



ABAC Adjudication Panel Determination No 82/21

Product: Venue
Company: Victoria Hotel Orange
Media: Radio
Date of decision: 8 May 2021
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”) arises from a complaint concerning radio advertisements broadcast for Victoria Hotel Orange on 7, 14 and 21 March 2021, on FM107.5 (Orange Community Broadcasters Inc) during a program or segment discussing youth issues. The complaint was received on 9 April 2021.
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 9 April 2021.
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 the Instagram posts.

The Marketing

10. This determination relates to an advertisement for Victoria Hotel Orange, broadcast on FM107.5 (Orange Community Broadcasters Inc) during a program or segment discussing youth issues.

The Complaint

11. The complainant has the following concerns about the marketing:

This advertisement is being played on FM107.5 during the same hour when a programme targeted and advertised as discussing youth issues is broadcast, violating ABAC Code.

A marketing communication should not be placed with programmes or content primarily aimed at Minors. Yabba with Gabba is advertised by the broadcaster as discussing "youth issues" and is presented by a teenager. It is reasonable that young people (minors) would be listening at that time, even if just the presenter's young friends.

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 4 of the ABAC Code provides that:

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 that:

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:

- (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 Placement Policy).
- (ii) A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.
- (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.
- (v) A Marketing Communication must not be sent to a Minor via electronic direct mail (except where the mail is sent to a Minor due to a Minor providing an incorrect date of birth or age).

The Company's Response

15. The Company responded to the complaint by email on 12 April 2021. The principal points made by the Company were:

- Regarding the complaint of our advertising through 107.5, I agreed to a 3 month advertising period through December, January and February with the understanding I was given it would be played certain times of the day through their peak listening hours. I was quite shocked to be notified about the complaint, as the ad was meant to be finished.
- As the licensee of the Victoria Hotel, I myself have a duty of care to staff and patrons and the business. I was unaware it was during a youth program as the ad was meant to be ceased. With this I have called the radio station and stopped the ad. I have no control of who was playing the ad or when the times it would be played as it is a community radio station which I believe is not out there to discriminate.

The Panel's View

16. This determination involves a complaint about an 'ad' broadcast over a community radio station during a slot compered by a person who seems to be under the age of 18. The ad promotes a hotel and makes only a fleeting reference to 'beer'. The concern expressed by the complainant is that alcohol should not be played with a program directed at minors. The complaint raises some novel issues.
17. Firstly, it is borderline as to whether the 'ad' is in fact a marketing communication for the purposes of the ABAC scheme. It seems that community radio station FM107.5 doesn't broadcast 'ads' as such but rather individuals and businesses can 'sponsor' the station and in return the sponsorship entitles the 'sponsor' to be acknowledged. A sponsor of the station is Victoria Hotel in the NSW town of Orange. The spots acknowledging the Hotel talk about the Hotel's history and facilities and only mentions alcohol - beer- twice. Once it stated the Hotel has since 1922 ' being going strong with cold beer'. Later the spot references a beer garden and ends with a song which mentions 'grab a beer'. There is no reference to any brand of beer nor is there any mention of retail information like prices, or the range of products available.
18. The 'ad' is far more about the Hotel as a social and entertainment hub for the community than it is about alcohol beverages or the Hotel being a retailer of alcohol. That said, the definition of a 'marketing communication' for the purposes of the ABAC is widely drawn and there is mention of beer being available at the Hotel. Accordingly, the spots broadcast on the station should meet the ABAC standards of responsible alcohol marketing.
19. The complainant is worried about the spot being aired with the station's 'Yabba with Gabba' program which is broadcast on Sundays from 12 noon to 1-30 pm. The complainant pointed to a station schedule which described the program as discussing youth issues. The station's website provides no detail of who 'Gabba' is or the content of the program, however a station Facebook post identifies the program's host as Gabbi who seems to be a teenage girl. Several segments of the program listened to by the Panel broadcast around the time the complaint was made contained no youth issues discussion but rather had Gabbi introducing music and at one point reading the forthcoming week's weather forecast for the district.
20. There are no available ratings for the community station upon which the size and demographics of the show's audience can be assessed. It seems unlikely that under 18 year olds will be flocking to listen to community radio in an era of social media apps, online video games and streaming services. For its part, the Hotel was surprised its promotional spot was even still airing, and it certainly made no conscious choice to have its spot aired with the Yabba with Gabba Sunday afternoon timeslot.

21. Drawing this together, it is unlikely the ABAC Placement Rules have been breached, other than potentially Rule 4, which provides that an alcohol marketing communication must not be placed with a program or content primarily aimed at minors. The Rules do not contemplate a scenario where a radio presenter is a minor and Rule 4 goes to the actual content of the program. Beyond the station schedule mentioning 'youth issues', there is little available evidence of the actual broadcast program (as opposed to the description in the schedule) being aimed at minors e.g. the music played seemed to be from the station's limited catalogue and was not akin to the playlist of a more recognised youth oriented station such as Triple j.
22. A common-sense set of conclusions is as follows:
- the complainant raises a valid concern that alcohol marketing should not be broadcast in conjunction with a youth focused radio program and to do so would be a breach of the ABAC Placement Rules;
 - to the extent that the Yabba with Gabba show on FM107.5 is in fact a youth focussed show, then the station itself should not place any alcohol entity sponsor promotional slots with the program as a matter of good practice (noting that the ABAC scheme does not bind media enterprises but only alcohol industry participants);
 - there is no problem with the content of the Hotel's promotional spot aired on FM 107.5 as alcohol use (to very limited extent it is mentioned at all) is portrayed properly and entirely consistently with the standards contained in the ABAC;
 - the Hotel did not intend nor expect that its spot would be aired with a youth program;
 - given the description of the Yabba with Gabba program, and the age of the presenter, on the balance of probabilities there has been a breach of Placement Rule 4; and
 - in all the circumstances, particularly the Hotel's understanding that its promotional spots were no longer being aired, it is appropriate to make a 'no fault' breach finding.
23. The complaint is upheld as a no fault breach.