media federation of australia

DVM LAW
DIGBY VON MUENSTER

MFA WHITE PAPER ON THE

AANA MASTER MEDIA BUYING SERVICES AGREEMENT (July 2019)

PREPARED BY:
Stephen von Muenster, Partner, DVM Law
3 September 2019

Introduction

The intention of this White Paper is to provide to the industry and public generally the Media Federation of Australia's (MFA's) position on what it perceives to be the positive and negative aspects of the revised AANA Media Buying Services Agreement, dated July 2019, and its supporting Guidance Notes.

The MFA provided input and extensive feedback to the AANA through the revision process, in an effort to address the unworkable and impractical previous iteration, developed without agency consultation in 2016.

There is no obligation on MFA members or non-member agencies to agree with or adopt in any way the recommendations of the MFA in this White Paper. Individual agencies must always negotiate terms and conditions suitable to their own individual circumstances and seek independent legal and commercial advice as and when necessary.

media federation of australia

DVM LAW
DIGBY VON MUENSTER

MFA WHITE PAPER ON THE

AANA MASTER MEDIA BUYING SERVICES AGREEMENT (July 2019)

Executive Summary

1. The revised AANA Media Buying Services Agreement (2019 Agreement), dated July 2019, is an improvement on the previous version, which was unworkable and created combative and protracted negotiations between clients and agencies. However, there are still improvements needed to address some key issues.

2. The AANA's stated intention in the Guidance Notes that the contract between Advertiser and Agency should be a *"mutually beneficial"* is undermined by the contract template itself.

3. The MFA has identified a number of legal and commercial concerns, pertaining to a number of clauses within the 2019 Agreement.

4. The MFA supports the need for transparency and disclosure between Agencies and Advertisers. However, the 2019 Agreement places a number of obligations upon Agencies in regards to third-party arrangements, transparency and identifying value in the supply chain, which legally and practically may not be within the control of an Agency.

5. Every commercial arrangement is different and both agencies and advertisers have a spectrum of different operating models and therefore a one-size-fits-all contract template solution is impractical.

6. The MFA supports the AANA's Guidance Notes introductory statement and 8 contract principles. However, it is the MFA's view that the 2019 agreement can only be viewed as a starting point, not as a stand-alone contracting solution and is not endorsed by the MFA for the reasons stated in this White Paper.

Observations

The MFA is pleased that the AANA took on board a number of the commercial and legal drafting concerns raised by the MFA. As a result, the 2019 Agreement contains a number of concessions that are more legally and commercially realistic for our market.

However, the MFA believes improvement is still needed, and that further consultation by the AANA may have resulted in some of the issues highlighted in this White Paper being addressed.

The 2019 Agreement states in the preamble that it has been *"drafted having regard to what the AANA believes to be in the* ***best interests of advertisers*** *to achieve a transparent, fair and equitable agreement with media buying agencies."* [Emphasis added.] The 2019 Agreement as currently drafted is not in the best interests of Agencies. Furthermore, the stated intentions of the AANA within the Guidance Notes of achieving a *"mutually beneficial contract"* is undermined by the contract template itself.

Guidance Notes Published July 2019

The MFA fully supports and commends to its members the AANA's introductory statement that *"An effective advertiser-agency relationship, underpinned by a mutually beneficial contract, is a powerful means to create enduring value for both advertisers and their agency partners."* The MFA believes Advertisers and Agencies should always attempt to negotiate a binding contract that meets this objective.

The MFA further supports the AANA's 8 contract principles as outlined in the Guidance Notes.

However, in the MFA's opinion, the stated introductory intentions of the AANA in the Guidance Notes and the AANA's 8 contract principles are unfortunately undermined by the way the 2019 Agreement has been structured and cast as a stand-alone document, and then progressively

AANA MASTER MEDIA BUYING SERVICES AGREEMENT (July 2019)

diluted by the individual obligation drafting contained within the agreement. It remains difficult to reconcile the AANA's statement in the Guidance Notices that there should be a *"mutually beneficial"* contract, with its statement in the preamble to the 2019 Agreement that the contract has been drafted *"in the best interests of Advertisers"*.

There are a number of other contradictions between the Guidance Notes and the 2019 Agreement that are of concern to the MFA, for instance:

1. The AANA advocates for transparency and identifying value in the supply chain where it is within the control of the Agency and Advertiser. However, the 2019 Agreement contains a number of overarching obligations on the Agency to ensure total transparency across the entire supply chain, including areas that are legally and practically outside the agency's control on a day-to-day basis. For examples of where this could occur, please refer to Point 4 in the Commentary section of this White Paper.

