



ABAC Adjudication Panel Determination No. 74/18

Product: Furphy
Company: Lion
Media: Outdoor
Complainant: Confidential
Date of decision: 2 August 2018
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 the placement of an outdoor advertisement for Furphy beer by Lion (“the Company”) and arises from a complaint received 5 July 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:
 - 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;

- 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 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 5 July 2018.
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 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 obtained for the content of this marketing communication.

The Marketing Communication

10. The complaint relates to a poster on a wall under a train bridge showing a bottle and glass of beer that is located very close to a kindergarten in Ascot Vale.

The Complaint

11. The complainant objects to the marketing as it is located very close to a kindergarten in Ascot Vale and she walks and drives past it when taking her granddaughter to kindergarten.

The ABAC Code

12. 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.

13. Part 6 of the ABAC Code includes definitions including:

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

Placement Rules means:

- (ii) 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).
- (iii) 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
- (iv) 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)
- (v) A Marketing Communication must not be placed with programs or content primarily aimed at Minors

The Company's Response

14. The Company responded to the complaint by letter dated 16 July 2018. The principal points made by the Company were:
- a) Lion works closely with outdoor media buying agency Universal McCann (UM) to ensure Part 3(b)(iv) is adhered to when determining the placement of advertisements for our portfolio of brands. On this occasion, UM has confirmed that the Furphy outdoor advertisement was inadvertently placed at the Ascot Vale Road site, and was never included in the site booking list which was placed by Lion for this burst of activity.
 - b) Whilst this site is within 150 metres of a kindergarten, it is not believed to be within direct line of sight. However, it does not meet the requirements of the Code, nor Lion's policies, so therefore has never been booked for placement.
 - c) UM have confirmed that the placement was an error on the part of the media vendor, which they have since acknowledged. Um has made it clear to the vendor both their breach of the site booking list and Lion's commitments under both internal policies and and the Code. UM has since reminded their out of home vendors that Lion advertisements should not appear within 150 metre line of sight of a kindergarten, school or day care centre, as stipulated in Part 3(b)(iv) of the Code.
 - d) Lion will now revisit all policies, Codes and requirements with all creative and media agencies, building on previous conversations regarding compliance. (Lion supplied a list of all locations formally booked with UM by Lion for the placement of this outdoor advertisement).
 - e) In light of the factors outlined, this particular breach was outside the reasonable control of Lion, and should therefore be classified as a no fault breach.
 - f) 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. The advertisements for Furphy were 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; and

- 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.
15. Universal McCann provided information in support of the Company's response by letter dated 12 July 2018. The principal points made by Universal McCann were:
 - a) The recent Furphy advertisement that was inadvertently placed on the Ascot Vale Road site was not included in the booking which was placed with the media vendor by UM.
 - b) It was an error on the part of the media vendor which they have since acknowledged.
 - c) We have followed up with the OOH vendors to reiterate that Lion advertisements should not appear within 150m of a school, kindy or day care centre of any kind.
 - d) Lion has no direct relationship with Revolution360.
 16. Revolution360 provided information in support of the Company's response by letter dated 24 July 2018. The principal points made Revolution360 were:
 - a) As indicated from installation run sheets provided, we did not schedule for any Furphy advertisements to be installed on the Ascot Vale site at any time during the campaign beginning 10/6/2018. The site is listed in our CRM inventory as an 'Alcohol Prohibited'.
 - b) When the complaint was brought to our attention we investigated this further and discovered that a poster was in fact installed on the site for a period. The installation was done in error.
 - c) Revolution360 takes full responsibility for the error and goes to lengths to ensure we are compliant with alcohol advertising regulations at all times.

The Panel's View

17. The Ascot Kindergarten is located in the Melbourne suburb of Ascot Vale. According to its website the kindergarten is community managed and a not for profit entity offering programmes for 3-4 year olds in their first year of kinder and/or 5 year olds in the year prior to attending school.
18. The complaint concerns an outdoor advertisement for Furphy beer positioned on a wall under a railway overpass quite close to the kindergarten. The complainant is a grandparent of a child attending the kindergarten and the advertisement is passed by the grandparent and child when accessing the kindergarten.

