Investigation report no. BI-658

| Summary |  |
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| **Licensee** | Commonwealth Broadcasting Corporation Pty Ltd [KIIS 1065] |
| **Finding** | Breach of 2.2 [community standards of decency] |
| **Relevant code** | Commercial Radio Code of Practice 2017 (revised in 2018) |
| **Program** | *Kyle & Jackie O* [breakfast program] |
| **Date of broadcast** | 23 August 2022 |
| **Date finalised** | 24 July 2023 |
| **Type of service** | Commercial radio |
| **Attachments** | A – The ACMA’s approach to assessing content |

Background

In November 2022, the Australian Communications and Media Authority (the **ACMA**) commenced an investigation under the *Broadcasting Services Act 1992* (the **BSA**) into a segment broadcast on the *Kyle and Jackie O* program(the **Segment**).

The Segment was broadcast on KIIS 1065 by Commonwealth Broadcasting Corporation Pty Ltd (the **Licensee**) on 23 August 2022 at approximately 6.30 am.

The ACMA received complaints alleging that the Segment included material that was offensive. The complaints received by the ACMA stated:

This is absolutely unbelievable. This is homophobia and slander against our entire people. In modern countries, this is a hate crime and one that should carry a punishment.

and

[Kyle Sandilands] clearly promoted health misinformation that was hurtful to the LGBTQI+ community at a time when the World Health Organisation is stating that stigma and stereotype with Monkeypox is the real threat.

The ACMA reviewed the broadcast and then investigated the Licensee’s compliance with 2.2 [do not offend against standards of decency] of the Commercial Radio Code of Practice 2017 (revised 2018) (the **Code**).

Issue: Decency

Relevant Code provision

Material not suitable for broadcast

2.2. Program content must not offend generally accepted standards of decency (for example, through the use of unjustified language), having regard to the demographic characteristics of the audience of the relevant Program.

Finding

The ACMA finds that the Licensee breached 2.2 of the Code.

Reasons

To assess compliance, the ACMA has addressed the following questions:

* What would the ordinary reasonable listener have understood the material to convey?
* What are the demographic characteristics of the audience?
* In light of the above, did the material offend against any generally accepted standards of decency?

The Licensee submitted:

While the Segment may have contained some unfavourable descriptions of those susceptible to the virus, being homosexual males, the Segment was intended to bring about awareness to the community of the public health risk surrounding the transmission of the monkeypox virus and the availability of a vaccine to prevent transmission against infection – which posits the Segment was well-intended and demonstrate a paucity of ill-will towards [the] LGBTQIA+ community.

Further detail about the ACMA’s approach to assessing content is set out in **Attachment A**.

***What would the ordinary reasonable listener have understood the material to convey?***

The Segment was a medical advice segment with ‘Dr KIIS’ that invited listeners to call in. It began with a reference to co-host Jackie O having a whooping cough vaccination, in order to meet co-host Kyle Sandilands’s newborn son.

The Segment then turned to a discussion about the monkeypox virus (**mpox**) and its association with gay men. In the course of the discussion, newsreader Brooklyn Ross’s partner was invited into the discussion via telephone. “Dr KIIS” was also a participant.

During the discussion, four relevant exchanges/statements were broadcast.

Excerpt 1:

Brooklyn Ross: What about me, do I need the monkeypox vaccine?

Kyle Sandilands: No-oh, we’re not letting any gays near him.

The ACMA considers that the meaning conveyed was clear – that there was no need for Brooklyn Ross to be vaccinated against mpox because Mr Sandilands stated that he would not let ‘any gays’ near his son.

Given the context provided by Brooklyn Ross’s question, the ACMA considers that the ordinary reasonable listener would have understood Kyle Sandilands’s statement to have been based on the belief that ‘any’ gay man represented a danger to Kyle Sandilands’s son by being a potential carrier of the mpox virus, regardless of their vaccination status or their individual circumstances.

The Licensee submitted that the meaning of this exchange was properly contextualised by the following (Excerpt 2):

Brooklyn Ross: Yeah, there’s a monkeypox vaccine.

Kyle Sandilands: Is there? You getting it?

Brooklyn Ross: No, I don’t think so.

Kyle Sandilands: Why? You’re rolling the dice again? What’s wrong with you gays?

Jackie O: He’s in a committed relationship.

and that taking ‘Excerpt 1 and Excerpt 2 together then, means Mr Sandilands did differentiate between unvaccinated and vaccinated persons’.

