



ABAC Adjudication Panel Determination No 146/21

Product: Dan Murphy's
Company: Endeavour Group
Media: Digital (Company Website)
Date of decision: 16 June 2021
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 website advertising for Dan Murphy’s (“the Product”) by Endeavour Group (“the Company”). It arises from a complaint received on 24 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 24 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 marketing communication (Approval Number 18661).

The Marketing

10. This determination relates to images of a model on the Dan Murphy's website:

<https://www.danmurphys.com.au/liquor-library/seltzers>

The following images were identified by the complainant:



The Complaint

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

A majority of photos within the article show a young girl. We submit that the individual shown appears under 25 years of age and furthermore may be considered by some as under the age of 18.

The ABAC Code

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

- (b)(ii) depict a person who is or appears to be a Minor unless they are shown in an incidental role in a natural situation (for example, a family socialising responsibly) and where there is no implication they will consume or serve alcohol.
- (b)(iii) depict an Adult who is under 25 years of age and appears to be an Adult unless:
 - they are not visually prominent; or
 - they are not a paid model or actor and are shown in a Marketing Communication that has been placed with an Age Restricted Environment.

The Company's Response

13. The Company responded to the complaint by letter emailed on 1 June 2021. The principal points made by the Company were:
- 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 Parts 3(b)(ii) or 3(b)(iii) 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

- 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 2 September 2020 with approval number 18661.

Responsibility toward Minors

- ABAC asked whether the marketing breaches Part 3(b)(ii) of the Code by depicting a person who is or appears to be a minor.
- In response to this question, Dan Murphy's submits the following:
 - Part 3(b)(ii) of the Code provides that a person who is or appears to be a minor should not be shown in a marketing communication unless there is no implication that they will consume or serve alcohol.
 - Dan Murphy's has sighted the identification of both models displayed in the Advertisement and confirms that they are both over the age of 25. Due to privacy and confidentiality obligations, Dan Murphy's is unable to provide dates of birth of the models.

- The models also clearly appear to be adults, and a reasonable viewer of the Advertisement would not believe that they appear to be minors given the following factors:
 - the mature facial features of the models;
 - the adult attire and makeup being worn by the models;
 - the models not being depicted in poses or engaging in activities that would suggest that they are minors; and
 - one of the models has tattoos (which can generally only be done for adults), and these tattoos appear to have some years of ageing.
- For the reasons outlined above, Dan Murphy's believes that the Advertisement does not depict persons who are, or appear to be, minors and that the Advertisement does not breach Part 3(b)(ii) of the Code.
- ABAC asked whether the marketing breaches Part 3(b)(iii) of the Code by depicting an Adult who is under 25 years of age and appears to be an Adult.
- In response to this question, Dan Murphy's submits the following:
 - Part 3(b)(iii) of the Code provides that an adult who appears in a marketing communication must not be under the age of 25 and appear to be an adult, unless the person is not visually prominent or is not a paid model or actor.
 - Part 3(b)(iii) of the Code only applies where a marketing communication depicts an adult who is under the age of 25. As stated above, the models depicted in the Advertisement are over the age of 25. As such, Part 3(b)(iii) does not apply to the Advertisement.
 - For the reasons outlined above, Dan Murphy's believes that the Advertisement does not breach Part 3(b)(iii) 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.

The Panel's View

14. This determination relates to a page on the Dan Murphy's website promoting alcoholic seltzer products. The complainant is concerned that the post includes images of a young girl who appears to be under 25 and may be considered by some to be under 18.
15. The relevant ABAC standards in Part 3 (b) (ii) and (iii) provide that an alcohol marketing communication must not depict a person who is or appears to be a minor or adults under the age of 25, apart from limited circumstances.
16. The Company advised that they have sighted the identification for both models displayed on the website page and both are over 25 years of age. In addition, the Company submits that a reasonable viewer of the website would not believe that the women appear to be minors given the following factors:
 - the mature facial features of the models;
 - the adult attire and makeup being worn by the models;
 - the models not being depicted in poses or engaging in activities that would suggest that they are minors; and
 - one of the models has tattoos (which can generally only be done for adults), and these tattoos appear to have some years of ageing.
17. The model identified in the complaint has youthful features, such as freckles, but also has a prominent tattoo, and there are no cues in the images that would suggest she is a minor. On balance, the Panel believes the model appears to be an adult, and given the age of the model has been verified as over 25, the website is consistent with the standards in Part 3 (b) (ii) and (iii).
18. The complaint is dismissed.