



ABAC Adjudication Panel Determination No. 110/18

Product: Furphy Beer
Company: Lion
Media: Digital
Date of decision: 18 October 2018
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns an Instagram post featuring Furphy Beer for Lion (“the Company”) and arises from a complaint received 6 September 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 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 Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the 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 6 September 2018.
8. The Panel endeavour to determine complaints within 30 business days of receipt of the complaint. This complaint was considered within that 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 this marketing communication or its placement.

The Marketing Communication

10. The complaint relates to a post by @mitch.cox that shows and references Furphy beer. A screenshot of the post complained about is included following.



The Complaints

11. The complainant objects to the marketing as the post:
- depicts a female adult under 25 years of age;
 - is alcohol marketing by reason of the use of #furphybeer in the caption and the visual depiction of the female consuming a bottle of Furphy beer;
 - fails to use available age restriction controls to exclude minors from the audience; and
 - is accessible to Instagram users including young people aged 13-17 years who would have directly received this post. It is highly likely that the social media influencer would have a high number and proportion of followers who are younger than 18 years. As a result, there is no basis for a reasonable expectation that the audience of these Posts would comprise at least 75% adults.

The ABAC Code

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

(b)(iii) depict an Adult who is under 25 years of age and appears to be an Adult unless:

- they are not visually prominent or
- they are not a paid model or actor and are shown in a Marketing Communication that has been placed within an Age Restricted environment.

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

13. Part 4 of the ABAC Code provides that:

A breach of this Code that is reasonably unforeseeable by or outside the reasonable control of the Marketer or their agency will be classified as a no fault breach.'

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

A **Minor** means a person who is under 18 years of age and therefore not legally permitted to purchase an alcohol beverage in Australia.

The Company's Response

15. The Company responded to the complaint by letter dated 20 September 2018. The principal points made by the Company were:

- a) We confirm that Lion's media-buying agency Universal McCann (UM) brokered a relationship with a number of social media influencers through an independent Australian publisher and creative network called The Adventure Handbook to create content for Furphy. Mr. Mitch Cox was one of the influencers identified through this network. Specifically, Mitch was engaged to partake in a 3 day shoot at Wilsons Promontory National Park in Victoria, Australia, with 2-4 of his friends to capture photographic and video content to be reproduced on Furphy branded social media and digital channels. Given the purpose of this project was to capture content to feature on Furphy digital and social channels, Lion instructed UM to ensure all persons engaged for this brief were 25 so that we could ensure that any marketing materials used by the Furphy brand would comply with section 3(b)(iii) of ABAC Code. Prior to attending the trip, Mr Cox was also required to sign a Photographer Brief where he acknowledged that "*Age: Legally, every person [accompanying him on the trip] needs to be over the age of 25*". Lion approved the engagement of Mr Cox and his friends on the trip on the understanding that they were all 25 years of age.
- b) Please find attached to this letter correspondence from both UM and The Adventure Handbook outlining the fact that the influencer, Mr Cox, untruthfully signed a contract stating he was over the age of 25.
- c) Lion did not review or approve the content posted on Mr Cox's Instagram account, however we acknowledge that it will likely be characterised by the Board as a "Marketing and Advertising Communication" under the ABAC Code.
- d) The female shown in the Instagram post - Cleo Codrington - is 24 years of age, and 1% of both Cleo Codrington and Mr Cox's Instagram followers are under 18 years of age. Audience insights for each individual's Instagram page are attached. We confirm that Furphy funded the expenses associated with Mr Cox's three-day trip to Victoria and he also received \$2,000 in financial remuneration for the production of the 30 photographs.
- e) While Furphy has age restriction controls on its own Instagram and Facebook pages, Mr Cox's pages do not. Mitch Cox's Instagram audience composition data is attached to this letter.
- f) In light of the factors I have outlined, this particular breach was outside the reasonable control of Lion, and should therefore be classified as a no fault breach. As a responsible marketer, Lion 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.

- g) Lion has revisited its influencer policy and henceforth will require all influencers engaged directly by Lion, or any agency acting on Lion's behalf, to provide full identity documentation prior to entering into any agreement, paid or otherwise, to create digital content for Lion's brands.