Although Excerpt 2 does refer to mpox vaccination and comments on those getting vaccinated as opposed to those who were not, the ACMA does not agree with the Licensee’s interpretation. The significance of the vaccination status of Brooklyn Ross (and by extension, other gay men) was clearly addressed in Excerpt 1 where Kyle Sandilands dismissed it as a determining factor on whether Brooklyn Ross could meet Kyle Sandilands’s son, because they weren’t letting ‘any gays’ near him.

Therefore, with respect to Excerpt 1, the ACMA considers that the meaning conveyed to the ordinary reasonable listener was that gay men in general were a danger for transmitting mpox.

Excerpt 2:

In this exchange, as reproduced above, Kyle Sandilands responded to Brooklyn Ross’s statement that he wasn’t intending to get an mpox vaccination with two questions, the first of which implied Brooklyn Ross was taking a risk (‘rolling the dice’) by not getting vaccinated and the second of which indicated that such risk-taking on health matters was a general characteristic of gay men (‘what’s wrong with you gays?').

The Licensee has submitted that Excerpt 2:

[…] should be considered in light of COVID. We do not need to repeat the breadth and seriousness of COVID. One clear result though was the enormous profile raising of obtaining vaccinations. Mr Sandilands was a strong supporter and advocate for members of the public to obtain vaccination […].

With this in mind, we submit the comments in Excerpt 2 are potentially an incredulous response to not obtaining a vaccination where available. A reasonable listener, having just lived through COVID, would have “read between the lines” and focused on the element of not obtaining a vaccine. Our view is that only more homophobic listeners would have focussed on the “gay” element, but homophobes are not reasonable listeners.

The ACMA accepts that Kyle Sandilands’s reaction would have been understood by the ordinary reasonable listener to be incredulous. However, the incredulity was conveyed in relation to an entire demographic – ‘you gays' – not Brooklyn Ross individually. Additionally, Kyle Sandilands’s incredulity was not conveyed as one based on any information about mpox vaccination rates amongst gay men but rather a simple extension from Brooklyn Ross declaring he would probably not be getting vaccinated, to ‘what’s wrong with you gays’ in general.

The ACMA does not consider that this understanding of the comments would have been one restricted to ‘homophobic listeners’, as the Licensee has submitted, but rather one that was apparent from a plain language understanding of the comments as broadcast.

The ACMA considers that the ordinary reasonable listener would have understood from the exchange that Kyle Sandilands was asserting that gay men in general did not act responsibly when it came to preventive health and, in particular, sexual health.

Such a comment relies on stereotyping gay men and creates parallels to the AIDS stigma of the 1980s.

The ACMA considers that this particular meaning was conveyed on the basis of the extensive history of public discussion of risk-taking and gay men’s sexual health associated with HIV/AIDS, due to the similarities in modes of transmission.

Excerpt 3:

Kyle Sandilands: Now the monkeypox. The big gay disease floating around loads. It’s only the gays getting it. Are you worried about getting it?

The ACMA considers that the meaning conveyed to the ordinary reasonable listener by this statement was that mpox was a disease that gay men were more susceptible to, relative to other people, by a large margin (‘a big gay disease’) and that other people were not impacted (‘only the gays’).

Excerpt 4:

Kyle Sandilands: If I was a doctor, I’d put a sign up, ‘no monkeypox admitted’.

Brooklyn Ross: Oh, you can’t do that, as a doctor.

Jackie O: You can’t. No.

Kyle Sandilands: I think you can do whatever you want as a doctor. You don't have to have every Tom, Dick and bloody dirty monkeypox victim coming in there do you?

[…]

Dr KIIS Technically we don't, but we are supposed to provide care for everybody.

Kyle Sandilands But you can put a sign up saying no monkeypox people?

Here, Kyle Sandilands refers to people carrying the mpox virus as ‘bloody dirty’ victims. The ACMA considers that the mild expletive, ‘bloody’, combined with the expression ‘dirty’, conveyed a degree of contempt about people who were to be regarded as unclean and who warranted little or no sympathy or compassion.

Discussion

The Licensee has submitted that it is important that the ACMA not consider particular statements ‘in isolation from the wider broadcast’. The ACMA agrees that context is important but at the same time considers that individual statements have the capacity to convey meaning on their own.

In this instance, concerning a discussion that took place over the course of several minutes, the ACMA considers that the overall sentiment conveyed in the Segment was that gay men were irresponsible with regards to their personal sexual health and that this was resulting in their being the prime carriers of a virus that presented a danger to other members of society and that they deserved little sympathy, including to the extent that doctors might legitimately refuse to treat them.

