



ABAC Adjudication Panel Determination No 261/21

Product: Beer
Company: Better Beer
Media: Instagram
Date of decision: 17 December 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 Instagram advertising for beer ("the Product") by Better Beer ("the Company"). It arises from a complaint received on 12 November 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 the 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 meet 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 12 November 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 an 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 communication.

The Marketing

10. The complaint refers to an Instagram post made to the Inspired Unemployed Instagram page. The post is a video, showing a number of people in different situations drinking from a can of Better Beer and then moaning. One of the people is riding a bike. The post is accompanied by the words “Yep, it’s that good [@betterbeer](#)”. The following are screenshots of some of the scenes from the video.





The Complaint

11. The complainant is concerned about the television advertisement as follows:

- An Instagram post shows multiple people drinking a can of Better Beer resulting in having an orgasm/making sexual noises.
- The post suggests drinking the beer leads to having a sexual therapeutic benefit. I feel it is unprofessional and shameless self-promotion of a product that ignores the current guidelines on alcohol advertising. The promoters should be held to the same standards as others in the industry.
- The video also depicts a man riding a bicycle on a road drinking a beer which is reckless and illegal behaviour.

The ABAC Code

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

- (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.
- (d) show (visibly, audibly or by direct implication) the consumption of an Alcohol Beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical coordination, such as the control of a motor vehicle, boat or machinery or swimming.

The Company's Response

13. The Company responded to the complaint by email on 3 December 2021. The principal points made by the Company were:

- Please note the Inspired Unemployed will remove the video from their Instagram page

Alcohol advertising pre-vetting service

- Better Beer was in correspondence with pre-vetting in an off the record conversation in regards to the complaint directed at Part 3 (c)(ii). We are in no way are saying that we got approval or went through the correct channel. However, our conversation was similar to the below:

Question – Can you make a reaction to the taste of a beer or Alcoholic Beverage?

Can you smile when you taste a beer – Yes

Can you say it's bloody delicious' – Yes

Can you say 'mmmm' – Yes

Can you Moan in almost a sexual manner – Yes

Generation and control of the marketing

- Inspired Unemployed are part brand owners of Better Beer.
- The post on the Inspired Unemployed page was not approved by Better Beer. The Post on Better Beer Page was approved by Better Beer.

Responsible depiction of the effects of alcohol

- ABAC Code Part 3 (c)(ii) and the guidance notes for this Code do not reference reactions from the taste of an alcoholic beverage. The Code states:

‘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;’

- The key word being ‘Success’ – We have in no way referenced any success by moaning in pleasure at the taste of a beer.

- Additionally – Ad Standards dismissed the same complaint.

Safety

- Riding a bike was a mistake by the video's editor. This version of the Instagram Video was only on @inspiredunemployed never made its way onto @betterbeer Instagram page.

The Panel's View

Introduction

14. According to the Company website, Better Beer came about from a collaboration between Matt Ford and Jack Steele and the founder of the Torquay Beverage Company, Nick Cogger. Messrs Ford and Steele are better known as the Inspired Unemployed who are social media personalities. The pair have attracted over 1 million followers on Tik Tok and they have translated this popularity into a wider media presence.
15. As recent entrants to the Australian alcohol market, the Company has implemented a media and marketing strategy to launch the brand . One initiative has been a competition entitled the Better Beer's Best Moan Challenge. The Challenge involved consumers purchasing a six-pack of Better Beer and uploading a video to Instagram of the consumer moaning after tasting the beer. The winner received a trip for two to New York for ten days.
16. The complaint relates to the competition and a collation of 'best moans' that was posted to the Inspired Unemployed Instagram page. The complainant raises two concerns. Firstly, the Instagram video shows a person drinking a beer and riding a bike, which is claimed to be reckless and illegal. Secondly, that the video depicts people making sexual noises and implying the use of the product leads to sexual benefit.
17. As explained in paragraphs 4 and 5, the complaint was lodged with Ad Standards and because the concerns expressed raised issues under both the ABAC and the AANA Code of Ethics, two complaint processes have been triggered. The decision of the Ad Standards Community Panel about the Code of Ethics is found in Case Report 0325-21. This determination considers the consistency of the marketing with the ABAC, and deals with the following matters:
 - is the video posted on the Inspired Unemployed Instagram account captured as a marketing communication under the ABAC Scheme;

- does the marketing suggest the product is a cause of sexual success in breach of Part 3 (c)(ii);
- does the marketing depict alcohol consumption in conjunction with a dangerous activity in breach of Part 3 (d); and
- the interplay between the ABAC and Ad Standards complaint processes.

