



ABAC Adjudication Panel Determination No. 11/20

Product: Dan Murphys
Company: Endeavour Drinks Group
Media: Digital Catalogue
Date of decision: 17 February 2020
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 a digital catalogue by Dan Murphys (“the Company”) and arises from a complaint received 28 January 2020.
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. 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 the other codes as well as meeting the standards contained in the ABAC.
4. For ease of public access, Ad Standards (AS) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by AS, 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 AS 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 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 28 January 2020. The Panel endeavours to make a decision within 30 business days of the receipt of a complaint and this complaint has been determined within that timeframe.
8. 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 catalogue.

The Marketing Communications

9. The complaint refers to page 15 of the Victorian digital catalogue for Dan Murphys that ran for the period from 16 to 29 January 2020.



BONUS
Stella Artois Gift Pack with any Stella Artois Case or 2 x 6 pack purchase.
\$45⁹⁰
CASE (24)
Stella Artois
330mL Bottles

INTERNATIONAL

 12 PACK 24⁹⁰ PACK (12) Coors Lager 355mL Cans	 6 PACK 2 FOR 39⁹⁰ CASE (24) Asahi Super Dry Black 334mL Bottles	 39⁹⁰ CASE (24) Carlsberg Green Lager 330mL Bottles	 41⁹⁰ CASE (24) Singha Lager Beer 330mL Bottles	 43⁹⁰ CASE (24) Peroni Nastro Azzurro 330mL Bottles	 45⁹⁰ CASE (24) Budweiser 330mL Bottles
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For a long weekend beer that's balanced and smooth, and great for sharing, look no further than XXXX Gold.
\$38⁹⁰
CASE (24)
XXXX Gold
375mL Bottles

MODERATION

 4 PACK FREE ORGANIC LAGER 15⁹⁰ PACK (4) Free Organic Lager 375mL Cans	 0% alc/vol 34⁹⁰ CASE (24) Carlton Zero 330mL Bottles	 Mid 39⁹⁰ CASE (24) Coopers Dry 355mL Bottles	 Mid 42⁹⁰ CASE (24) Coopers Mid Ale 375mL Cans	 Mid 43⁹⁰ BLOCK (30) Iron Jack Ultra Crisp Lager 375mL Cans	 Gluten Free 45⁹⁰ CASE (24) Hahn Gluten Free 330mL Bottles
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Australia's favourite craft beers

Dan Murphy's is a proud supporter of GABS, and you'll find plenty of previous winners available in-store. Tune into the countdown revealing this year's winners, as voted by the Australian public, on January 25. gabsfestival.com



AUSTRALIAN BEER

 36⁹⁰ CASE (24) XXXX Summer Bright Lager 330mL Bottles	 43⁹⁰ CASE (24) Two Suns Premium Dry 330mL Bottles	 44⁹⁰ CASE (24) Foster's Classic Lager 375mL Cans	 45⁹⁰ CASE (24) Crown Lager 375mL Bottles	 48⁹⁰ CASE (24) Byron Bay Brewery Premium Lager 355mL Bottles	 47⁹⁰ CASE (24) Victoria Bitter 375mL Cans
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Personal shoppers only. Prices valid from Thursday 16 to Wednesday 29 January 2020 unless stated otherwise. We reserve the right to limit sales to retail quantities. Excludes bulk buyers and institutions sales. Dan Murphy's supports the responsible use and consumption of alcohol. Alcohol and tobacco not sold to persons under 18 years. Wine bottles are 750mL, and spirit bottles are 750mL, unless otherwise stated. Images may vary. In-Store prices apply to purchases of six or more bottles of wine or spirits. In any 10c prices apply to purchases of six or more bottles of wine or spirits. In any 10c prices apply to purchases of six or more bottles of wine or spirits. The listing of a product on our site does not constitute an offer to sell that product to you. Prior to any offer or acceptance, additional price details will be completed and the price of the product may increase to ensure compliance with the Northern Territory Minimum Unit Pricing Legislation. This may change the final price calculation for your order. Some varieties not available in all stores. Some varieties not available at the Dan Murphy's Cash Store. **Shedding New** is available only in selected metro areas and products based on your local store. We reserve the right to limit sales quantities subject to availability. **Seasonal Case Release** - Newell Lager Price Guarantee. Conditions apply. call 1300 72 33 88, visit danmurrpys.com.au or see a team member for details. 15/01/2020, 10

The Complaint

10. The complainant is concerned that the advertisement is irresponsible due to:
- the inclusion of a range of alcohol products available in multiples, such as a carton, under the heading "moderation"; and
 - the use of checkmarks (like the Heart Foundation Tick mark of approval) for mid strength and organic alcohol products.