The ACMA notes that the sentiment that gay men were irresponsible with regards to their exposure to mpox was further communicated through references to sexual promiscuity that were part of several exchanges involving Kyle Sandilands, Brooklyn Ross and his partner, including:

How do we know that bloody boy is not at home sucking everyone off that comes over with a delivery?

The Licensee has submitted that the overall tone of the Segment was ‘one of concern, urging caution given the high transmission rate amongst the homosexual community specifically’ and while it ‘may have been confronting or distasteful for some’, it ‘provided a balanced, sensible discussion in order to bring an informed awareness of the risks of monkeypox’. The Licensee submitted:

[…] the public health messaging was targeted towards gay and bisexual men being the most affected population. This is relevant as the mention of monkeypox being a disease that largely affected the gay population is correct. To suggest otherwise or “sugar-coat” the scenario could actually do a disservice to the gay community else they do not appreciate the risks. It also means that specific reference to the gay community being prone to monkeypox is not of itself offensive.

The Licensee has submitted that the inclusion in the broadcast of ‘other key contributing individuals (Dr KIIS, Brooklyn Ross and his partner […])’ provided ‘countervailing comments’ to those of Kyle Sandilands. The ACMA notes that those contributions occurred after that part of the Segment in which the excerpts referred to above were broadcast and included some information from Dr KIIS on mpox transmission modes, vaccination protection and fatality risk. This information was presented off a platform provided by a conversation involving Kyle Sandilands, Jackie O, Brooklyn Ross and his partner, about aspects of Brooklyn Ross’s and his partner’s social and personal lives.

The ACMA notes that one of the premises of the Segment purported to be an opportunity to seek medical advice and we accept that the information provided by Dr KIIS went some way toward fulfilling that objective. However, the inclusion of this information did not negate Kyle Sandilands’s offensive, exclusionary comments explicitly aimed at the presumed conduct of gay men.

***What are the demographic characteristics of the audience?***

Under the decency provisions, regard must be had to the demographic characteristics of the audience of the relevant program. As part of this, the ACMA considers audience demographics and their likely expectations.

The Licensee did not provide specific demographic data about the audience of the program. However, the Licensee submitted:

Mr Sandilands is known for his outspoken views and colourful vernacular which endear him to his regular audience, and we appreciate that those who are unfamiliar with the format of the Program may consider the content opinionated and forthright. The ACMA has previously accepted that Mr Sandilands is known for this particular style of broadcasting.

The ACMA acknowledges the Licensee’s submission that the audience of the program would likely have a degree of tolerance for coarse language and a familiarity with Kyle Sandilands’s turn of phrase and general vernacular.

The Licensee also noted Kyle Sandilands’s ‘unique turn of phrase and blunt manner of delivery’ and submitted that the audience appreciated that ‘the comments were showmanship and entertainment and not derogatory or offensive towards the LGBTIQ+ community’.

However, there is nothing in the submission to suggest that the demographic of the audience would have different standards from the rest of the community when it comes to the need for non-judgemental public health messaging.

***In light of the above, did the material offend against any generally accepted standards of decency?***

Provision 2.2 requires the ACMA to consider the meaning of the phrase ‘generally accepted standards of decency’.

The phrase ‘generally accepted standards of decency’ refers to the current consensus of recognised present-day standards of propriety. In this regard, some guidance is provided by the courts, which have said that community standards will be those of the average person who can be summed up as moderate, and ‘not given to thoughtless emotional reaction’ nor ‘given to pedantic analysis’.[[1]](#footnote-2)

The ACMA acknowledges that diverse audiences in Australia will not necessarily have common tastes and standards. Members of the community may accept that some material they find coarse, or offensive would not be similarly judged by others. People tend to accept, up to a point, the right of others to have such material broadcast during programs to which they listen.

With regards to the comment that initiated the discussion – that Kyle Sandilands would not allow Brooklyn Ross, as a gay man, near Kyle Sandilands’s young son – the ACMA considers that the community standard relevant to parents’ attitudes towards their children, particularly when those children are newborns, is an understanding that such parents are intensely protective.

The ACMA considers that the community understands that parents of newborns are vigilant about potential harms to which their children might be exposed. However, notwithstanding a level of understanding in relation to the health and safety of a newborn baby, the ACMA does not consider that the community would find the suggestion that, based on their sexuality, segregating a group of individuals from children was acceptable in contemporary Australia.

