



ABAC Adjudication Panel Determination No 90/22

Product: Beer
Company: Better Beer
Media: Instagram
Date of decision: 7 November 2022
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”) arises from a complaint received on 28 October 2022 and concerns social media marketing via Instagram by Better Beer (“the Company”).
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:
 - 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;
 - 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 28 October 2022.
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

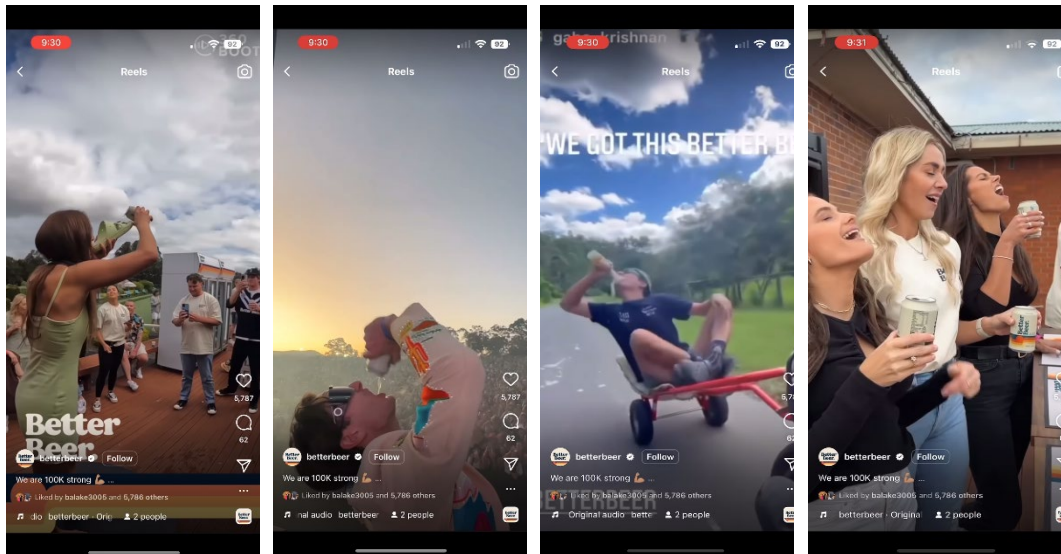
9. The quasi-regulatory system for alcohol beverage marketing features an independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not sought for the marketing.

The Marketing Communication

10. The complaint relates to a compilation video at the following link:

<https://www.instagram.com/reel/CkK-05agBsj/?igshid=YmMyMTA2M2Y=>

The following screenshots were taken of some of the scenes:



The Complaint

11. The complainant objects to the marketing as follows:
- *In many parts of this video you will see multiple breaches to the ABAC code. excessive and rapid consumption of alcohol, as well as irresponsible behaviour by the means of doing a “shoey” (sculling alcohol via a shoe), holding alcohol above the head and pouring down the throat.*
 - *There are also breaches of alcohol safety which can be seen in the video where a male is seen riding a wheeler attached to the back of a motorbike, using the motorbike wheel to open his beer and then drink it.*
 - *The video also ends with a clear breach in responsible depiction of the effects of alcohol, where three females sip the beer and let out a sexual moan after consumption.*

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (a)(i) show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines;
 - (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 co-ordination, 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 29 October 2022. The principal comments made by the Company were:
- **Shoey** – A shoey is pouring an entire beer into a 'shoe' and drinking all of the contents as fast as you can. I believe the lady in this video is pouring a beer onto a 'sandal' or 'croc' for a photo. She was not sculling an entire beer can and it is not a shoey.
 - **Person holding a beer can and pouring into their mouth** – We don't see an issue with someone pouring what looks like .2 seconds of beer into their mouth.
 - The moan challenge has been previously approved by ABAC No 261/21.
 - With regards to showing a person riding a wheeler attached to the back of a motorbike and using the motorbike wheel to open their beer and then drinking - it is our understanding via the ABAC Code & Guidance Notes that this particular incident is not a breach. We accept that being in control of a car, boat or bike would be a breach – however this person is just a passenger on the back of a bike.