The ABAC Code

11. 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

12. The Company responded to the complaint by letter dated 10 February 2020 advising that:

- It is Dan Murphy's aim to be Australia's most responsible retailer of alcoholic beverages. This is highlighted by the fact that Dan Murphy's formalised its status as a signatory to the ABAC Scheme in 2013. Dan Murphy's maintains strict internal and external processes in addition to those required by the Code. Furthermore, as part of our community charter 'Our Community, Our Commitment', Dan Murphy's has in place a range of industry leading initiatives to ensure that minors are not served alcohol and to encourage responsible drinking practices. These include:
 - ID25 (ask from anyone who looks under 25);
 - Don't Buy It For Them (stopping secondary supply to minors);
 - Our intoxication Policy (refusal of service to anyone who may be intoxicated); and
 - 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 program 'Safe'.
- For the reasons outlined below, it is Dan Murphy's view that the Ad does not breach Part 3(a) of the Code.
- The Ad depicts six beer products under the heading 'Moderation'. Dan Murphy's has included those beers in the Ad since they all contain a lower alcohol by volume in comparison to full-strength beers which contain at least 4.8% alc/vol. The products featured contain the following alcohol by volume:
 - Free Organic Lager – 4.4% alc/vol
 - Carlton Zero – 0% alc/vol
 - Coopers Dry – 4.2% alc/vol
 - Coopers Mild Ale – 3.5% alc/vol
 - Iron Jack Crisp Lager – 3.5% alc/vol
 - Hahn Ultra Crisp Gluten Free – 4.2% alc/vol

Dan Murphy's submits that placing emphasis on product's low strength alcohol relative to the typical strength of a similar product, as is done in this Ad, does not result in a breach of Part 3(a)(iv) of the Code.

- The complainant has interpreted the use of the word ‘moderation’ to suggest that the products are being promoted such that their consumption in large quantities amounts to “moderate” consumption and, as such, breaches Part 3(a) of the Code. Dan Murphy’s disagrees with this interpretation for the following reasons:
 - The Ad does not suggest in any way that the customer should purchase the depicted products in large quantities and consume the same products in excessive quantities. Only single units of the products are depicted in the Ad. Dan Murphy’s does sell these products in multi-packs but it submits that those packs are to be consumed in moderation across a period of time or by multiple individuals.
 - The Ad does not contain any language or imagery that endorses or encourages the excessive consumption of the featured products, encourages irresponsible or offensive behaviour or challenges or dares individuals to consume the featured products in breach of Part 3(a) of the Code. In relation to the use of the work “moderation” (or moderate), Dan Murphy’s highlights that a reasonable individual would understand this to have a different meaning than to suggest that consumers should purchase the depicted product in large quantities (Macquarie Dictionary – “the quality of being moderate, restraint, avoidance of extremes, temperance). Also, reasonable individuals would understand that moderate consumption of alcohol is consistent with health guidelines.
 - The specific elements of the Ad that the complaint has raised should be considered in the whole context of the catalogue page. Dan Murphy’s submits that the entire page does not suggest that customers should purchase alcoholic products in large quantities as all products are displayed in static form, no text or images are used that directly or indirectly encourages the excessive consumption of alcohol. In fact, the terms and conditions located at the bottom of the page highlights that *Dan Murphy’s supports the responsible service and consumption of alcohol.*
- Dan Murphy’s disagrees that the Dan Murphy’s “tick” badges breach Part (a) of the Code because they may be confused with the Heart Foundation Tick:
 - The Heart Foundation Tick is shown on a disc and is encircled with the text “National Heart Foundation Approved”. Dan Murphy’s “tick” badges do not include any reference to the National Heart Foundation and display different attributes of the product that customers may find useful.
 - The Heart Foundation Tick predominantly features the colour red, whereas the Dan Murphy’s “tick” features the colour light blue.
 - The tick in the Heart Foundation Tick is of a brushed appearance that covers a large portion of the Heart Foundation Tick, whereas the tick in the Dan Murphy’s “tick” badges use clean lines that covers only a small portion of the badge.
- The purpose of the Dan Murphy’s “tick” badge is to draw attention to specific attributes of the products. The badge is neither developed, nor does it suggest,

or encourage excessive consumption of alcohol and it doesn't resemble the Heart Foundation Tick or purport to have their mark of approval. Dan Murphy's believes that a reasonable person would share this view.

The Panel's View

13. Dan Murphys is a major alcohol retailer within the Woolworths group of companies. Between 16 to 29 January 2020 the Company was promoting its products via an online catalogue. In part the catalogue showed a number of products grouped under the heading of 'moderation'. Overlaid on the picture of each product was a blue circle with a word or two description of the product and in five of six of the circles, a tick was added.
14. The complainant believes the ad is irresponsible, as the heading 'moderation' is misleading, and the 'tick' brings to mind health endorsement symbols such as those used by the Heart Foundation. The Company contends the ad would not be interpreted in this way and that it is consistent with ABAC standards.
15. In assessing if a marketing communication is consistent with Code standards the Panel adopts the viewpoint of the probable understanding of a reasonable person, taking the content of the marketing item as a whole. The concept of the 'reasonable person' is drawn from the common law system and means that the life experiences, values and opinions found commonly in a majority of the community is to be the benchmark.
16. The Panel does not believe the ad is in breach of the ABAC standards. In reaching this conclusion the Panel noted:
 - the heading 'moderation' is not particularly prominent within the ad as a whole and would likely be taken to refer to the lower alcohol content (in one case zero alcohol content) of the products grouped under the heading compared to standard strength products;
 - the ad as a whole provides pricing for products based upon their purchase in a case (i.e. multiples) rather than a single can or bottle of the product and it is unlikely a reasonable person would understand that the heading 'moderation' is implying that it is acceptable to consume the product in excess; and
 - the use of a tick symbol in advertising is very common and while a tick is used by the Heart Foundation on certain foodstuffs, the context of the use of the tick within the ad would not be taken as implying a health endorsement. Rather a reasonable person would probably understand it is no more than usual advertising puffery.
17. The Complaint is dismissed.