19. The complainant does not express concern about the content of the advertisement and presumably the concern is about the ad's location which is considered inappropriate. A concern of this nature poses the question of whether the location of the ad is consistent with the placement rules contained in the ABAC.
20. The placement rules have the policy aim of directing alcohol marketing towards adult audiences. This is done through a series of rules applying to the use of particular media by alcohol marketers such as outdoor advertising, electronic media and digital media. In relation to outdoor media the ABAC incorporates the provisions of the Outdoor Media Association's Alcohol Policy which provides that an outdoor advertisement is not to be placed on fixed signs located within a 150m sightline of a primary or secondary school.
21. The Company explains that it did not intend for the ad to be placed at the site near the Ascot Kindergarten. It provided detailed information as to how the placement came about and presumably the ad has now been removed. This means in a practical sense the concern raised by the complainant has been acknowledged by the Company and the issue resolved by the removal of the advertisement.
22. While in a practical sense the concern might now be resolved the Panel is obliged to make a decision on whether the ABAC has been breached and if so, whether this breach should be regarded as a "No Fault" breach by the Company. This requires the Panel to firstly apply the terms of the OMA Alcohol Policy as incorporated into the ABAC by means of placement rule (i).
23. As mentioned the OMA policy provides that alcohol ads are not to be placed within a 150m line of sight of a **primary or secondary school**. This makes the issue whether the Ascot Kindergarten is captured within the meaning of a primary school.
24. Neither the OMA policy nor the ABAC define the terms primary, secondary or school. Absent a definition of the terms the Panel is to decide what these terms mean within the context of the ABAC.
25. Education within Australia is primarily the responsibility of the States and Territories. While the systems operating in each jurisdiction have more in common than they have differences each system nonetheless varies somewhat. One difference is the structure of the classes and age groups of children that attend primary school and whether kindergarten or pre-school is part of the primary school system or is separate from it.
26. In Victoria information taken from the state education and training department website indicates that:
 - "prep" is the first year of primary school;
 - to start prep a child needs to turn 5 by 30 April of the commencing year and a child must be enrolled in prep in the year they turn 6; and
 - funded kindergarten is available to children in the year before primary school.

27. Drawing this together it would appear that kindergarten generally and the Ascot Kindergarten specifically would not be considered by the Victorian Government to be part of the primary school system. While kindergarten and other pre-school facilities such as family day care centres are regulated by Government this does not make them a primary school.
28. In contrast the Company appears to take the view that an outdoor alcohol advertisement is not to be placed within 150m of a "school, kindy or day care centre of any kind". This is reflected in the Company's instructions given to Universal McCann its outdoor media buying agency. This policy however appears based on the Company's internal standards which go beyond that required by the OMA policy.
29. The role of the Panel is to apply the ABAC as it is written. The Panel is not responsible for the drafting of the Code itself and while the Panel applies a common sense approach to interpretation guided by the spirit and intent of the ABAC, it would be beyond the Panel's remit to unilaterally expand the scope of the OMA policy and hence placement rule (i). This means the term primary school needs to be given its ordinary meaning and in Victoria a community kindergarten is not a primary school.
30. It follows that the placement of an outdoor alcohol advertisement within 150m of the kindergarten is not a breach of the OMA policy nor placement rule (i). Hence it is not necessary for the Panel to decide whether a no fault breach ruling is appropriate even though the Company has provided a full explanation that the placement of the advertisement occurred without its knowledge and after it followed a proper and prudent processes.
31. The Panel believes that the OMA should review the intended scope of the 150 metre school restriction. Possibly the terms primary, secondary and school could be defined so that if it is intended that organised pre-school entities such as a kindergarten are intended to be included then the definitions reflect this fact.
32. While the Panel is dismissing the complaint it is recognised that the complainant's concern has been accepted and acted upon by the Company.