



ABAC Adjudication Panel Determination No. 120-123, 125-127, 131, 134-135/20

Product: Various
Company: Dan Murphy's
Media: Television
Date of decision: 23 September 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”) relates to television marketing by Dan Murphy’s (“the Company”) and arises from ten complaints received between 24 August and 2 September 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 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 meeting 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 complaints raise concerns under the ABAC Code and accordingly are within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaints were received between 24 August and 2 September 2020.
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 complaints were completed in 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 obtained for the content of these marketing communications (15801).

The Marketing Communication

10. The complaint relates to a series of television advertisements.
11. The first television advertisement opens with Stephen Curry getting up from his chair in a living room as he says "Listen up Australia and listen up good, our cheeks hurt from all your crappy gifts [he holds up and throws away a pair of socks], and what, we're all number one are we? hmm [he holds up a mug with the caption #1 DAD! and drops it so it smashes on the ground]. Now, I'm not saying my way or the highway, but do Dad's day different this year [he lifts up and shakes a glass that appears to contain a spirits drink] at Dan Murphys". A logo with the tagline and brand name appears on the screen together with the "Get the facts Drinkwise" logo.
12. The second television advertisement opens with Stephen Curry sitting in an armchair in a living room and on a side table next to him is a mug with the caption "#1 DAD!" and he says "Oh we're all number 1 are we?". He then looks intently at the mug as it moves across the side table by itself and smashes onto the floor, and then looks at the camera as a puff of smoke on the side table reveals a glass of red wine. He finishes by picking up the glass of wine and saying "Do Dad's Day Different at Dan Murphy's" as a logo with the tagline and brand name appears on the screen together with the "Get the facts Drinkwise" logo and text "Catalogue out now".
13. The third television advertisement opens with Stephen Curry sitting in an armchair in a living room holding a glass that appears to hold a spirits drink, as he says "Australia we've had it up to here, we're sick of the socks and the jocks and the mugs and the last minute phone calls, wheres the effort. This year we're asking Dads what they really want for Father's day. It's time to do Dad's day different [he lifts up his glass] at Dan Murphys". A logo with the tagline and brand name appears on the screen together with the "Get the facts Drinkwise" logo.

The Complaint

14. The complainants object to the marketing for the following reasons:
 - it is offensive to toss away presents given by family and belittles younger children's gifts and simple, innocent gift giving;
 - it is offensive to suggest that alcohol is a better alternative, or the only acceptable gift for Father's Day and the only gift that a Father would want;
 - it is insensitive to recovering alcoholics trying to stay sober for their children;
 - it cuts across public health messages such as "a little habit become a big problem";
 - alcohol should not be promoted at any time and particularly during COVID lockdown;
 - alcohol should not be promoted in an area that already has problems with irresponsible drinking, anti-social activity and family breakdown;

- associates a good and appreciated relationship with alcohol, which is a product with negative health and cultural issues, such as family violence associated with alcohol consumption;
 - associates a suave, smart mouthed man with alcohol;
 - encourages young people to buy alcohol for their father, perpetuating the idea to young people that alcohol consumption is acceptable and a better alternative and this sends a terrible message to children and could lead to young people being hooked on alcohol;
15. One complainant expresses concern that the ad was shown between 6 and 7pm during the Channel 9 News when children are viewing.

The ABAC Code

16. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (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
 - (b)(i) have Strong or Evident Appeal to Minors
 - (b)(iv) be directed at Minors through a breach of any of the Placement Rules
 - (c)(ii) show (visibly, audibly or by direct implication) the consumption or presence of an Alcohol Beverage as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success
17. Part 6 of the ABAC Code provides:

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 Alcohol Guidelines).
- (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).

Strong or Evident Appeal to Minors means:

- (i) likely to appeal strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
- (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

The Company's Response

18. The Company responded to the complaint by letters dated 3 and 8 September 2020. The principal points made by the Company were:

Introduction

- a) 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 Alcohol Beverages Advertising Code (the **Code**) Scheme in 2013 and it prepares all its advertising in accordance with the Code. When required (as is the case with these ads) Dan Murphy's seeks pre-vetting approval for advertising materials prior to broadcasting those materials to ensure compliance with the Code. Furthermore, Dan Murphy's maintain's strict internal and external processes in addition to those required by the Code. 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:
 - A. ID25 (ask for ID from anyone who looks under 25 years of age);
 - B. Don't Buy It For Them (stopping secondary supply to minors);
 - C. our Intoxication Policy (refusal of service to anyone who may be intoxicated); and

D. 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'.

These processes provide Dan Murphy's with a compliance framework to ensure that it serves customers in accordance with its obligations under the various applicable laws.

