



ABAC Adjudication Panel Determination No. 12/20

Product: Booze Brothers
Company: The Saturno Group
Media: Digital
Date of decision: 12 March 2020
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 digital marketing which appeared in the InDaily online news service arranged by the Saturno Group (“the Company”) for the alcohol retailer Booze Brothers and featuring several beer cans produced by the brewer Coopers Brewery and arises from a complaint received 30 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 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 complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaint was received on 30 January 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 this marketing communication.

The Marketing Communication

10. The complaint relates to a digital banner advertisement that was seen on the InDaily website on 30 January 2020.



The Complaint

11. The complainant objects to the marketing as:
- it links the alcohol product to 'lifesaver' lollies which are a product aimed at minors; and
 - describing the product as a 'lifesaver' suggests that its consumption may create or contribute to a significant change in mood, offer a therapeutic benefit and be an aid to relaxation.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (b)(i) have Strong or Evident Appeal to Minors
 - (c)(i) suggest that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment
 - (c)(iv) suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation
13. Part 4 of the ABAC Code includes definitions including:
- 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 provides:
- 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

15. Coopers Brewery responded to the complaint by letter dated 11 February 2020. The principal points made by the Company were:

- a) Coopers Brewery Ltd is committed to the ABAC Scheme and strives to uphold its obligation to market its products in a responsible manner. The company maintains strict internal and external processes to help ensure compliance with the Code. However, in this instance, Coopers was not the relevant Marketer responsible for the marketing communication. The marketing communication was generated by retailer Booze Brothers without Coopers' knowledge or input. Consequently, Coopers contends that the communication was not within its reasonable control for the purposes of clause 2(a) of the Code.
- b) Coopers contends that the marketing communication was outside its reasonable control due to the following factors:
 - i. The communication was not created by Coopers or its agencies.
 - ii. Coopers had no prior knowledge that the retailer planned to release this communication.
 - iii. From time to time, the retailer will release marketing communications using the Coopers' brand or products. However, the retailer will always seek Coopers' approval prior to release. In this instance, the retailer omitted to obtain approval.
 - iv. The communication was not based upon any of Coopers' existing marketing or brand strategy materials. In this respect, we note:
 - The retailer appears to have taken their own photograph of the Coopers' products; and
 - Coopers does not use the terms "lifesavers", "independent colours" or "natural flavours" in connection with its products.
- c) Coopers had to contact the retailer in order to have the communication removed by the advertiser.

- d) As Coopers had no input into, and has no understanding of, the concept behind the marketing communication, we are of the view that it would be unhelpful to the Panel for Coopers to comment on whether the communication breaches Part 3(b)(i), 3(c)(i) or 3(c)(iv) of the Code.
- e) If the Panel is of the view that the communication is in breach of the Code, then Coopers submits that the breach should be recorded as a “no fault breach” with respect to Coopers. The breach is due to a third party’s actions that were both reasonably unforeseeable and outside the reasonable control of Coopers.
16. The Saturno Group responded to the complaint by email dated 5 March 2020. The principal points made by the Company were:
- a) Booze Brothers has agreements with suppliers regarding partnered advertising spend. In this instance it was with Coopers Brewery with Solstice Publications. Booze Brothers works with Solstice to produce artwork for advertisements in their digital publications. On the instance the advertisement in InDaily was picked up as an alleged breach, it was immediately removed from the digital sites.
- b) The artwork allegedly breaching the code was produced by Solstice media, not either Coopers or Booze Brothers. The publishing house put these ads up as fillers in the schedule so unfortunately was not known by Coopers nor Booze Brothers at the time of this occurrence.
- c) We politely ask that this be considered as a complete oversight by Solstice as they were not aware of the codes and of Booze Brothers for not consulting more closely on the artwork, to in this instance be dismissed.
- d) Booze Brothers has advised Solstice of the codes and in the future will ensure all parties check the artwork for approval and it is in line with the campaigns Coopers are running that would have ABAC approval.
- e) We sincerely hope you can accept our apologies on this matter and we will ensure we consult the codes with all future advertising.

