



ABAC Adjudication Panel Determination Nos 151, 152, 153 & 154/21

Product: Faxé Lager
Companies: Endeavour Group (Dan Murphy's) & Kent Street Cellars
Media: Website & eBay page
Date of decision: 9 July 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") arises from four complaints received from a single complainant on 28 May 2021 and concerns marketing for Faxé Lager by Kent Street Cellars on its website and Endeavour Group (Dan Murphy's) on both its website and eBay page.
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 on 28 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.

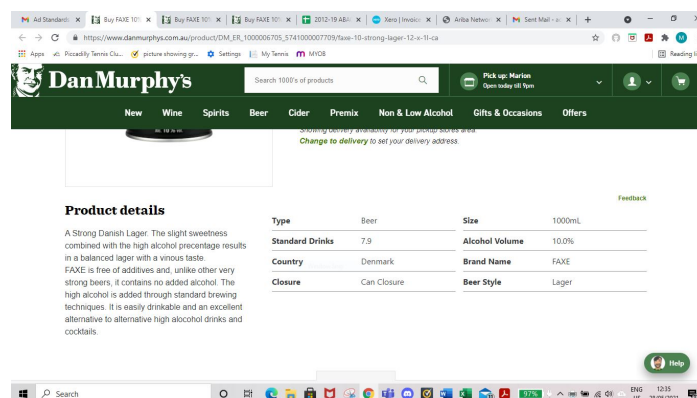
Pre-vetting Clearance

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 not obtained for the marketing.

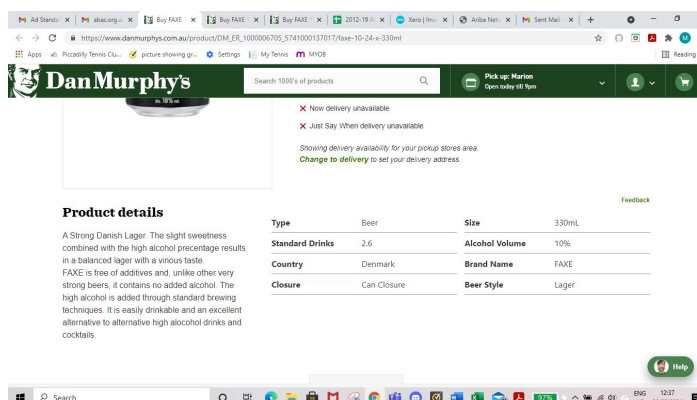
The Marketing

10. This determination relates to marketing on the following websites and eBay page:

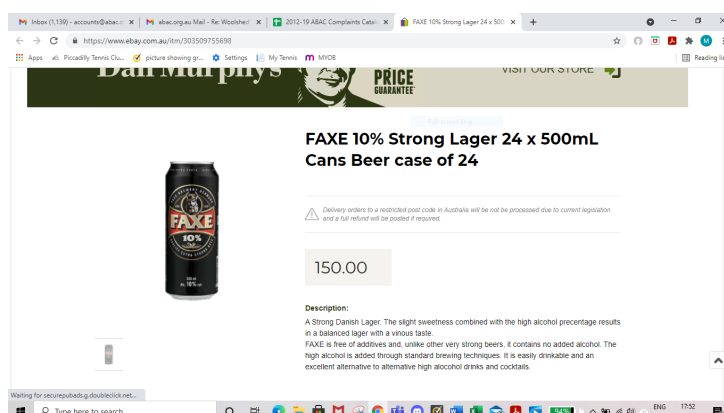
Webpage 1



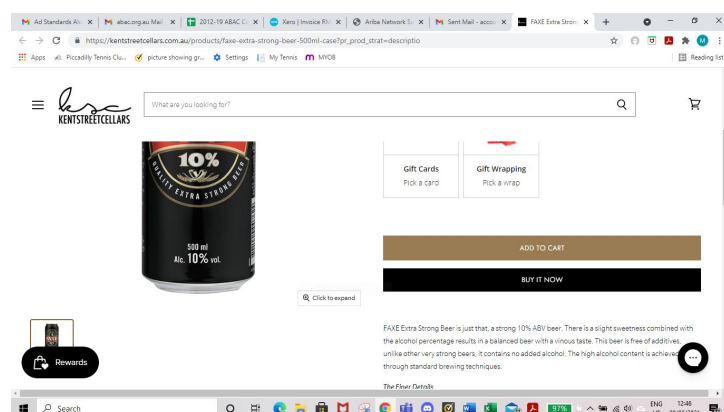
Webpage 2



Webpage 3 – eBay page



Webpage 4



The Complaints

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

The product description for Faxe 10% Strong Lager makes many references to and promotes the beer based on its high alcohol content and how drinkable the high alcohol content is.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (a)(iv) encourage the choice of a particular Alcohol Beverage by emphasising its alcohol strength (unless emphasis is placed on the Alcohol Beverage's low alcohol strength relative to the typical strength for similar beverages) or the intoxicating effect of alcohol.

The Company's Responses

13. **Endeavour Group (Dan Murphy's)** responded to the complaints by letter emailed on 16 June 2021. The principal points made were:

- Dan Murphy's thanks the ABAC Adjudication Panel (the Panel) for the opportunity to respond to the Complaints. Dan Murphy's understands that the Panel is considering whether or not the Advertisements breach Part 3(a)(iv) of the ABAC Responsible Alcohol Marketing Code (the Code).
- Dan Murphy's maintains the position that the Advertisements do not breach any Part of the Code for the reasons outlined below and it, therefore, requests the Panel to dismiss the Complaints.