2. The AANA recognises the costs of compliance and audit need to be identified and considered in the negotiation of fair remuneration – however, the 2019 Agreement does not take this approach and instead mandates transparency, compliance and audit as an implied Agency cost, with the cost thereof to be perhaps agreed after the fact by the Advertiser. The MFA requested that the cost of compliance and the attainment of transparency be set out in the 2019 Agreement as an expense item with its own discrete costing. This has not occurred.

3. The AANA notes the circumstances where an Agency may purchase media from a media owner independently and without instruction from an Advertiser (e.g. for a DSP or similar) and in this case the AANA refers to the Agency as a *"media owner"* with the on-selling of such media to the Advertiser to be done under a separate agreement.

   While referring to an Agency as a *"media owner"* may not technically be correct, the bigger concern rests with how such transactions are addressed by the 2019 Agreement. The 2019 Agreement refers to such *"at risk"* media as a *"Principal Transaction"* and the subsequent sale of such media to an Advertiser as a *"Principal or Inventory Sale"*. The 2019 Agreement seeks to control such transactions and mandates back-end transparency – including any mark-up of such media by the third-party vendor and Agency – notwithstanding the risk taken by the Agency in purchasing the media in the absence of an immediate Advertiser purchaser.

4. While the AANA acknowledges in the Guidance Notes that unbilled media (also known as media variances) is a liability owed to media owners by Agencies, a number of provisions the 2019 Agreement unconscionably seeks to shift legal risk to the Agency with the Advertiser taking the risk-free benefit of returned unbilled media. The MFA advises Agencies to look very carefully at the risk involved in dealing with unbilled media.

A Comment on Transparency

At a time when the opacity of the supply chain is under scrutiny as outlined in the ACCC's Final Report in respect of the Digital Platforms Inquiry in July 2019, the MFA recognises that some of the issues of opacity as they pertain to the role of media agencies, can and should be addressed in the contract between an Advertiser and Agency through the inclusion of specific terms and conditions.

The MFA supports the AANA's stated intention that transparency and disclosure to Advertisers should form part of an Agency's contractual obligations, should this approach be what the parties intend.

AANA MASTER MEDIA BUYING SERVICES AGREEMENT (July 2019)

The 2019 Agreement - Commentary

While the 2019 Agreement has many improvements over the earlier published 2016 version, it is drafted to be in the best interests of the Advertiser. Accordingly, Agencies must scrutinise the broad and overarching provisions and obligations, to ensure any hard-won specific and individual concessions are not diluted or entirely obviated by the overall structure and architecture of the 2019 Agreement.

The MFA is of the view that many of the broad and overarching provisions and obligations in the 2019 Agreement are unduly onerous on Agencies, rendering full compliance with the 2019 Agreement as drafted improbable if not impossible. This may result in persistent technical breaches across numerous obligations owed to an Advertiser and potentially placing Agencies in a situation where they might, in order to comply with the 2019 Agreement, conflict with or unwittingly breach legal obligations (either contractual, statutory / regulatory) owed to numerous other stakeholders, including media owners, third-party suppliers, employees and shareholders.

As it is likely that many Agencies would be unaware of this situation and any unintended consequences, the 2019 Agreement and its provisions, whether used in whole or part, must be carefully considered in the context of the specific circumstances that the negotiating parties find themselves.

Furthermore, Agencies should not be asked to place themselves in a situation of indeterminate legal and commercial current and future risk that undermines the joint intention of a mutually beneficial contract. The MFA is of the view that Advertisers and Agencies should address discrete areas or conduct of concern to the Advertiser via the contract.

In the Guidance Notes, the AANA has now acknowledged the current media industry practice in Australia where Agencies act as principal in their contractual relations with media owners to purchase media and then look to Advertisers to approve and pay for the media purchased. There is no direct contractual relationship between the Advertiser and media owner or via a disclosed agency relationship. This is in contrast to the drafting of the 2016 version of the AANA agreement.

While the legal outcome of a fiduciary obligation arising under an agency relationship to act in the best interests of the Advertiser has now been removed, the 2019 Agreement contains the contractual notion of the Agency doing *"all things necessary to protect and advance the interests of the Advertiser"*. Whilst the duties of a fiduciary to act in the best interests of a principal are an established part of Australian law, the precise meaning of the contractual term to do all things necessary to protect and advance the interests of the Advertiser remains untested in the Courts and is accordingly a very uncertain legal obligation upon an Agency. There is not much legal difference in effect between the two expressions. It is for this reason, Agencies must exercise caution before agreeing to such a term in their contracts.

