



ABAC Adjudication Panel Determination No. 85/17

Product: XXXX Gold
Company: Lion
Media: Television
Complainants: Mr Stilts
Date of decision: 5 June 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 advertisement for XXXX Gold by Lion (“the Company”) and arises from a complaint received 9 May 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 complaint was received on 9 May 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 complaint has been determined within this timeframe.

Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was obtained for the marketing communication (15158).

The Marketing Communication

10. The television advertisement opens at a marina and we see a man 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. The scene changes to a beautiful river in a remote location and we see a different man getting out of his four wheel drive and looking out over the lake smiling.
12. The scene changes again to a third man walking out of his house toward a barbecue and removing the cover.
13. Scenes then move quickly between the different settings:
 - River scene - The man is removing camping equipment from his four wheel drive. A carton of XXXX Gold can be seen in the back of his vehicle.
 - Boat scene - The man 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.
 - River scene - The man kicking open a roll of camping equipment.
 - Barbecue scene - The man checking his barbecue equipment.
 - River scene – The man hammering in tent pegs then watching a lizard that is watching him.
 - Boat scene - A boat's motor being lowered and then the man throwing a set of keys to another man wearing a white cap and saying "Thanks Cap".
 - River scene – The man inflating an air mattress in the tent.
 - Barbecue scene – The man flipping his tongs in the air and catching them, then lifting a piece of meat from the barbecue to a chopping board and smiling as a companion holding a stubby of XXXX Gold says "Ahh He's done it again"
 - River scene – The man holds out his arms as another 6 people arrive at the campsite and gestures behind him and says "So what do you guys think?" and a smiling woman responds "Well done".

- Boat scene – The man reversing the car with trailer and boat attached down a boat ramp as the man previously called ‘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.
- Barbecue scene – A group of people sitting outside with food and holding a stubby of XXXX Gold as the man walks over to the table with a board of sliced meat and says “Lunch is served”.
- River scene – A group of people sitting in deck chairs and moving around a campsite on the water’s edge where four tents are set up and a XXXX Gold esky and a guitar are in front of the group.
- Boat scene - The boat is on the water. We see the first man handing a bowl of food to another man holding a can of XXXX Gold and saying “Look at this” as the ‘Cap’ is 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 another passenger.
- River scene – A man takes a stubby of XXXX Gold out of the esky.
- Barbecue scene – Several men are opening a stubby of XXXX Gold and laughing.
- River scene – The campers are all sitting in deck chairs and holding or sipping a stubby of XXXX Gold.
- Boat scene – The first man takes a sip from a can of XXX Gold.
- River scene - We see the campers in their deck chairs behind and one man says “How good is this” as some of the campers cheers. The camera moves up to the sky so we see the sun and the words “Take in the Gold” are superimposed on the scene and the XXXX Gold logo then appears over the sun 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

14. The complainant is concerned that people are drinking alcohol on a boat, on the water, very visibly without life jackets where promoting going on the water without a lifejacket is highly irresponsible and promoting drinking alcohol on the water without a lifejacket should be considered criminal.

The ABAC Code

15. Part 3 of the ABAC Code provides that a Marketing Communication must NOT
 - (a)(ii) show (visibly, audibly or by direct implication) or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage..

- (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

16. The Company responded to the complaint by letter dated 16 May 2017. The principal points made by the Company were:

- The advertisement that is the subject of this complaint is a part of a TVC montage 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 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 advertisement breaches any section of the Alcohol Beverages Advertising Code (ABAC) or any other advertising code.
- Lion takes water safety and safety in camping or any activity very seriously as well as community concerns around water and safety in general. 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.
- 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.
- 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

17. 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 and numerous complaints about a television advertisement featuring a group of people on a boat. This advertisement includes some elements of the advertisement previously considered by the Panel but also includes additional scenes in new settings, such as camping and a social barbecue.
18. The complainant is concerned that the advertisement is showing alcohol use on a boat and passengers on the boat not wearing life jackets
19. 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.

20. 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.
21. 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.
22. The Panel has considered the advertisement and does not believe it 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;
23. Accordingly, the complaint is dismissed.