Is the video captured by the ABAC

18. The ABAC applies to 'marketing communications in Australia generated by or within the reasonable control of a marketer' i.e., an Australian producer, distributor, or retailer of alcohol beverages. This means to fall within the ambit of the Scheme an Instagram post referencing alcohol must have a discernible and direct link to and be within the reasonable control of a producer, distributor or retailer of alcohol beverages.
19. The post appeared on the Instagram account of the Inspired Unemployed and not that of the Company. The Company advised that while Messrs Ford and Steele are part brand owners of Better Beer, the Company did not create or approve the post made to the Inspired Unemployed Instagram account. As a matter of law, the Company and the individuals who own the Company are different entities and the actions of one cannot be automatically assigned to the other.
20. It is clear however that the video can be regarded as a marketing communication within the reasonable control of the Company. It is noted:
 - the Company has publicly stated via a statement to the Australian Securities Exchange that the Inspired Unemployed are accountable for marketing and PR to support the launch and ongoing sales of Better Beer;
 - the Company advised that it could cause the video to be removed; and
 - the content of the video is self-evidently a promotion of the brand.

Responsible depiction of the effects of alcohol

21. The complainant's first concern is that the marketing communication shows multiple people drinking the product and then making sexual noises and/or having an orgasm. It is argued that this suggests that drinking the beer leads to sexual benefit.
22. Part 3 (c)(ii) of the ABAC provides that an alcohol marketing communication must not show the consumption or presence of alcohol as a cause of or contributing to the achievement of sexual or other success. Assessment of whether a standard has been breached is from the probable understanding of the marketing item by a

reasonable person. This means the life experiences, values and opinions found in most of the community is the benchmark.

23. The Company argues that the Part 3 (c) standard is not breached. It is submitted that while people are shown moaning in pleasure at the taste of the beer, the video does not reference anyone achieving success.
24. The video depicts various people moaning after taking a mouthful of the product. Some of the sounds and facial expressions do bring to mind sexual pleasure as pointed out by the complainant. That said, the Panel does not believe the video breaches the standard. The Panel noted:
 - all people are shown fully clothed, the majority are in public, and no physical activity is depicted which is sexual in nature;
 - the ABAC standards do permit people to be depicted enjoying an alcohol beverage; and
 - taken as a whole the video would most likely be understood as a somewhat exaggerated reaction to tasting the product rather than suggesting the product causes sexual fulfilment.

Alcohol and Safety

25. The complainant's second issue is that the video shows a person drinking a beer and riding a bike, which is contended to be reckless and illegal. This raises Part 3 (d) of the ABAC which provides that an alcohol marketing communication must not show the consumption of alcohol before or during any activity that for safety reasons requires a high degree of alertness or physical coordination.
26. One scene in the video shows a bike rider on a public road holding what appears to be a can of the product. The rider is depicted moaning, consistent with the theme of the video and hence raising the direct implication that the product has been consumed.
27. The Company does not refute that the scene is inconsistent with the Part 3 (d) standard, but merely points out that the scene was not used in the Company's own Instagram account and 'was a mistake by the video's editor'.
28. The Panel concludes that the video is inconsistent with the Part 3 (d) standard. The bike riding scene shows (by direct implication) the consumption of alcohol while riding a bike on a public road, which, for safety reasons, requires a high degree of alertness or physical coordination.

ABAC and Ad Standards Complaint Processes

29. The complaint raised issues taken up by Ad Standards and considered under the AANA Code of Ethics. This means there have been two regulatory decisions on the single item of marketing. In these circumstances it is helpful to note how the regulatory system fits together.
30. Firstly, while both systems have the high-level goal of marketing being responsible and meeting community standards in how products should be presented, each scheme has a different focus. Ad Standards is centred on the advertising of all goods and services and community standards regarding the portrayal of race, gender, sexuality, nudity, violence and health and safety. The ABAC focus is more tightly directed to the responsible modelling of the use of alcohol.
31. A second important difference is that a complaint picked up by Ad Standards will be reviewed against each of the standards in the Code of Ethics irrespective of the concern expressed by a complainant. In contrast, the ABAC complaints process examines a marketing communication against the relevant ABAC standard which matches the concern of the complainant. This means not every ABAC standard is considered in an ABAC Panel determination.
32. Thirdly, while the two schemes in most parts look at different issues, there is some overlap. In particular section 2.6 of the Code of Ethics on prevailing community standards on health and safety and Part 3 (d) of the ABAC regarding alcohol and safety cover somewhat similar ground. Further, on occasions section 2.4 of the Code of Ethics on sexuality and nudity might intersect with the ABAC standard in Part 3 (c)(ii) regarding alcohol and achieving sexual success.
33. In the current case, both the ABAC Panel and Ad Standards have concluded that to depict alcohol consumption while riding a bike is a breach of the respective codes. Ad Standards have made a further finding that several scenes in the video showed alcohol consumption in ‘public places’ and this was ‘inappropriate and potentially unsafe’. Because of this, this aspect of the video was held to be in breach of section 2.6 of the Code of Ethics.
34. This determination does not deal with alcohol use in public places. This is because the complainant did not raise any concern about the video in this respect. Further it is noted that the laws regarding alcohol consumption in public spaces such as parks and foreshores etc are quite nuanced and there is no outright prohibition on the consumption of alcohol in public places in Australia as such. The position varies from State to State and depends on the operation of Liquor Licensing laws and often the designation given to areas by local councils.
35. The complaint is upheld in relation to Part 3 (d) and dismissed in relation to Part 3 (c)(ii).