If the provision is to be adopted, then it should be tied to a narrow and clearly defined and measurable obligation upon the Agency.

The usual and orthodox contractual drafting approach when a party such as an Advertiser engages a contractor to provide professional type services has already been accommodated in the 2019 Agreement. Under *"Agency Obligations"* in clause 4, we find what has now been identified by the Courts as the *"contractual standard"* where the Agency agrees to provide:

> *"… the services in a timely and professional manner with all due care, skill and diligence as is necessary and appropriate for its proper performance and provision of the Services in accordance with the highest professional and industry standards relevant to the Services."*

In Ikon Communications Pty Ltd v Advangen International Pty Ltd [2018] NSWSC 1650, a case involving the obligations

AANA MASTER MEDIA BUYING SERVICES AGREEMENT (July 2019)

of a media agency under an advertiser and agency services agreement, the Court found that the above contractual standard applied in the media agency and client relationship context against which the acts, omissions and performance of the agency under other operative provisions of the agreement were ultimately tested and assessed.

It must be reasonably considered by the negotiating parties if the notion of the Agency doing *"all things necessary to protect and advance the interests of the Advertiser"* is something necessary in addition to the *"contractual standard"* when the stated intention is to NOT have a fiduciary relationship and, if so, how it can be limited to specific and clearly defined obligations to render the notion legally certain and capable of being performed in the day-to-day agency services context.

Below we overview a number of legal and commercial concerns with the 2019 Agreement from the Agency perspective by listing the applicable clause headings as they appear in the 2019 Agreement:

1. **Definitions and Interpretation:**
   Generally, there are numerous definitions that are very broad, potentially resulting in unreasonable agency outcomes when read in conjunction with corresponding operative clauses in the 2019 Agreement. Agencies will need to carefully scrutinise defined terms during contract negotiations.

2. **Appointment and Scope of Work:**
   The overarching requirement to do all things necessary to protect and advance the interests of the Advertiser in relation to all third-party contracts. Where such third-party contracts are at arm's length and not agency affiliates, this obligation is legally and commercially uncertain given the varying nature and different application of a myriad of third-party contracts Agencies must enter into, either before or during a client services contract. The task an Agency would face to even begin the process of auditing these relationships may be almost impossible from a cost and resource point of view.

3. **Agencies' Obligations:**
   Use of tools and data to *"protect Advertisers' best interests"* is again uncertain and dependent on the actual tools and data to be used. The overarching requirement to provide transparency with respect to all transactions generally – be that with affiliates, media owners, third parties – is so broad and so overarching that somewhere along the line an unintended breach is likely to occur.

4. **Agency Services and Transparency:**
   The overarching requirement of the Agency or any of its affiliates to not enter into contractual relations with any third party (including media owners or other third-party suppliers) that in some way do not conform to the precise wording of the 2019 Agreement. If this obligation were to be performed, numerous extant contracts with third parties would need to be renegotiated (if at all possible, at significant cost to Agency, and if so with the overarching requirement to do all things necessary to protect and advance the interests of the Advertiser) and many third-party vendors of media and other vital services would need to be excluded as such third parties would simply not agree to the terms of the 2019 Agreement (particularly platforms or media with dominant market power). This in turn would impact service delivery and Advertiser-desired outcomes. There is also the broad requirement to ensure Agency operates on a *"fully transparent"* basis when providing digital media placements, including programmatic media, when this may not always be possible and outside of the Agency's realm of influence.

AANA MASTER MEDIA BUYING SERVICES AGREEMENT (July 2019)

Concluding Remarks

As this White Paper seeks to explain, there remain a number of legal and commercial concerns with the 2019 Agreement from the Agency perspective, and accordingly the MFA is of the view that the 2019 Agreement should not be seen as a stand-alone contracting solution between Advertiser and Agency.

Instead, the MFA agrees with the AANA that it should merely be a "starting point" on how to approach each element of the contract negotiation conversation. The extent to which an Advertiser and Agency adopt (in whole, part or not at all) the 2019 Agreement on a case-by-case basis, is entirely a matter for the parties.

The MFA hopes to continue to work with the AANA to improve the 2019 Agreement and make changes that better serve the spirit of trust and transparency.

Important Disclaimer
Please note that the above commentary is simply a guide and a starting point for contract negotiations with Advertisers. There is no obligation on MFA agency members or any other person or entity to use this document and they are free to negotiate whatever terms and conditions they deem appropriate. As this document does not constitute legal advice, entities and individuals should take advice from experienced legal counsel on a case-by-case basis before adopting any of the suggested amendments or commentary in whole or in part.