



ABAC Adjudication Panel Determination No. 123/17

Product: Cellarbrations
Company: ALM Liquor Group
Media: Radio
Complainant: McCusker Centre for Action on Alcohol and Youth
Date of decision: 10 January 2018
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Jeanne Strachan
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns the placement of an advertisement for Cellarbrations by ALM Liquor Group (“the Company”) on radio station Nova 93.7FM during the Kate, Tim & Marty show at 4.25pm, 4.45pm and 4.50pm on Friday 8 December 2017 and arises from a complaint received on 12 December 2017.
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 Advertising Standards Bureau (ASB) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the ASB, 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 the ASB 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 ASB 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 12 December 2017.
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 determined within this timeframe.
9. The quasi-regulatory system for alcohol beverage marketing features independent examination of the content of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast.

Pre-vetting approval is not generally sought for the placement of a marketing communication and was not sought in this case.

The Placement

10. An advertisement for Cellarbrations was heard by the complainant at 4.25pm, 4.45pm and 4.50pm on radio station Nova 93.7FM during the Kate, Tim & Marty show.

The Complaint

11. The complainant is concerned that the advertisement was broadcast at a time when children and young people would have been finishing school and many would have been picked up and been exposed to the alcohol ad while travelling in a car or when listening to the radio on their phones. The complainant provided statistics on the percentage of students that travel to and from school by car, and links to government reports which indicated:
 - 49% of 5-6 year olds and 42% of 9-10 year olds are driven to school every day; and
 - 40% of Western Australian secondary school students travel to or from school each day by car.

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:

Placement Rules (in part) 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

The Company's Response

14. The Company responded to the complaint by letter dated 20 December 2017. The principal points made by the Company were:
- a) We believe the placement of the Cellarbrations radio commercials at 4.25pm, 4.45pm and 4.50pm is not directed at minors and as such, does not breach the ABAC placement rule in particular:
 - i. Nova has confirmed that the Cellarbrations commercials are compliant with the Commercial Radio Code of Practice.
 - ii. Nova has confirmed that during the period of 5th November to 9 December, 78% of the Nova listeners were 18 years and over. This audience data has been sourced from the GfK radio ratings, National Metro Survey 8, 2018, Monday – Friday 16:00 – 16:59 – Sydney, Melbourne, Brisbane, Adelaide and Perth.
 - iii. Nova has confirmed that the Kate, Tim & Marty show is not aimed at minors. The data provided in response 2 (b) informs the development of the content which is designed to appeal to audiences over the age of 18 years old.

The Panel's View

Introduction

15. On 1 November 2017 a revised version of the ABAC came into operation. The new Code included provisions which required that a marketing communication must not be directed at minors (persons under the age of 18) through a breach of any of the Placement Rules. Prior to this revision, the ABAC was concerned with standards which went only to the content of an alcohol marketing communication and did not impose any obligations on the medium or location a marketing item might be transmitted or located.
16. In essence, the Placement Rules create a cascading and interlinked series of requirements which a marketer must satisfy in placing an alcohol marketing item in broadcast and digital locations and platforms. These requirements are:
- Compliance with all applicable media specific codes regulating the placement of alcohol marketing;
 - The use of available age restriction digital controls that permit the exclusion of under 18 year olds from the potential audience of the marketing communication;

- If an age restriction control is not available on the digital or other media platform, then an alcohol marketing item may only be placed where the audience is reasonably expected to comprise at least 75% adults;
 - In addition to the availability of age restriction controls and the placement of a marketing item where the audience will likely be predominately adult, an alcohol marketing communication must not be placed with programs with content primarily aimed at under 18 year olds; and
 - Finally, a marketing communication must not be sent to a minor via electronic direct mail (noting this may occur if an incorrect date of birth has been entered).
17. The Panel made its first determination dealing with the Placement Rules on 8 December 2017 in Determination 115/17 and has followed that up with a number of further Determinations each dealing with a different form of media. This determination and a further two concerning the same complainant (Determination 122/17 & 124/17) both relate to alcohol advertisements broadcast over commercial radio. Collectively these initial determinations provide the opportunity to explore the interaction of the Rules with the principal forms of media utilised by alcohol marketers and canvass the issues arising in some detail in order to provide guidance about how the Rules operate.

