



ABAC Adjudication Panel Determination No 129/21

Product: Dan Murphy's
Company: Endeavour Group
Media: Mobile Billboard
Date of decision: 21 June 2021
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns billboard advertising for Dan Murphy’s (“the Product”) by Endeavour Group (“the Company”), which was seen opposite Byron Bay High School. It arises from a complaint received on 17 May 2021.
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 complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaint was received on 17 May 2021.
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 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 the marketing communication (Approval Number 19432).

The Marketing & Placement

10. This determination relates to the placement and content of the following billboard advertisement seen opposite Byron Bay High School:



The Complaint

11. The complainant has the following concerns about the marketing:

The local skate park is frequented by under-age drinkers. We have plenty of bottle shops. Offering to home deliver is ripe for under-age house parties, as only one person over 18 needs to sign.

Byron Bay has a youth drinking problem.

Furthermore, by saying skate while you wait and being parked near the high school at 3pm (letting out time) they are directly targeting underage drinkers.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:

- (b)(i) have Strong or Evident Appeal to Minors;
- (b)(iv) be directed at Minors through a breach of any of the Placement Rules.

13. 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).

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

14. The Company responded to the complaint by letter emailed on 31 May 2021. The principal points made by the Company were:

- I refer to your letter dated 20 May 2021 in relation to the complaint (the Complaint) regarding a Dan Murphy's mobile billboard 17 May 2021 which was temporarily stopped at the corner of Bangalow Road and Broken Head Road, Byron Bay (the Advertisement).
- Dan Murphy's thanks the ABAC Adjudication Panel (the Panel) for the opportunity to respond to the Complaint. Dan Murphy's understands that

the Panel is considering whether or not the Advertisement breaches Part 3(b)(i) or Part 3(b)(iv) of the ABAC Responsible Alcohol Marketing Code (the Code).

- Dan Murphy's maintains the position that the Complaint does not breach any Part of the Code for the reasons outlined below and it, therefore, requests the Panel to dismiss the Complaint.

Alcohol Advertising Pre-vetting Service Approval

- Dan Murphy's submits the following:
 - 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 Scheme in 2013 and it prepares all its advertising in accordance with the Code.
 - Furthermore, Dan Murphy's maintains 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:
 - ID25 (ask for ID from anyone who looks under 25 years of age);
 - 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 training program 'Safe'.
 - The processes outlined above provide Dan Murphy's with a compliance framework to ensure that it serves customers in accordance with its obligations under the various applicable laws.
 - The Advertisement received Alcohol Advertising Pre-Vetting Service Approval on 30 March 2021 with approval number 19432.

- In response to community feedback that the Advertisement was taking up parking space, Dan Murphy's has discontinued the mobile billboard marketing campaign in Byron Bay.

Responsibility toward Minors

- Dan Murphy's submits the following:
 - Part 3(b)(i) of the Code prohibits a marketing communication from having strong or evident appeal to minors. Dan Murphy's notes that the Complaint seems to raise a concern that 'skate while you wait' directly targets minors.
 - The Advertisement refers to the abbreviated name of the activity roller skating, not skateboarding. Roller skating is an activity enjoyed by the broader community, and does not have a particular appeal to minors than it does to adults.
 - Additionally, the reference to 'skate while you wait for your Dan Murphy's order to arrive' clearly indicates that the customer has already made a purchase with Dan Murphy's. As stated in above, Dan Murphy's has strict policies in place to prevent the sale or supply of alcohol to minors. minors from purchasing or taking. As such, the wording in the Advertisement would only resonate to adults who have purchased alcohol with Dan Murphy's, not minors.
 - Furthermore, the Advertisement must be considered as a whole rather than just its words.¹ As such, the following components of the Advertisement further reduce any potential that it has a strong or evident appeal to minors:
 - The Advertisement prominently features a dark green background and deep colours, and does not have bright or vibrant eye-catching colours or product images;
 - the text of the Advertisement, being in a full and complete sentence and in a mature font (and not in large block or bubble writing), would not draw the attention of minors; and
 - the image of the Dan Murphy's delivery box and app, which is the more prominent feature of the Advertisement,

¹ Part 5 of the Code.

is more readily noticeable by adults and would not be of particular interest to minors.

