

ABAC Adjudication Panel Determination No. 65/17

Product: Dan Murphy's
Company: Endeavour Drinks Group
Media: Digital
Complainant: Confidential
Date of decision: 7 March 2017
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”) concerns digital advertising for Dan Murphy’s by Endeavour Drinks Group (“the Company”) and arises from a complaint received 8 February 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. Within this framework, some of the requirements go to the placement of alcohol marketing, while others go to the content of the marketing. The ABAC is a content code, which means the standards of good marketing practice within the Code apply irrespective of where the marketing occurs (e.g. in print, in digital formats, or by broadcast mediums). Equally, the fact that the marketing is placed in a particular medium or in a particular location will not of itself generally be a breach of the ABAC. In contrast, the placement codes applying to outdoor sites or free to air television don’t go to what is contained within alcohol marketing but the codes will be potentially breached if the marketing occurs at particular timeslots or is placed near a school.
 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 8 February 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 has been determined within 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 this marketing communication.

The Marketing Communications

10. The marketing communication is an electronic direct mail (EDM) by Dan Murphy's.
11. The EDM features the text in small print at the top of the email "We Don't Match Prices We Beat Them – Can't see this email? View online".
12. Below in larger print is "My Dan Murphy's" against a black background and "We Don't Match Prices We Beat Them" against a dark green background.
13. The email then states "Hi (first name of recipient), Here's proof that we don't just match prices, we beat them. Make Ballantine's your Valentine this February!" Then an image of the product with the caption "\$30.90 each" and the text "Ballantine's Scotch Whisky 700ml - \$30.90 each^ Check Store Availability or Buy Online>". This is followed by a second special with an image of another Ballantine's product with the caption "\$40 each" and the text "Another Unbeatable Member's Offer. Ballantine's 12 Year Old Scotch Whisky 700ml - \$40 each^^ From one of the most prominent Scotch producers, this perfectly balanced Ballantine's Scotch has a rich creaminess and hints of vanilla oak, with a lingering aftertaste that goes on and on delightfully. Member Offer>".
14. Below are links to "My Offers", "Upcoming Events" and "My Competitions" followed by terms and conditions.

The Complaint

15. The complainant is concerned that the promotion of Ballantine's Scotch Whisky with the line "Make Ballantine's Your Valentine this February":
 - Suggests a person should make love to their whisky or if single, drown their sorrows with whisky;
 - Promotes an intense and dangerous relationship to whisky; and
 - Is distasteful.

The ABAC Code

16. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (a)(i) show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or

abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines;

- (a)(ii) show (visibly, audibly or by direct implication) or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage.

The Company's Response

17. The Company responded to the complaint by letter dated 24 February 2017. The principal points made by the Company were:

- This response addresses advertising, marketing and retail activities under the control of Endeavour Drinks Group (EDG). EDG ambition is to be Australia's most responsible retailer of alcoholic beverages and as part of that commitment is a signatory to the ABAC Scheme. Prior to becoming a signatory, EDG demonstrated a long-standing commitment to supporting and adhering to ABAC and Advertising Standards Bureau principles. EDG maintains strict internal and external processes in addition to those required by the ABAC Scheme, which are highly relevant in this context. EDG has also instigated a range of industry-leading initiatives to ensure that children are not served alcohol, including:
 - ID25 (ask for ID from anyone who looks under 25)
 - Don't Buy It For Them (stopping secondary supply to minors)
 - Staff training that exceeds legal requirements, including "Don't Guess, Just Ask", team talkers, regular refresher and reminder courses, and implementation of the award winning training program "Safe".
- In marketing alcoholic products, EDG has been fully aware of the requirement not to encourage under-age drinking or to appeal to children or adolescents. These advertisements were not subject to pre-vetting approval on this occasion as it was a retail price and product Electronic Direct Mail (EDM) to Dan Murphy's loyalty program (*MyDanMurphy's*) customers who are required to complete a date of birth to register and to confirm they are of legal drinking age. This campaign was limited to Valentines Day and as such has now ended.
- Taken as a whole, the Dan Murphy's EDM advertisement present a mature, balanced and responsible approach to the consumption of alcoholic beverages and do not in any way encourage irresponsible behaviour.

- The line “Make Ballantines Your Valentine this February” would be viewed by the reasonable person as simply using two words that rhyme to convey a message aligned to the seasonal activity of Valentines Day. It humorously plays on the enjoyment a connoisseur of Scotch Whiskey would have towards their favourite alcoholic beverage. The line is limited to associating a special ‘price offer’ on Ballantines to a seasonal event.
- EDG would dispute that the sentence encourages excessive or rapid consumption. Even if taken literally, making a bottle of Scotch a person’s Valentine doesn’t provide any connotation or connection to consuming the product in an irresponsible manner or rapidly to the point of intoxication. The sentence also has no encouragement for it to be consumed on a single day (Valentines Day) or on a single occasion. It very clearly encourages the “purchase” of that particular Scotch in the month of February.
- Equally, there could be no literal interpretation that by making the bottle “your valentine” it would be encouraging irresponsible or offensive behaviour that relates to the consumption or presence of the Scotch. There is no depiction of anything other than price and product in the EDM. The 12 year old Scotch has some romance copy describing the characteristics of the Scotch and the producer. No designs, motifs, symbolism or fantasy imagery is used. Neither the copy nor the photo of the bottle could be seen to encourage rapid or excessive consumption or irresponsible or offensive behaviour.
- The EDM carries the Dan Murphy’s “Our Commitment, Our Community” iconography and message that it “supports the responsible service of alcohol” as well as the legal requirements not to serve people under the age of 18. To summarise, there is nothing in the sentence specifically or in taking the EDM as a whole that a reasonable person would consider as “encouraging” the excessive or rapid consumption; or “encouraging” irresponsible or offensive behaviour. Accordingly, the complaint should be dismissed, and the Panel should determine that there has been no breach of the Code.

The Panel’s View

18. The complaint concerns a direct marketing email, which was forwarded to subscribers of the Dan Murphy chain of alcohol retail outlets. Distributed in February 2017, the email largely contains price information about products but in doing so makes a play between the product Ballantine Scotch with Valentine’s day. It is this word play which has drawn the adverse comment of the complainant.
19. The complainant contends the messaging in the email is distasteful and promotes an unhealthy association between alcohol use and Valentine’s day.

The sentence “make Ballentine’s your Valentine” is argued to highlight that alcohol is deserving of love or if you’re single, a means to overcome sorrow or loneliness.

20. The Company refutes that the email message would be interpreted in this way. The Company contends that the word play is based on a rhyme of Valentine and Ballentine and wouldn’t be taken as encouraging irresponsible alcohol use.
21. The test to be applied by the Panel in assessing the consistency between a marketing communication and an ABAC standard is the probable understanding of the communication by a reasonable person. A “reasonable person” is a concept borrowed from the legal system and means a so called average person sharing attitudes, opinions and values found in a majority of the community.
22. On this occasion the Panel does not believe a reasonable person would share the complainant’s interpretation of the message. The Panel thinks the message would be taken as promoting the product at its marketed price during the month of February. The rhyming device is used between the annual February event of Valentine’s day and the name of the product, but this wouldn’t be taken as conveying a message that the alcohol product should be used irresponsibly or excessively or as a substitute to a personal relationship.
23. The complaint is dismissed.