- b) Dan Murphy's created the ads after a nationwide survey amongst about 1,000 Australian dads in partnership with YouGov. The purpose of this survey was to gain an understanding on how Australian dads feel about Father's Day presents they receive. A majority of the respondents answered that a large number of Australian dads have to wear unwanted presents they received for Father's Day. The aim of the Ads is that Australians (of legal drinking age) would find inspiration for this upcoming Father's Day and attempts to provide this as a suggestion in a light humoristic fashion by actor Stephen Curry.

Code Part 3(a)(ii) - A Marketing Communication must not 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

- c) The complainants allege that the Ads show or encourage irresponsible or offensive behaviour which is related to the consumption or presence of alcohol by suggesting that alcohol is the best gift for Father's Day. Dan Murphy's disagrees with this allegation, because the Ads neither expressly call out that alcoholic beverages are the presents children should consider for Father's Day, nor do the Ads expressly call out that the audience should purchase their presents at Dan Murphy's.
- d) The actor says "do dad's day differently" and "do dad's day differently this year" which is to encourage Australians to buy presents for Father's Day other than the presents they usually purchase for Father's Day. Dan Murphy's submits that does not mean that children are encouraged to buy alcoholic beverages or to discourage them from buying a present they usually bought their fathers (including a #1 Dad mug).
- e) The Ads also do not display any irresponsible or offensive behaviour relating to the consumption of alcoholic beverages. Dan Murphy's submits that the actor (Stephen Curry) in the Ads does not show any signs of intoxication. The Ads only show one alcoholic beverage per advertisement (eg. a glass of wine and a glass of whiskey) which is not consumed by the actor.

Code Part 3(b)(i) - A Marketing Communication must not have Strong or Evident Appeal to Minors

- f) Some complainants allege that the Ads breach Part 3(b)(i) of the ABAC because they may have a strong or evident appeal to minors, in particular targeting minors, given its call to action to purchase alcohol for Father's Day which will have strong appeal to children looking for gifts to buy their father.
- g) Dan Murphy's disagrees with this allegation because the Ads do not state or suggest that minors should buy alcoholic beverages. As mentioned above Dan Murphy's has strict policies in place that prevent minors from purchasing alcoholic beverages. This includes the ID25 initiative which requires individuals who look under the age of 25 to show photo identification. Therefore, it would only be permitted for adult children to purchase alcoholic beverages for their father at Dan Murphy's.
- h) The Ads are also not created to appeal to minors as Dan Murphy's used an adult actor in a formal setting, using advanced language. Dan Murphy's further submits that the Ads were only broadcasted during TV slots or mediums outside hours that minors are watching. For third party digital platforms, Dan Murphy's used age gated systems which prevent the Ads from being visible for minors. As such, the Ads were not directed at minors.
- i) In relation to targeting other specific individuals or Victorians, Dan Murphy's says that the Ads prominently include a reference to the DrinkWise campaign which provides various types of support to individuals that struggle with alcohol consumption and information about alcohol and its effects on health. This is standard with all Dan Murphy's TV advertisements and complements Dan Murphy's internal processes outlined above.

Code Part 3(c)(ii) - A Marketing Communication must not show (visibly, audibly or by direct implication) the consumption or presence of an Alcohol Beverage as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success

- j) One complainant alleges that the Ads breach Part 3(c)(ii) of the ABAC by suggesting that alcohol is a cause of or contributes to personal success by associating a suave and smart mouthed man with alcohol and having him positively promoting alcohol.
- k) Dan Murphy's disagrees with this allegation. The actor does not consume any alcohol in the Ads. The presence of the alcohol is also not used to suggest any form of achievement of personal or other success. The alcoholic beverages are only being shown to the audience towards the end of the Ads. The Ads make a suggestion to the audience to consider a different present for Father's Day. This may be a present from Dan Murphy's which ultimately is a decision for the audience and only permitted if the purchase complies with the relevant laws and policies.

Code Part 3(b)(iv) - A Marketing Communication must not be directed at Minors through a breach of any of the Placement Rules, relevantly, '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 Alcohol Guidelines).'

- l) Dan Murphy's has investigated the allegation that the ads were visible between 6 and 7pm on Channel 9 during the live news broadcast. The free to air broadcasting schedule received from Channel 9 and supplied to ABAC shows all broadcasting times for the Dan Murphy's ads between 4pm and 11pm on 1 September 2020 in Sydney, and the only times that the ads were broadcast between those times was between 9pm and 10pm.
- m) Dan Murphy's submits that the complainant may have seen the ads on Channel 9's on demand network between 6 and 7pm, however, broadcasts on these services are age gated for individuals aged 18+. Dan Murphy's further submits that the ads are not directed at minors for the reasons outlined above.
- n) Dan Murphy's further used age gating for its digital media advertising of the ads on third party platforms (such as Youtube, Facebook and Instagram).
- o) For these reasons the ads do not breach Part 3(b)(iv) of the Code and we request that the Panel dismiss the complaint.

