

Decision of the ADVERTISING REGULATORY BOARD

Complainant	Mr. Stephen Claassen
Advertiser	Brothers Vaping Lounge
Consumer/Competitor	Consumer
File reference	2636 – Brothers Vaping Lounge – Stephen Claassen
Outcome	Upheld
Date	20 July 2023

The Directorate of the Advertising Regulatory Board has been called upon to consider a consumer complaint lodged against online advertising on the Advertiser’s home page at <https://www.bvl-app.co.za/?v=edb5dc74af1c>.

Description of the advertising

The website contains, *inter alia*, the following statement:



Complaint

The Complainant initially insisted that the Advertiser should remove this claim which promotes “*facts with insufficient data*”. When the Directorate asked the Complainant to elaborate on his reasons for objecting, he submitted the following:

“As vaping has its own set of health risks, I believe that this is misleading and targeted at younger individuals to sell more product”.

Response

On 25 May 2023, the Advertiser was sent a copy of the Complainant's submissions, a copy of the relevant portions of the ARB Code, and a formal request for a response to this complaint by 1 June 2023. On 2 June 2023, the ARB Directorate notified the Advertiser that no response had been received. Later that day, the Advertiser submitted the following:

"I am currently talking and being advised by VPASA (Vapers Association of South Africa) as 'Vaping Saved my Life' is an [sic] harm reduction initiative initiated by them and supported by all the members. You will receive my response by Tuesday 09/06/23".

The Directorate followed up, but no further response was received from the Advertiser.

Opinion

Considering that the dispute pertains to the newly drafted Appendix L of the Code of Advertising Practice, which deals specifically with products of this kind, the Directorate sought an opinion from the Vapour Products Association of South Africa ("VPASA").

The VPASA confirmed that the Advertiser was an Associate Member and had been a member since 2021. It clarified that the "*Vaping Saved My Life*" initiative was that of a consumer advocacy group, a separate entity with its own mandate, not directly affiliated or tied to that of the VPASA.

The VPASA clarified that the Advertiser's claims were based on a research paper titled "*Potential deaths averted in USA by replacing cigarettes with e-cigarettes*", authored by David T Levy, Ron Borland, Eric N Lindblom, Maciej L Goniewicz, Rafael Meza, Theodore R Holford, Zhe Yuan, Yuying Luo, Richard J O'Connor, Raymond Niaura, and David B Abrams. It was published in 2017 in the journal "Tobacco Control", said to be "*an international peer-reviewed journal covering the nature and consequences of tobacco use worldwide*".

The VPASA went into the substantiation presented by the article in some detail:

- Regarding the term "Vaping Saves Lives", it is an extrapolation of many findings from research that empirically reports that since vaping is less harmful than cigarettes, would be smokers' lives are 'saved' by transitioning to vaping.

- Looking further into this particular case, BVL quoted an article titled Vaping Saves Lives authored by Alex Tabarrok of George Mason University posted in October 2017 on a blog called Marginal Revolution.
- The article spoke of the research paper titled *Potential deaths averted in USA by replacing cigarettes with e-cigarettes* by David T Levy et al.
- BVL left out a part from the paragraph in the article “(It’s worth noting that the authors are all cancer researchers, statisticians and epidemiologists concerned with reducing cancer deaths.)”.
- The quote on the blog post references the following line in the research paper:

However, evidence is mounting that e-cigarettes deliver only a small percentage of the toxicants delivered by cigarettes.^{26–32} In addition, newer e-cigarettes models have been shown to more efficiently deliver nicotine^{29 30 33} than older models and provide sensorimotor experiences and ‘throat-hit’ similar to smoking,³⁴ thus increasing their potential to serve as effective substitutes for cigarettes.

- This section in the research paper has in-line referencing to several studies.
- The study’s methodology and results are as follows:

“A Status Quo Scenario, developed to project smoking rates and health outcomes in the absence of vaping, is compared with Substitution models, whereby cigarette use is largely replaced by vaping over a 10-year period. We test an Optimistic and a Pessimistic Scenario, differing in terms of the relative harms of e-cigarettes compared with cigarettes and the impact on overall initiation, cessation and switching. Projected mortality outcomes by age and sex under the Status Quo and E-Cigarette Substitution Scenarios are compared from 2016 to 2100 to determine public health impacts.

