



ABAC Adjudication Panel Determination No 139/23

Product: Nil Desperandum Rum
Company: CAVU Distilling Pty Ltd
Media: Radio
Date of decision: 4 October 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 25 August 2023 in relation to marketing for Nil Desperandum Rum (“the Product”) by CAVU Distilling Pty Ltd (“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:
 - 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;

- 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 25 August 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

10. The complaint relates to the placement of a radio advertisement for Nil Desperandum Rum on Triple M Tradie Radio and Triple M Hard & Heavy throughout the day.
11. The radio transcript for the ad has been provided as follows:

*Nil Desperandum – It's latin for 'no worries.' And round here, it's a bloody good Australian rum.
Shake your phone now to save \$10 off.
Made from wild fermented, locally sourced Organic molasses and Woombye water.
Double pot distilled, then aged for at least two years on the beautiful Sunshine Coast. The perfect, delicious rum for any occasion
Nil Desperandum, No worries. Australia's Finest Rum. Shake your phone to buy a bottle online and save \$10.*

Complaint

12. The complainant objects to the marketing as follows:
 - *Ad does not contain an 18+yo disclaimer, and the ad has discounted promotion for liquor. I'm not 100% sure about the standards for advertising discounts/promotions for liquor.... - but I would think that if there is a promotion then the ad should have an 18+ disclaimer.
Understand the target demographic of the particular radio stations, but they also play at any time of the day when children could be listening.*

The ABAC Code

13. A new ABAC Responsible Alcohol Marketing Code commenced on 1 August 2023. As the complaint relates in part to Placement Rule 4(c) which has a longer transitional period of 1 January 2024, the complaint will be considered under the previous Code.
14. 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.
15. 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 Response

16. The Company responded to the complaint by email on 31 August 2023 and 13 September 2023. The Company's primary comments were:
 - Pre-vetting approval was not obtained.
 - Available age restriction controls were applied to exclude Minors from listening to the Alcohol Marketing Communication. The ad could only be heard by logged in users that were listening through the LiSTNR app that met the 18+ age gate requirement.
 - The LiSTNR Triple M Tradie Radio and LiSTNR Hard N Heavy streamed services are not primarily aimed at Minors. Subject to the signed in LiSTNR user meeting the 18+ age gate requirement and other specified criteria the ad can be heard at any time of the day.
17. Southern Cross Austereo confirmed that the commercial was only being served digitally to people over 18 who have an interest in alcohol or online shopping throughout the campaign.

The Panel's View

18. This determination has arisen from a complaint about marketing for Nil Desperandum Rum on Triple M Tradie Radio and Triple M Hard and Heavy, Australian digital radio programmes available via the LiSTNR app or online.
19. The complainant raises two concerns about the ad, namely:
 - the lack of an 18 + disclaimer; and
 - the ad is played at any time of day when children might be listening.
20. The ABAC standards do not require that alcohol marketing be accompanied with a 'disclaimer' regarding the legal drinking age. The Code does require that the content of an alcohol ad not be strongly appealing to minors. Further, the ABAC Placement Rules require that marketing be directed towards adults and to the extent possible away from minors. The concern expressed by the complainant that the ad is played when children may be listening enlivens the ABAC Placement Rules.
21. The relevant rules for the broadcast of an alcohol ad over a digital radio broadcast require:
 - 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; and
 - Rule 4 - irrespective of the utilisation of available age restriction controls and the expected audience, alcohol marketing must not be placed with programs or content primarily aimed at minors.
22. In relation to Rule 2, the Company advises that Southern Cross Austereo have applied the available age restriction controls to exclude Minors from receiving the ad as it was restricted to users logged onto the LiSTNR app who were registered as aged 18 years or older. This means the ads would not be served online or over a device to a minor.
23. It is recognised that a minor might give a false date of birth and of course it is possible a minor might be listening to the Tradie or Hard and Heavy radio over a device registered in an adult's name. That said, the nature of the content of these stations makes it unlikely the audience of minors would be significant.
24. Placement Rule 3 does not apply where there are age restriction controls available that are capable of excluding minors from the audience, as was the case on this occasion.

25. Placement Rule 4 requires that irrespective of the utilisation of available age restriction controls, alcohol marketing must not be placed with programs or content primarily aimed at minors. Triple M Tradie Radio is described as being aimed at an audience of tradespeople who work on building sites and Triple M Hard N Heavy Radio is a station dedicated to Hard Rock and Heavy Metal music. Both stations are clearly aimed at an adult audience and not primarily aimed at minors.
26. Accordingly the complaint is dismissed.