- Therefore, Dan Murphy's believes that the Advertisement, taken as a whole, does not breach Part 3(b)(i) of the Code.
- Part 3(b)(iv) of the Code prohibits a marketing communication from being directed at minors through a breach of any of the placement rules.
- As the Advertisement is an outdoor placement, the only applicable placement rule is Placement Rule 1 of Part 6 of the Code (Placement Rule 1) as 'the remaining Placement Rules relate to digital electronic and broadcast media and not to outdoor placement'.²
- Placement Rule 1 requires that a 'Marketing Communication must comply with codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies (for example ... Outdoor Media Association Placement Policy).' The relevant provision of the Outdoor Media Association (OMA) Placement Policy is that 'OMA members will not advertise alcohol products ... within a 150 metre sightline from the boundary of a school'.³
- The OMA Placement Policy applies only to fixed outdoor advertisements, not mobile outdoor advertisements, as indicated in the relevant guidance materials:
 - ***'OMA members will not place any advertising for certain products on fixed and digital OOH signs located within a 150 metre sightline of a primary or secondary school'***; and 'school' is defined as an ***'official Australian primary or secondary school which is registered with the appropriate state authority'***;⁴ and
 - ***'[the OMA Placement Policy] requires OMA members and ABAC signatories to ensure alcohol advertising is not placed on fixed signs that are located within a 150***

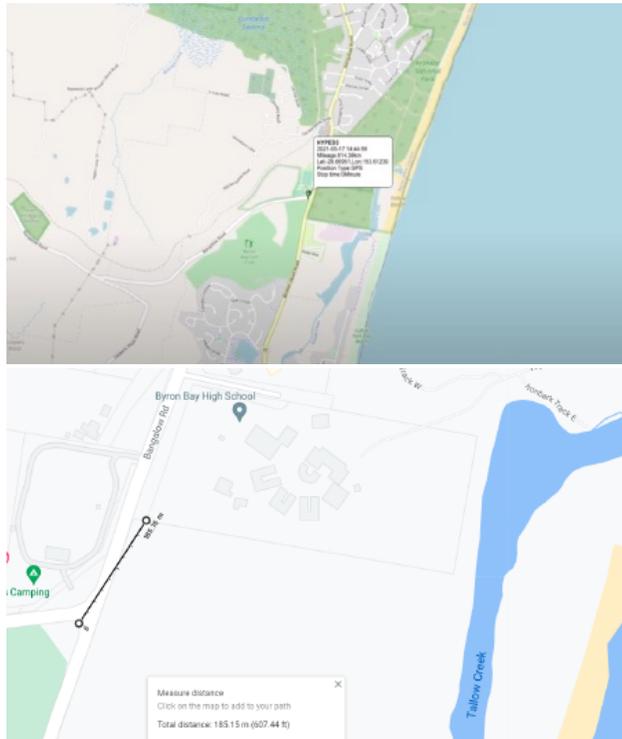
² ABAC Adjudication Panel Determination No. 127/17 para 19.

³ OMA Placement Policy, section 3.1

⁴ OMA Community FAQs: Placement Policy, section 1.

metre sight line of a primary or secondary school (save licensed premises).⁵

- As such, the Advertisement would not be captured by the OMA Placement Policy and therefore does not breach Placement Rule 1.
- Even if the Advertisement was captured by the OMA Placement Policy, Dan Murphy's notes that the nearest primary or secondary school to the Advertisement is Byron Bay High School. Based on data from the GPS tracking of the Advertisement and Google Maps (below), the straight-line distance to the closest boundary of the school is approximately 185 metres. As this exceeds the 150 metre sight line required by the OMA Placement Policy, the Advertisement would nevertheless still have been compliant with Placement Rule 1.