The Complaint

18. The complaint has been submitted by Ms Hannah Pierce on behalf of the McCusker Centre for Action on Alcohol and Youth. The McCusker Centre's mission is to reduce alcohol related harms in young people through reduced overall consumption and lower risk patterns of alcohol consumption. The Centre employs various strategies to influence young people directly and indirectly including media and other advocacy. A target area for the Centre is the exposure of young people to alcohol advertising and promotion.
19. The complaint concerns a radio advertisement for the Company broadcast on the Nova FM radio network and heard in Perth. The particular program within which the advertisements were aired was the drive program broadcast from 4pm to 6pm. The actual advertisements were aired at 4.25pm, 4.45pm and 4.50pm on Friday 8 December 2017.
20. The complaint does not raise a concern about the content of the advertisement and it is not asserted that the content has strong or evident appeal to minors. Rather the complaint argues that the advertisement breaches the Placement Rules as it 'played at a time when children and young people would have been finishing school' and would have been exposed to the advertisements. In support of this contention the complainant provided links to two Government papers. The first is entitled 'The Road Less Travelled – 2015 Progress Report Card on Active Transport for Children and Young People'. The second report is entitled 'Growing up in Australia – The Longitudinal Study of Australian Children 2009-10 Annual Report'.

Commercial Radio and Placement Rule (i)

21. Placement Rule (i) requires that an alcohol advertisement comply with codes regulating the placement of alcohol marketing that have been published by Australian Media Industry bodies. Commercial Radio Australia has published Codes of Practice and Guidelines which apply to commercial radio networks such as Nova. These radio codes have been registered with the national regulator of broadcast media, the Australian Communications and Media Authority (ACMA).
22. The radio codes of practice only deal with alcohol in two brief ways. Code 1, which deals with programs unsuitable for broadcast provides that a radio station must not broadcast a program (which includes advertising) which in all of the circumstances presents the misuse of alcoholic liquor as desirable. Code 10 deals the promotion of gambling provides that a commercial relating to betting or gambling must not associate gambling with alcohol.
23. The radio codes do not otherwise deal with the broadcast of alcohol advertising or endeavor to restrict the time of day during which an alcohol advertisement might be broadcast. Accordingly the broadcast of the advertisements during the Nova drive program is not a breach of Placement Rule (i).

Placement Rules (iii) and (iv)

24. Placement Rule (III) provides that if no age restriction controls are available to exclude minors from the potential audience of an alcohol marketing item, then it may only be placed where the audience is reasonably expected to comprise at least 75% adults. This rule requires the Panel to assess available audience composition data and draw an objective conclusion.
25. The complainant submits reports from which it draws the conclusion that the audience for the Nova drive program will include a substantial number of school age children. This is because the two reports indicate a marked decline over recent decades in the number of occasions children access 'active' transport to get to and from school. i.e. walking and riding a bike and an increase in the use of private vehicles to transport children to and from school. The data in the reports do not go to radio audience demographics. Rather the complainant invites that the following conclusion be drawn:
 - That during the drive program time slot (or at least prior to 5pm) many school age children will be in motor vehicles;
 - The car radio will be playing;
 - Accordingly, the audience for the advertisements will contain many school age children and this proportion of under 18 year olds will be higher than at other times of the day when school age children presumably are not being transported in vehicles; and
 - Therefore, radio alcohol advertisements should not be broadcast in peak periods for the transport of school children.