The Panel's View

16. The photograph and video sharing social media platform, Instagram has reported over 1 billion active monthly users making it one of the world's most popular online sites. Acquired by Facebook in 2012, Instagram is utilised by marketers in various ways to promote brand attributes. This determination concerns the use of Instagram by the Company through a relationship brokered with two social media influencers namely, Mitch Cox and Cleo Codrington.
17. Ms Codrington and Mr Cox are a couple who clearly travel extensively. Mr Cox is a photographer and both influencers Instagram accounts feature many beautiful images of Australian and International settings. Mr Cox has 111,000 Instagram followers and Ms Codrington has 132,000 followers. The Company explains that its media placement agent, Universal McCann, engaged Mr Cox to create content to be used in the promotion of its product, Furphy Beer.
18. As a result of the arrangement with Mr Cox, it appears that images of Furphy beer have been placed within some of the Instagram posts of both Mr Cox and Ms Codrington. The Company points out that it did not have editorial control over the posts but it does not dispute that the posts are marketing communications for the purposes of the ABAC Scheme. This means that the placement rules and content standards for marketing communications contained within the ABAC apply to those posts which promote the Company's product.
19. In relation to the placement rules the complainant argues that the posts are in breach of the requirement that available age restriction controls be used to exclude under 18 year olds from viewing the posts. Further, it is argued that the likely audience of the Instagram posts would include over 25% of under 18 year olds.
20. In determination 85-103/18 the Panel detailed the most recent information received from Instagram as to how age restriction controls operate which can be summarised as follows:
 - differential age restriction capacities apply depending as to whether a private or business account is held
 - a private individual can elect to hold a business account and provided the person also has a Facebook account the age restriction capability can be applied to the Instagram account as a whole or to individual posts

21. Instagram has also advised that Mr Cox and Ms Codrington both hold business accounts. This means that age restriction controls were available. It seems that the controls were not utilised and hence the ABAC placement rule (ii) has been breached.
22. It is noted that the Company did not address placement rule (ii) in relation to the personal accounts in its formal response to the complaint. By way of context the Panel received more detailed advice from Instagram as to the workings of its age restriction controls after the Company's response was received. The most recent Instagram advice varied somewhat from advice received by the Panel earlier in the year as to how the platform operated. It seems the Company may not have appreciated that Mr Cox and Ms Codrington held business accounts.
23. The Company did supply audience insight data about the viewers of the accounts of Mr Cox and Ms Codrington which indicate the accounts have overwhelmingly adult followers. This data would be relevant to placement rule (iii) but as age restriction controls were available then placement rule (iii), which applies when controls are not available, is not applicable in this case.
24. The ABAC content standards apply to marketing communications irrespective of the medium by which the marketing communication is conveyed and irrespective of the actual audience. Part 3(b)(i) of the Code provides that a marketing communication must not have strong or evident appeal to minors. Part 3(b)(iii) requires that adults depicted in a marketing communication must be aged 25 years or older.
25. The complainant provided information which indicated that both Mr Cox and Ms Codrington were aged under 25. The age of the person is clearly a matter of fact. The Company has advised that both social media influencers were aged 24. This means that the ABAC standard has been breached.
26. While conceding the breach of the standard the Company argued that this was an appropriate case for the Panel to make a finding of a no fault breach pursuant to Part 4 of the Code. A no fault breach might occur if it was reasonably unforeseeable by or outside the reasonable control of the alcohol marketer or their agency. An agency here means an advertising agency such as Universal McCann.
27. The Company points out that it:
 - Gave instructions to Universal McCann to ensure all persons engaged for the brief were 25 so as to comply with Part 3(b)(iii) of the Code.
 - The contract used by Universal McCann contained a section by which Mr Cox and every person accompanying him on the photography trip were warranted to be over the age of 25.
 - Mr Cox untruthfully signed the contract including undertaking that he and the others involved, such as Ms Codrington, were 25 years or older.

- Universal McCann and hence the Company relied on this undertaking in good faith.
28. The Company has explained that in light of this experience it has now amended processes so that its advertising agents would require all social media influencers to produce proof of age documentation. It is commendable that the Company and its agent has improved a process when a deficiency has been revealed but this is a separate question as to whether the identified weakness was reasonably unforeseeable or outside of the reasonable control of the Company.
 29. The Panel does not believe a no fault breach finding should be made in this case. It should be regarded as prudent practice that age verification of talent used in alcohol marketing be undertaken including when social media influencers are engaged. It is foreseeable that a person who stands to gain commercially from securing a contract might not always be entirely forthright in answering questions. Also, contracts of engagement often contain numerous warranties and undertakings e.g. that public liability insurance is held and it is common practice that such representations are verified by the sighting of relevant documents.
 30. In short, the Panel believes that it was not reasonably unforeseeable that Mr Cox and Ms Codrington may have been under the age of 25 and this should have been verified beyond relying on an undertaking in a contract. Evidently the complainant was able through public sources to ascertain the age of both influencers and the Company and its agent could have done so as well.
 31. The complaint is upheld in relation to Part 3(b)(iii) and Part 3(b)(iv)(placement rule (ii)) of the Code.