Compared with the Status Quo, replacement of cigarette by e-cigarette use over a 10-year period yields 6.6 million fewer premature deaths with 86.7 million fewer life years lost in the Optimistic Scenario. Under the Pessimistic Scenario, 1.6 million premature deaths are averted with 20.8 million fewer life years lost. The largest gains are among younger cohorts, with a 0.5 gain in average life expectancy projected for the age 15 years cohort in 2016”.

The VPASA emphasised that:

- The design and content of advertising published by its members is not monitored by the VPASA. All members have received a copy of the ARB Code.

- The VPASA always urges its members to abide by the Code of Conduct in its entirety.

Responses to this opinion

In the interest of *audi alteram partem*, the Directorate afforded the parties to this dispute an opportunity to respond to the opinion of the VPASA, should they wish to do so.

The Advertiser affirmed its belief that vaping offers a means of harm-reduction as a substitute for smoking cigarettes. It submitted that it supports the “*Vaping Saved My Life*” initiatives aimed at advocating for the benefits of vaping, and shared anecdotal experiences of substituting cigarettes for vaping. It further submitted that it requires proof that all customers are older than 18 prior to purchase, and that the complaint might stem from being uneducated about this healthier option.

The Complainant submitted that the implied message that vaping is less dangerous than cigarette smoke is only supported by selective studies, whilst being contradicted by others. These products also appear to attract a young non-smoking audience, and may lead to further illicit drug use and cigarette smoking, which is why the communication needs to avoid appealing to non-smoking youths (the Complainant referenced several articles published at <https://www.hopkinsmedicine.org>). A more appropriate statement would be that vaping saves smokers’ lives, but this, presumably, does not have the same advertising appeal, which is exactly why the Complainant objected to this advertisement.

Application of the Code of Advertising Practice

The Directorate considered Appendix L to the Code (Vapour Products) to be relevant. In particular, it regarded the following clauses as applicable:

- Clause 2.2.4
- Clause 2.3
- Clause 2.6

Decision

Having considered all the material before it, the Directorate of the ARB issues the following finding.

Clause 2.2.4 of Appendix L specifically prohibit the use of the phrase “*safer than*” when juxtaposing a vaping product with combustible tobacco (i.e., cigarette products). However, Clause 2.6 appears to allow for a direct juxtaposition provided that the phrasing is “*couched in cautious terms*” such as “*less harmful than*”.

It would appear that the intention of this appendix was to ensure that vaping products are promoted as less harmful than tobacco products, but that this should not be interpreted as synonymous with “*safe*” in the ordinary meaning of the word.

This is an important distinction to make, and appears to correlate with the Complainant’s concerns that these products are marketed as “*safe*” as opposed to “*a safer alternative for those who already smoke*”. As the Directorate understands it, the intention behind Appendix L and the purported intention of the vaping industry is to encourage smokers to consider vaping as a safer alternative, and not to attract non-smokers to vaping as a “*safe*” means of consuming nicotine.

This interpretation is supported by the “*Vaping Saved My Life*” consumer advocacy group’s stated mandate of promoting “... *tobacco harm reduction through the means of electronic nicotine delivery systems (ENDS)*”.

The claims in question state that “*Vaping Saves Lives*” (important to note, not “*Vaping saved my life*”, but merely “*Vaping Saves Lives*”). It adds that:

“E-cigarettes are less dangerous than cigarettes but are equally effective at delivering nicotine. Levy et al. estimate that if smokers switched to e-cigarettes millions of life-years would be saved, even taking into account plausible rates of non-smokers who start to vape”.

The Complainant’s main concerns appear to be twofold:

On the one hand, he is clearly concerned over the truthfulness of the claims, and suggests that these are not supported by appropriate evidence. On the other hand, he is concerned that the communication might neglect to clearly communicate this as a safer alternative for people who already smoke, rather than as a generally safe alternative to anybody thinking of smoking. His complaint specifically noted that the Advertiser was promoting its products using “... *facts with insufficient data*”, which were ultimately used to sell vaping products, which have their own inherent health risks.