The Panel's View

Introduction

14. Better Beer was established in November 2021 and is a collaboration between the Torquay Beverage Company and social media influencers, The Inspired Unemployed. Naturally, the Company undertakes a significant amount of its marketing via social media, and it is a video post to the Better Beer Instagram page to celebrate achieving 100,000 followers that has drawn this complaint.
15. The video consists of a compilation of various unrelated scenes, some of which the complainant argues:
- encourage the excessive or rapid consumption of alcohol and irresponsible behaviour by showing people doing a "shoey" and holding alcohol above their head and pouring alcohol down their throat;
 - do not responsibly depict the effects of alcohol, particularly by showing three females make a sexual moan after consuming the product; and

- show unsafe behaviour, particularly by depicting a person riding a wheeler attached to the back of a motorbike and using the motorbike wheel to open their beer before drinking it.
16. These concerns raise several ABAC issues each of which will be assessed in turn below. The assessment of a marketing communication with an ABAC standard is from the probable understanding of the marketing item by a reasonable person taking its content as a whole. This means the benchmark is the attitudes, values and life experiences shared commonly in the community. If a marketing communication could be interpreted in several ways, it is the most probable interpretation which is to be preferred over a possible but less likely understanding of the marketing message.

Responsible and moderate portrayal of Alcohol Beverages

17. The first of the complainant's concerns raises Part 3 (a)(i) of the Code, which requires that a marketing communication must not show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines.
18. The complainant alleges that this Code standard is breached by showing a woman doing a "shoey" and also other people holding a can of beer above their head and pouring it into their mouth. In response, the Company argues that the woman is drinking from a "Croc", not a shoe, and that in both instances only small amounts of alcohol were shown being consumed.
19. The Part 3 (a)(i) standard is about alcohol consumption being depicted in marketing as occurring in a moderate and responsible fashion. Rapid and uncontrolled consumption such as drinking alcohol through a sandal or croc style footwear will almost inevitably be inconsistent with the standard. Further the reasonable understanding of a short scene within a compilation video is that the behaviour shown for a second or so is representative of the behaviour.
20. Accordingly, the scenes depicting the women drinking from her footwear and the man pouring the product from height directly into his mouth are a breach of the Part 3 (a)(i) standard.

Responsible depiction of the effects of alcohol

21. The video shows three women drinking the product and then moaning. The complainant has described the moan as sexual and contends that this is not a responsible depiction of the effects of alcohol.

22. This concern raises Part 3 (c)(ii) of the Code which requires that 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 sexual success (or any other success).
23. Given the compilation nature of the video, the Panel believes that the footage of three people moaning was most likely submitted as part of a competition conducted by Better Beer in late 2021. This competition involved consumers purchasing a six-pack of Better Beer and uploading a video to Instagram of the consumer moaning after tasting the beer.
24. As pointed out by the Company, a complaint raising similar concerns was raised at the time of the competition and dismissed by the Panel (Determination 261/21). The Panel once again does not believe that the Code has been breached, with the following matters being considered when reaching this conclusion:
- the people moaning are shown fully clothed and are in public;
 - throughout the entire video, 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 scene in the video would most likely be understood as a somewhat exaggerated reaction to tasting the product rather than suggesting the product causes sexual fulfilment.

Safety

25. The third concern raised by the complainant relates to the scene showing a man riding on a sack trolley that is being towed by a motorbike. The man reaches forward to use the rear tyre of the motorbike to open a bottle of beer and starts consuming. The complainant contends that it is unsafe to consume alcohol under these circumstances.
26. Part 3 (d) of the Code requires that a marketing communication must not 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 co-ordination.
27. The Company argues that because the man is not in control of the motorcycle but is a passenger, it is not inconsistent with the standard to show alcohol consumption by the man.

28. The Panel believes that the Part 3 (d) standard has been breached. In reaching this conclusion the Panel had regard to:
- motorbikes are not designed or intended to tow sack trolleys for the purpose of ferrying passengers. The person being towed is performing a stunt that requires concentration and co-ordination to be done safely; and
 - a reasonable person would consider that riding on a sack trolley or wheeler being towed by a motorbike is inherently unsafe, with the consumption of alcohol whilst doing so heightening the risk of injury by impacting concentration and reaction times.
29. The complaint is dismissed in respect of Part 3 (c)(ii) and upheld in relation to Parts 3 (a)(i) and (d).