has not been breached by the alcohol ads being shown during the day with the cricket.
32. Placement Rule 3 provides that an alcohol ad may only be placed where the audience is reasonably expected to comprise at least 75% adults. The complaints raise concerns about three separate audiences:
 - The audience of the ODI at the SCG;
 - The audience of the broadcast of the ODI on Kayo Sports; and
 - The audience of the broadcast of the Australia v India Test Match on free to air television.
33. Cricket Australia has estimated the audience of the ODI at the SCG to be 92% adults. Kayo Sports Subscription Television station has advised it has 100% adult subscribers but hasn't supplied audience composition data that takes into account family viewing. However, Foxtel audience data from the ODI on 29 November shows that 93% of the audience was over 18. In relation to the Test Match from 26 December to 29 December 2020 broadcast on Channel 7, OzTam television audience data shows that the proportion of viewership made up of adults ranged from 89.29% to 93.59%
34. This data is consistent with past ratings for cricket which reveals that it is a sport followed by generally an older audience. Hence this Placement Rule has not been breached.
35. Placement Rule 4 provides that irrespective of the actual audience, an alcohol ad cannot be placed with programs or content primarily aimed at minors. Cricket is a national sport followed across age groups. But it can't be said that television

broadcasts of cricket generally and test cricket in particular is primarily aimed at minors. The broadcasts aim to attract adult viewers, and this is confirmed by the ratings data.

36. Accordingly, the complaints are dismissed.