Conclusion

- p) Dan Murphy's takes all feedback it receives from its customers very seriously. As a result of this feedback and the Complaints in relation to the mug throwing segments only, Dan Murphy's has, notwithstanding the above and on a without admissions basis, instructed the TV networks and digital media channels on 27 August 2020 to remove the advertisements showing the mug throwing segment as soon as reasonably practicable (bearing in mind that those channels have strict scheduling timeframes which may delay the changeover which is outside Dan Murphys' control. The Ads were replaced with Ad 3 which started on 27 August 2020 on digital channels and 31 August 2020 on TV channels and will run until 6 September 2020.
- q) For the reasons outlined above Dan Murphy's believes the ads do not breach the relevant parts of the Code and requests the Panel to dismiss the complaints.

The Panel's View

Introduction

19. In the lead up to Father's Day 2020, the Company ran a series of television advertisements. The Company explained the concept for the ads was drawn from the results of a survey of about 1,000 Australian fathers which the Company had commissioned. The results indicated that 'a large number of Australian dads have to wear unwanted presents they received for Father's Day'. The Company advised that the concept of the ads was to inspire Australians (of legal drinking age) to 'do dad's day different'. Evidently, doing the day differently would involve the gifting of an alcohol product from one of the Company's retail outlets.
20. The ads attracted multiple complaints. While the various complainants highlighted specific concerns with the ad, a common theme was that the ads belittled the gifts children or family members might give to fathers and to do this while encouraging the gifting of alcohol products was highly offensive. Other more specific concerns included:
 - insensitivity to recovering alcoholics seeking to stay sober for children;
 - inconsistency with public health messaging on responsible alcohol use;
 - alcohol advertising should not be permitted;
 - downplaying family relationships and emphasising alcohol;
 - associating alcohol with success - a suave man;
 - encouraging minors to purchase alcohol for their father leading to alcohol use by the minor; and
 - the broadcast of an ad during 6 pm and 7 pm when minors are viewing.
21. In many respects the complaints raise issues which are not within the scope of ABAC. For instance, an argument that alcohol advertising should not be permitted is a policy question for government and not an issue for the ABAC which assumes alcohol marketing will occur but should be subject to standards of responsibility. Further, other matters in the complaints about it being distasteful to imply a Father's Day gift like socks are unwanted, don't raise an issue about the responsible use of alcohol. Accordingly, this determination examines the television ads against relevant ABAC standards and not against other undoubtedly legitimately held concerns, but which raise issues upon which the Panel has no jurisdiction to decide.

The ABAC standards

22. The nature of the complaints and the ads bring into play several ABAC standards as follows:
 - do the ads show or encourage irresponsible or offensive behaviour related to alcohol use (Part 3(a)(i));
 - do the ads have a strong or evident appeal to minors (Part 3(b)(i));
 - do the ads show alcohol use as a cause or contributor to the achievement of personal, social, or other success (Part 3(c)(ii)); and
 - was an ad broadcast on free to air TV at a time of day in breach of the ABAC Placement Rules.

23. In assessing if an ad is in breach of a Code standard, the Panel adopts the probable understanding of the ad by a reasonable person taking the content of the ad as a whole. The 'reasonable person' test is drawn from the common law system and means the life experiences, values and opinions commonly held by a majority in the community is the benchmark.
24. The Company contends the ads are consistent with the ABAC standards. It is argued:
- the ads ask viewers to think differently about the choice of gift for Father's Day;
 - the ads do not expressly call out alcohol should be the gift that children consider for Father's Day;
 - there is no indication that Mr Curry is affected by alcohol and no irresponsible or offensive behaviour is displayed;
 - the ads are directed toward adults and protocols adopted mean minors cannot purchase alcohol from Company stores;
 - there is no suggestion that alcohol is the cause of any success enjoyed by Mr Curry; and
 - the ads have not been broadcast in breach of ABAC Placement Rules.
25. The ads introduce the potential for an alcohol product to be a Father's Day gift. There is no ABAC prohibition on using an occasion such as Father's Day or Christmas or football grand final day and the like as a backdrop to position alcohol marketing messages provided the marketing is done in a responsible manner consistently with the ABAC standards. The Panel does not believe the ads are in breach of the ABAC standards. In reaching this conclusion the Panel noted:
- the ads are light-hearted and make fun of the Father's Day trope of giving 'socks and jocks' as a gift, and a reasonable person will interpret the ads using a sense of humour;
 - the discarding of the mug and pair of socks as a gift cannot be regarded as 'offensive behaviour' which is related to alcohol use;
 - the ads are mature in tone and do not have elements considered likely to appeal strongly to minors;
 - while Mr Curry is a successful actor and presents as an engaging character in the ads, this success is not caused by his use of alcohol; and
 - data supplied by the Company establishes that the ad did not air at times outside those permitted by the Commercial Television Industry Code of Practice and hence the ABAC Placement Rules have not been breached.
26. The complaints are dismissed.