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);
 - staff training that exceeds legal requirements, including 'Don't Guess, Just Ask', team talkers, regular refresher and reminder courses,
 - implementation of the award-winning training program 'Safe'; and

- enforcing restrictions on the supply of alcohol to 'dry zone' locations prescribed by legislation.
- 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.
- Dan Murphy's notes that the Advertisements were not specifically promoted on its website or eBay page (for instance by promoting it on the main landing page). Individuals were able to view the Advertisements by manually searching for the Product or navigating the product categories on the respective websites. As such, Alcohol Advertising Pre-Vetting Service Approval was not sought for the Advertisements.

Responsible and moderate portrayal of Alcohol Beverages

- Dan Murphy's submits the following:
 - Part 3(a)(iv) of the Code prohibits a marketing communication from encouraging the choice of a particular alcohol beverage by emphasising its alcohol strength. A marketing communication breaches this Part if 'the reference to alcohol strength adopts emotive terms or becomes a primary as opposed to a secondary focus of the marketing material.'¹
 - In assessing the Advertisements' compliance with the Code, it must be considered from the perspective of a 'reasonable person to whom the material is likely to be communicated and taking its content as a whole.'²
 - Taken as a whole, the Advertisements do not emphasise the Product's alcohol strength, given that:
 - repeated use of the words 'strong' and 'high alcohol', when read in their context, are clearly used to compare the Product's flavour and taste to alternative products (for example, 'unlike other very strong beers' and 'an excellent alternative to high alcohol drinks and cocktails');
 - the reference to the Product being 'easily drinkable' is a subjective term to indicate that the Product has a simple and smooth flavour that is likely to appeal to a broader

¹ ABAC Adjudication Panel Determination No. 180/20 para 18

² Part 5 of the Code.

range of consumers. The term is not indicative, and is a distinct concept entirely, of a product's alcohol strength;

- the Advertisements do not use special formatting for the Product's alcohol strength to distinguish it from other product information (for example, the alcohol content is not in bold text or larger font that distinguishes it from other information);
- being a product page on a retailer's website, the primary focus of the Advertisements is to let customers know the price that a particular product can be purchased for. This is supported by the fact that the image of the Product is the largest element of each Advertisement and the price is emphasised in a large shaded box. In contrast, the Product's alcohol content is given secondary focus in a table below the Product image and price, together with other information, and mentioned briefly as part of the product details blurb.
- Furthermore, the Advertisements do not encourage the choice of the Product by emphasising its alcohol strength, given that:
 - the Advertisements do not contain a call to action that the Product should be purchased due to its alcohol strength;
 - the reference to 'Strong Danish Lager' is a reference to the Product's name, not its alcohol strength; and
 - the use of the words 'strong' and 'high alcohol' would be understood by a reasonable viewer to be a factual and descriptive term of the Product's significant alcohol content, and are not words that would be considered particularly engaging or emotive in the context of the Advertisements; and
 - the Advertisements do not contain images or other emotive creative elements that would suggest the Product is being encouraged for its alcohol strength.
- For the reasons outlined above, Dan Murphy's believes that the Advertisements do not breach Part 3(a)(iv) of the Code.

14. **Kent Street Cellars** responded to the complaints by letter emailed on 7 June 2021. The principal points made were:

- We have amended the product listing in accordance with the concern. The listing now has the following content description:

There is a slight sweetness to this FAXE beer resulting in a balanced beer with a vinous taste. This beer is free of additives and it contains no added alcohol. The water used in brewing Faxe is drawn from deep wells where coral and lime layers provide a natural filtration system and add valuable salts to the water as it is drawn from the underground.

Starting in 1901 the Faxe Saga has been over a century-long voyage of discovery. In the course of this adventure the brewery has skilfully blended their passion for quality with their ambition to create the very best in refreshing and flavourful beers and soft drinks.

The Finer Details

Style - Lager

Country - Denmark

Can Size - 500ml

ABV - 10%

<https://kentstreetcellars.com.au/products/faxe-extra-strong-beer-500ml-case>

The Panel's View

15. This determination concerns website advertising for the product 'Faxe 10%' by the retailers Dan Murphy's and Kent Street Cellars. The product itself is a relatively high alcohol content beer brewed in Denmark and imported into Australia. This means its packaging (can design) is sourced from the parent Danish brewer while the retail description of the product on the two Companies websites is within the control of the Companies. It is the description of the product which has drawn the complaint with the concern being that the choice of the product is being encouraged by reference to its high alcohol content.
16. Part 3 (a)(iv) of the ABAC provides that an alcohol marketing communication must not encourage the choice of an alcohol beverage by emphasising its alcohol strength or the intoxicating effect of the alcohol. This provision does not mean that the strength of a product cannot be mentioned in marketing materials and in fact a consumer should be able to ascertain this information reasonably easily as it is important in making an informed choice about a product. What the provision seeks to do is prohibit undue emphasis to the alcohol strength so that this does not become a selling point. For instance, the standard might be breached by marketing which:
 - elevates references to the alcohol strength beyond factual statements;

- uses graphics and other design features to give significance to the strength of the product over and above other descriptors or attributes of the product;
 - uses emotive language to highlight the alcohol content.
17. In assessing consistency of a marketing communication with an ABAC standard, it is the overall impact of the marketing which is important rather than a 'tick a box' exercise of listing if a series of indicators are present or not. And this assessment is from the standpoint of how a reasonable person would probably understand the marketing item.
18. The website entry from both Companies was in the same terms. It establishes the product as being 'strong' and then goes to give taste characteristics and some information about the product's ingredients. The entry compares the product to other high alcohol drinks. While the terms 'strong' and 'high alcohol' are mentioned several times in the website entry, the Panel does not believe a reasonable person would consider the entry breaches the standard. The description of the product as strong is factual. The entry then goes to mention a range of product attributes. The entry is not emotive or overblown in its discussion of the product and references to its alcohol content are contextual.
19. The complaint is dismissed.