- For the reasons outlined above, Dan Murphy's believes that the Advertisement does not breach Part 3(a)(iv) of the Code.
- Therefore, Dan Murphy's believes that the Advertisement does not breach any Part of the Code and requests the Panel to dismiss the Complaint.

⁵ Guidance Notes - ABAC Responsible Alcohol Marketing Code, section 3(b).

The Panel's View

15. This determination concerns a mobile billboard advertisement for the Company. The vehicle carrying the billboard was seen by the complainant parked in the vicinity of the Bryon Bay High School prompting the following points of concern:
 - the reference in the billboard to 'skate while you wait' makes the messaging appealing to minors;
 - the parking of the billboard near a school is inappropriate; and
 - home delivery of alcohol is undesirable and contributes to the youth drinking problem in Bryon Bay.
16. Dealing with the last concern, the ABAC does not regulate alcohol sales or the operations of alcohol retailers beyond the marketing communications used by the retailers. The Company and all alcohol retailers including home delivery services are regulated by State and Territory liquor licensing authorities. The Company has supplied information on its responsible service/sale of alcohol practices; however, the adequacy of such measures is a matter directly for government authorities and not the ABAC Scheme.
17. The ABAC has the policy goal that the content of alcohol marketing should not have strong appeal to minors and that the audience of alcohol marketing should predominantly be adults. The complaint raises both issues. In assessing if an ABAC standard has been breached, the Panel adopts the standpoint of the probable understanding of the marketing communication by a reasonable person. This means the values, opinions, and life experiences of most people in the community is the benchmark.
18. The billboard consists of an image of the 'Dan Murphy' male character shown in the brand's dark green colouring. The text reads - 'Go for a skate while you wait for your Dan Murphy's order to arrive.' It is the 'skate while wait' reference which draws the most concern, as the complainant was aware of underage drinking occurring at a local stake park. The Company argues the billboard as a whole cannot be regarded as having strong appeal to minors.
19. The Panel acknowledges the point being made by the complainant but does not believe the content of the billboard can fairly be said to have strong appeal to minors. In reaching this conclusion the Panel noted:
 - the 'skate' reference would not necessarily be understood as meaning skateboarding or roller-skating. It could mean being busy such as 'get your skates on' in referring to having to act quickly to get things done;

- even assuming the reference would be understood as meaning skateboarding or rolling skating, this activity is popular across age groups and not solely with minors. That said, it is accepted that skateboarding is relatable to minors and can be portrayed in a way in alcohol marketing which could create a strong appeal to minors;
 - in the current case, however, the billboard does not depict skateboarding or rolling skating and the overall impression created by the billboard is mature, and it is not considered engaging or eye-catching to minors; and
 - taking the billboard as a whole, a reasonable person would not consider the billboard has strong appeal to minors.
20. The next issue is the location of the billboard and its proximity to the Bryon Bay High School. The ABAC Placement Rules create a cascading series of obligations on alcohol marketers to use available options to limit the exposure of minors to alcohol marketing. This is most possible with 'narrow-cast' distribution channels such as social media which has a technical capacity to target the audience of marketing posts. With broadcast mediums such as free to air TV, minors cannot be excluded from watching alcohol ads broadcast with programs, so the obligations are related to the time-of-day alcohol ads can be shown. There is no ability to control who can see an outdoor billboard, so Placement Rule 1 adopts the requirement in the Outdoor Media Association Alcohol Guidelines which in essence provide that an alcohol ad can't be placed on a billboard located within 150 metres of a school.
21. The Guidelines apply to 'fixed' locations such as signs placed on a building or a static billboard. By definition, a mobile billboard is not fixed and accordingly there is no constraint on where the billboard might be seen from time to time as it is driven around. The Company submitted the billboard was not parked within 150 metres of the school but whether this is correct or not is not decisive as the Placement Rule does not apply to this form of outdoor advertising.
22. While there has been no breach of the Placement Rules, the Panel does not believe it is appropriate for a mobile billboard to be parked near a school (noting the Company submits the billboard was not within 150 metres of the school). Care should be taken when using this form of marketing to act consistently with the spirit of the Placement Rules.
23. The complaint is dismissed.