



ABAC Adjudication Panel Determination No 96/23

Product: Alcohol
Company: Wine Concierge Service Pty Ltd
Media: Telemarketing
Date of decision: 18 July 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 7 June 2023 in relation to telemarketing for wine sales by The Concierge Club (“the Company”).
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 the 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 meet 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 7 June 2023.
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 an 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 marketing.

The Marketing Communication

10. The complaint relates to wine telemarketing by the Company.

Complaints

11. The complainant objects to the marketing as follows:
 - *They didn't ask for my age prior to pushing their sale.*
 - *I don't know who they got my details off since I rarely drink, but they could be calling recovering alcoholics or kids. Is telemarketing alcohol sales even legal?*

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 provides that:

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

14. The Company responded to the complaint by letter emailed on 12 July 2023. Its primary comments were:
 - The Wine Concierge Service agents are given numbers direct from a customer relationship management system to be called.
 - The Wine Concierge Service is aware of who owns the numbers contained in the CRM system. Our data includes details such as Full name, address and age. As a control The Wine Concierge service only loads data into the CRM that has been verified 18 years or older. This eliminates any chance of a minor being called by The Wine Concierge Service.
 - Information about the customer is confirmed on the phone before the order is placed i.e. full name, address and email.
 - We use Australia Post's wine delivery service to ensure we meet legislative requirements including checking ID on delivery.
 - Australia Post would not deliver to a minor, the wine delivery would be returned to our warehouse.

The Panel's View

15. This determination arises from an unsolicited call the complainant received promoting the sale of wines. While the complainant believed the call was from "Wine Direct", inquiries made by the ABAC Complaints Officer identified the call as coming from the Wine Concierge Club. This is a wine retailing business, making sales through its website, and also via telemarketing.
16. The complainant is concerned that the Company could be marketing to persons with alcohol dependency as well as minors. The ABAC does not contain any express standards regarding persons dealing with alcohol dependency, but it does have standards going to alcohol marketing and minors. As a result, the Panel will review the complaint against the ABAC requirements regarding minors.

The Placement Rules

17. The obligations in the ABAC in relation to minors are essentially twofold. Firstly, alcohol marketing in its messaging and content is not to be strongly appealing to minors (Content Standards). Secondly, alcohol marketing material, to the extent possible, is to be directed towards adults and away from minors (Placement Rules).
18. The concern expressed by the complainant was that phone calls promoting alcohol could be made to minors. This means the issue is not the ABAC content standards but the ABAC Placement Rules and the interplay of the rules with telemarketing calls.
19. The ABAC Placement Rules seek to have alcohol marketing directed toward adults and to the extent possible away from minors. The rules consist of five separate, but interrelated obligations imposed on alcohol marketers:
 - Rule 1 - the placement of marketing must comply with codes published by the Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy);
 - Rule 2 - available age restriction controls are used by the marketer to exclude minors from viewing alcohol marketing;
 - Rule 3 - if a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding minors, then alcohol marketing may only be placed where the audience is reasonably expected to comprise 75% adults;
 - Rule 4 - irrespective of the expected audience, alcohol marketing must not be placed with programs or content primarily aimed at minors; and
 - Rule 5 – a marketing communication must not be sent to a minor via electronic direct mail.
20. Working through the Placement Rules, and applying them to the specific circumstances of this complaint, it is clear that:
 - The Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy do not apply and therefore Placement Rule 1 has not been breached;

- Placement Rule 3 applies to overall audience reach numbers and does not seem applicable in this case;
 - The marketing was not placed with programs or content primarily aimed at minors, therefore Placement Rule 4 has not been breached; and
 - The marketing was not sent via electronic direct mail, therefore Placement Rule 5 has not been breached.
21. Placement Rule 2 is about the channels over which alcohol marketing is conveyed and mostly comes into play when digital marketing is being used on social media platforms or broadcast via digital TV and streaming platforms.
22. Placement Rule 2 requires the use of Available Age Restriction Controls, the Code definition of which refers to “age restriction, targeting or affirmation technologies available...” In past determinations, the Panel has considered Placement Rule 2 in the context of the application of technologies available to enable age restriction, targeting or affirmation on platforms such as Facebook and Instagram.
23. The Company has provided information as to how it ensures that it’s telemarketing is targeted away from minors. It was submitted:
- the Wine Concierge Service is aware of who owns the numbers contained in the CRM system. Our data includes details such as full name, address and age;
 - as a control The Wine Concierge service only loads data into the CRM that has been verified 18 years or older; and
 - this eliminates any chance of a minor being called by The Wine Concierge Service.
24. While it is a strain to describe the above as “age restriction technologies”, the policy intent of Rule 2 is that alcohol marketers should use the means reasonably available to them to exclude minors being served with alcohol marketing material. Given that the ABAC obligations are to be applied with “spirit and intent”, then the Panel believes the Rule can be understood as applying in this case.
25. So has the Rule been breached? The complainant has not advised of any specific instances of minors receiving calls from the Company, and the Company has asserted that it has controls in place to ensure that its marketing

is directed towards adults and away from minors. On the face of it, the Panel is not able to conclude that a breach of the ABAC Placement Rules has occurred.

26. While the Panel acknowledges the point made by the complainant, and unsolicited marketing calls are annoying, there has been no apparent breach of ABAC requirements and the complaint must be dismissed.