Clause 2.3 of Appendix L reads as follows:

“2.3 Advertising claims shall be:

2.3.1 accurate;

2.3.2 factual;

2.3.3 capable of support by verifiable factual and/or scientific documentary evidence; and

2.3.4 in compliance with Clause 4.1 of Section II”.

It is clear from this that claims are required to be factually accurate and supported by documentary evidence. The pertinent reference to Clause 4.1 of Section II is instructive, as this clause deals with substantiation, and requires advertisers to submit independent verification for all advertising claims capable of objective verification.

An essential benefit of relying on Clause 4.1 of Section II is that it removes the likelihood of arguing over interpretation or speculating over the accuracy of efficacy claims. In simple terms, advertisers are required to provide unequivocal confirmation from an expert in the field to which the claims relate that the claims in question are true, are adequately supported by evidence, and are valid for the product or service being advertised.

The advertising to which the Complainant objected incorporate a host of claims, all capable of independent verification as required by Appendix L as read with Clause 4.1 of Section II. These are:

- That “*Vaping Saves Lives*”,
- That “*E-cigarettes are less dangerous than cigarettes*”,
- That E-cigarettes are “... *equally effective at delivering nicotine*”,
- That if “... *smokers switched to e-cigarettes millions of life years would be saved ...*”, and
- That the projected “*millions of life years*” that would be saved would hold true even if one were to factor in “... *plausible rates of non-smokers who start to vape*”.

Despite being afforded the opportunity to do so the Advertiser has not submitted any verification from an independent and credible expert that its claims are true, as required by Clause 4.1 of Section II, as referenced in Appendix L.

However, the VPASA has stepped in and “done the work” for the Advertiser, explaining the content of the Levy study and its outcomes. While this is not ideal, the Directorate is, in this instance, prepared to accept the submissions of the VPASA. This is supported by

the fact that it has almost been established as trite that vaping is a less harmful activity than smoking. This is reflected in Appendix L, and supported by easily accessible expert opinion. (ref, for example, <https://www.nhs.uk/better-health/quit-smoking/vaping-to-quit-smoking/#:~:text=Nicotine%20vaping%20is%20substantially%20less,effective%20tools%20for%20quitting%20smoking.>)

Given this, the Directorate is prepared to accept that vaping is less harmful than smoking and, for people who were already smokers, a change to vaping will represent a healthier alternative.

However, the question is then whether the Advertiser has clearly communicated the supported research. It is here that the Directorate becomes less comfortable.

In the first place, as already referenced, there is a difference between the claim “Vaping saved MY life” (which is the tagline of the wider campaign), in the context of a particular person’s own story, and the more absolute and blanket claim “Vaping saves lives” with no context to a particular story.

In the second place, the claim “Vaping saves lives” creates an impression that vaping might be able to address harm already done. There is nothing in the research, or in the common understanding about vaping, that supports this. The danger is that a person with lung cancer or emphysema or similar health issues might understand that vaping will “save their life” and reverse the harm. This is not supported, and seems unlikely. At best, the research seems to show that vaping will do less further harm than continuing to smoke.

Finally, the Directorate is not convinced that the claim is clearly enough communicated “as an alternative to smoking”. It is found amongst the products advertised by the Advertiser, with no explanation as to where it fits into the discourse around vaping. It does not say, for example, “Looking to give up smoking? Vaping is less harmful to your health”. There is a danger that less educated consumers might understand that vaping is healthy as compared to not smoking or vaping. This is categorically not supported. Because of the enormous public policy and health concerns around this, it is imperative that Advertisers veer on the side of caution in communication around the “health benefits” of vaping. These need to be anchored in clear and unambiguous context, understandable to less educated and young consumers.

Given this, the Directorate does not believe that the claim, as communicated, is substantiated, nor is it communicated within the parameters clearly set out in Appendix L.

Sanction

Given the above finding, the Advertiser is requested to remove or appropriately amend the advertising that gave rise to this dispute with immediate effect, and within the deadlines stipulated in Clause 15.3 of the Procedural Guide.

ARB members are also advised not to accept advertising from this advertiser which contains the claims in dispute.

The Advertiser's attention is also drawn to the remaining provisions of Appendix L, which incorporates guidance on how to avoid misleading communication, and express instructions to refrain from making certain safety or health-related claims, and (where applicable) the mandatory warnings that the products contain nicotine and are addictive.