The Panel’s View

Introduction

17. This determination concerns a number of Adelaide based alcohol and media entities. For clarity the parties involved are as follows:
- the **InDaily** - a digital news publication which focusses on events occurring in and around Adelaide
 - **Solstice Media** - the media and communications company which is responsible for the InDaily online news service

- **Saturno Group** - a South Australian based entertainment and hospitality group of companies which operates hotels, alcohol retail outlets, event venues and gaming
 - **Booze Brothers**- brand name of the alcohol retail outlets operated in greater Adelaide by the Saturno Group
 - **Coopers Brewery** - the South Australian based brewer of various beer products available nationally
18. On 30 January 2020 the complainant came across a banner advertisement in the InDaily. At first blush the banner was promoting Coopers beer products in a manner which the complainant believed to be irresponsible and a complaint was made. As is usual practice the ABAC Executive Officer contacted Coopers to gain a response to the complaint and it emerged the position was somewhat more complicated. The advice received was that Coopers did not create the ad nor cause the banner ad to appear in the InDaily. Rather it seems the ad appeared as result of a break down in a more complex set of commercial relationships between Coopers and the Saturno Group and then Saturno and Solstice as the owner of the InDaily.
 19. The ABAC applies to all marketing communications in Australia generated by or within the reasonable control of an alcohol marketer. A marketer means a producer, distributor or retailer of alcohol beverages. Solstice Media is not an alcohol marketer (nor the InDaily). Saturno Group as the operators of Booze Brothers and Coopers are both alcohol industry entities and hence are 'marketers' to which the ABAC Scheme asserts jurisdiction. This means if the banner ad was 'generated or within the reasonable control' of either the Saturno Group or Coopers then prima facie, the ad needs to meet ABAC standards. If the ad was not within the reasonable control of the alcohol entities but was created unprompted by Solstice Media of its own accord, then the ad will not fall within the ABAC Scheme.
 20. The advice at hand is that Saturno (Booze Brothers) has agreements with alcohol suppliers regarding partnered advertising. Presumably Coopers is such a supplier and Coopers advised that 'from time to time Booze Brothers will release marketing communications using Coopers' brand or products'. Not surprisingly Coopers wishes to protect the way its brand is portrayed so its approval must be obtained by Booze Brothers prior to advertising occurring featuring Coopers' products. Notwithstanding this requirement, it is common ground that Coopers was not involved in the banner ad being created nor was its approval sought in advance.
 21. The relationship with Solstice Media appears to be directly with Saturno and not Coopers. Booze Brothers 'works with Solstice to produce artwork for advertisements in their digital publications'. For the InDaily edition of 30 January, the advertisement is said to have been produced by Solstice and placed as 'fillers in the schedule' without the knowledge of Booze Brothers or Coopers. This is described by Saturno to have been an oversight by Solstice with a concession of some failure by Booze Brothers for 'not consulting more closely on the artwork.'
 22. Drawing this together, the Panel believes it is likely that Saturno (Booze Brothers) did have a reasonable measure of control over the advertising so as to bring the ad within the scope of a marketing communication subject to the provisions of the ABAC. The fact that a breakdown occurred in communication between InDaily and Booze Brothers does not relieve the alcohol retailer of its obligations to market in

accordance with community expectations of good practice. In other words, the obligation to meet marketing regulatory obligations includes a responsibility to manage media partners diligently so that marketing consistent with ABAC standards takes places.

Consistency with the ABAC Standards

23. The complainant contends the banner ad linked the Coopers product to lifesaver lollies and hence created a strong or evident appeal to minors. Further the complainant believes the term 'lifesaver' suggests the product may create a significant change in mood and/or offer a therapeutic benefit. These concerns bring into play Part 3 (b) and (c) of the ABAC.
24. Neither Coopers (because it says it had nothing to do with the ad) nor Saturno endeavoured to make a substantive response to the arguments about a breach of the ABAC standard. Compliance with an ABAC standard is to be assessed from the probable understanding of the marketing communication by a reasonable person taking it content as a whole.
25. The ad is clearly making a reference to the well -known confectionary of a lifesaver. Lifesavers are lollies best known for their rainbow colours and placing the various coloured cans of Coopers products together with the description of 'lifesavers with independent colours and natural flavours' brings to mind the lollies. That said it's not all that likely a reasonable person would confuse the alcohol products as actual lollies. However, a minor, particularly children would likely be strongly drawn to the ad due the layout, colours and reference to lifesavers. For this reason, the Panel believes the Part 3(b) standard has been breached.
26. In contrast, it is not considered the word 'lifesaver' in the context of the ad would be taken by a reasonable adult as suggesting the product will lead to a significant change in mood or offer a therapeutic benefit. The lolly reference would be understood, not that somehow the product is going to give health or other benefits.
27. Accordingly, the complaint is upheld in relation to Part 3(b) and dismissed in relation to Part 3(c).