Accentuating this was the sentiment that, as a gay man, Brooklyn Ross posed a particular risk of passing on mpox. This sentiment was repeated at other points during the Segment, particularly in Excerpt 3 (‘a big gay disease’) and underpinned the entire Segment, which was premised on an association between mpox and gay male sexuality.

The ACMA notes that the World Health Organisation (WHO) has commented that men who have sex with men are at risk of contracting mpox:

Although I am declaring a public health emergency of international concern, for the moment this is an outbreak that is concentrated among men who have sex with men, especially those with multiple sexual partners.

That means that this is an outbreak that can be stopped with the right strategies in the right groups.

It’s therefore essential that all countries work closely with communities of men who have sex with men, to design and deliver effective information and services, and to adopt measures that protect the health, human rights and dignity of affected communities.[[2]](#footnote-3)

The ACMA notes that this statement asserts an empirical association between mpox infection and men who have sex with men, ‘especially those with multiple partners’. The ACMA acknowledges, therefore, that a basis existed for a discussion about mpox that involved references to gay sexuality and promiscuity. The ACMA considers that the Australian community is tolerant of public health discussions that may appear to be targeted toward particular sections of society, where there is a rational basis for suggesting such an association.

Therefore, given the information communicated by the WHO, which was provided in the early stages of the spread of the virus and which had been released at the time of the broadcast, the ACMA considers that associations made in the Segment, between mpox and gay men, and between mpox and promiscuous sexual behaviour, although cast in quite general terms, did not, in and of themselves, offend against Australian community standards of decency.

The ACMA acknowledges that the presentation style of the Segment and of the presenter, Kyle Sandilands, is not one of sombre, reasoned discussion in which the many nuances of medical knowledge and public health messaging are readily accommodated. Rather the presentation style, which is accepted and appreciated by the audience for the program, is one where information is often communicated in reductive terms, and crude stereotypes are used. In this sense, the ACMA does not expect the Segment to have presented a discussion about mpox in the same respectful way as would an organisation such as the WHO.

The Segment also conveyed other meanings, being that (usually promiscuous) gay men were being irresponsible (again) by taking unnecessary risks and accordingly, they did not deserve any sympathy when they (as ‘bloody dirty monkeypox victims’) presented for medical assistance.

These meanings go beyond a reductive and combative presentation suited to the style of the program, which nevertheless, as the Licensee submitted, ‘was intended to bring about awareness to the community of the public health risk surrounding the transmission of the monkeypox virus and the availability of a vaccine’. The ACMA notes that, while that may have been the Segment’s intention, in actuality, it also assigned blame and suggested that a deserved consequence in the form of refusal of medical treatment was appropriate.

The Licensee has submitted that these sentiments were simply showmanship designed to provide a platform upon which serious issues could be addressed in an accessible manner for the benefit of the LGBTIQ+ community.

The ACMA considers that an ordinary reasonable listener would not have understood the Segment to merely be a provocative performance and would have understood the Segment to include simple derision and insult.

The ACMA does not consider that the sentiments as expressed in the Segment are accepted by the Australian community as part of a proper response to the problem of a novel, infectious disease. In the ACMA’s understanding of the Australian community standard, people are not blamed for being at risk; and people who do get infected, remain deserving of the community’s compassion and of accessible health care.

Accordingly, the ACMA finds that, in broadcasting the Segment, the Licensee breached 2.2 of the Code.

Attachment A

The ACMA’s approach to assessing content

When assessing content, the ACMA considers the meaning conveyed by the material, including the natural, ordinary meaning of the language, context, tenor, tone, and any inferences that may be drawn. This is assessed according to the understanding of an ‘ordinary reasonable’ listener or viewer.

Australian courts have considered an ‘ordinary reasonable’ listener or viewer to be:

A person of fair average intelligence, who is neither perverse, nor morbid or suspicious of mind, nor avid for scandal. That person does not live in an ivory tower, but can and does read between the lines in the light of that person’s general knowledge and experience of worldly affairs.[[3]](#footnote-4)

Once the ACMA has ascertained the meaning of the material that was broadcast, it then assesses compliance with the Code.

1. *Mackinlay v Wiley [1971]* WAR 3 at 25. [↑](#footnote-ref-2)
2. See <https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-the-press-conference-following-IHR-emergency-committee-regarding-the-multi--country-outbreak-of-monkeypox--23-july-2022>, accessed 11 April 2023. [↑](#footnote-ref-3)
3. *Amalgamated Television Services Pty Limited v Marsden* (1998) 43 NSWLR 158 at pp 164–167. [↑](#footnote-ref-4)