26. Radio ratings are published on a regular basis. The ratings are compiled by the research company GfK under contract to the peak body for radio networks, Commercial Radio Australia. It seems that the ratings are based on surveys of 70,000 listeners across five state markets each year. Perth is one of the markets included in the surveys. 8 surveys were conducted in 2017 with survey 8 released on 14 December 2017 capturing the period in which the advertisements were broadcast.
27. From the ratings in survey 8 for Perth, it seems:
- Nova's drive time program captured the overall largest radio audience of the stations contained in the survey (it's noted the Nova drive program runs from 4pm to 6pm whereas the survey uses the hours of 4pm to 7pm as 'drive time'); and
 - Across all the time periods (not specifically drive time) Nova was the most popular radio station for persons in the age group 10 to 17.
28. The publicly available ratings information does not disclose the share of the audience of the Nova drive program that is under 18 years old. Advice from the Company, stated to be based on the same survey, is that during the period 5 November to 9 December between 4 and 4.59pm Nova has a 78% adult audience in Perth and a 78.1% adult audience across Sydney, Melbourne, Brisbane, Adelaide and Perth.
29. The Panel is not a research body and in making its assessment, it relies upon information supplied by the complainant, the responding company and publicly available sources. For Placement Rule (iii), essentially a factual judgment is required of the likely audience of a program with which an alcohol advertisement has been placed.
30. Drawing this together, the following observations can be made:
- by its nature, radio is a broadcast medium which means that advertisements aired on radio will invariably be heard across age groups including under 18 year olds;
 - The impact of Placement Rules (iii) is to seek to restrict the placement of alcohol marketing with programming on radio that will have a predominately adult audience;
 - The 75% adult audience composition requirement is to be an objective assessment based upon available data;
 - The data supplied by the complainant points to various factors changing the pattern of physical activity amongst school age children in getting to and from school compared to earlier time periods. It supports the contention that more children than previously are being driven from school in private vehicles than once occurred (with consequent issues for health and wellbeing of children related to physical activity) but the complainant's data does not go to the relative adult/child audience composition of individual radio programs;

- publicly available information on radio time slot ratings provides data on the relative share of radio listeners of Nova to other stations and the age demographics of the audience of different radio stations; and
 - Information provided by the Company goes to the adult/under 18 year old make up of the Nova drive time program.
31. Based on the available information, the adult audience of the Nova drive program at the times the advertisements were broadcast was above 75%. This means that Placement Rule (iii) has not been breached.
 32. Placement Rule (iv) provides that an alcohol advertisement must not be placed with programs or content primarily aimed at minors. This requires an assessment to be made of the Nova drive program and a conclusion reached as to whether the program can be said to be primarily aimed at minors.
 33. The list of factors that will be relevant in making this assessment will vary from case to case but may include matter such as:
 - any classification of the program given by the Classifications Board for movies or classifications given by television or digital content distributors e.g. is it a P or PG classified material;
 - The audience composition of the program;
 - The theme of the program and the presence of elements such as violence, language, and the treatment of sex and sexuality;
 - The use of storylines and the nature and complexity of the plots where relevant;
 - The sense of play and wonderment; and
 - The age and portrayal of principal characters depicted in the program or presenting the program.
 34. The drive time Nova program is presented by longtime television actor Kate Ritchie, veteran radio presenter Tim Blackwell and comedian and radio presenter Marty Sheargold. The format of the program consists of exchanges between the hosts, lighthearted competitions and popular music.
 35. The program is popular including with under 18 year olds. It could not be said however the program was primarily aimed at minors. Rather the program would be aimed at an older demographic.

Conclusion

36. The complaint raises the interplay of commercial radio with the Placement Rules inserted into the ABAC in November 2017. The Placement Rules apply to broadcast media such as radio and narrow cast digital platforms.

37. Alcohol advertising will invariably be heard across age groups including minors. The Placement Rules aim to better target the audience which will access alcohol advertising by limiting its placement to programs with a predominantly adult composition and not permitting advertising with programs primarily aimed at under 18 year olds.
38. In this case the complainant argues that the drive time (4pm – 6pm) radio time slot should not be used to place alcohol advertising on the basis that this will be a period that school age children are being driven home from school.
39. The Panel has examined Placement Rules (i), (iii) and (iv). The other rules are not relevant as they apply specifically to marketing via digital platforms. The Panel has concluded based on the available data and the assessment of the Nova program that the Rules have not been breached.