



## ABAC Adjudication Panel Determination No 114/22

**Product:** Beer  
**Company:** Better Beer  
**Media:** Instagram  
**Date of decision:** 17 December 2022  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Professor Richard Mattick  
Ms Jeanne Strachan

### Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 28 November 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 November 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

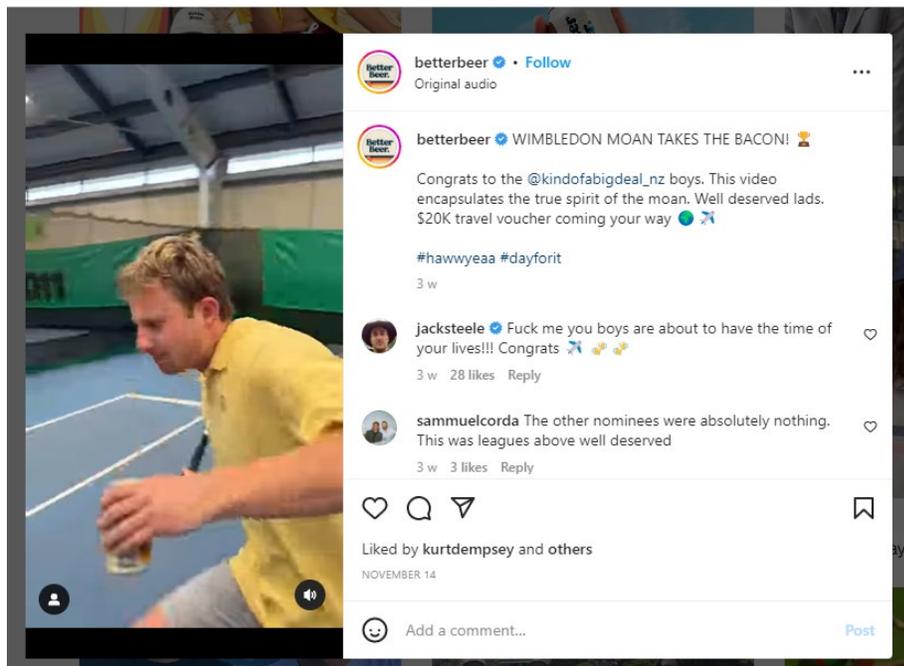
9. The quasi-regulatory system for alcohol beverage marketing features an independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not sought for the marketing.

## The Marketing Communication

10. The complaint relates to an Instagram video at the following link:

[https://www.instagram.com/reel/Ck7o9zlgArB/?utm\\_source=ig\\_web\\_copy\\_link](https://www.instagram.com/reel/Ck7o9zlgArB/?utm_source=ig_web_copy_link)

The following screenshots are from the video:





## The Complaint

11. The complainant objects to the marketing as follows:

- *Better Beer conducted a competition where applicants were required to post a story of their best moan (sound) after drinking a Better Beer product.*

- *The competition winners posted on November 14 portray a tennis match whilst drinking beer followed by a moan.*
- *The ‘umpire’, ‘ball-boy’ and ‘tennis players’ are all shown with a beer in their hand whilst conducting their respective roles e.g. the tennis players are shown playing a game of tennis whilst drinking beer.*
- *The comment under the video states “WIMBLEDON MOAN TAKES THE BACON! ??”*
- *The marketing communication violates several of the ABAC standards:*
- *3 (d) Alcohol and Safety:*

*The umpire, the ball boy and the tennis player are all seen to be using alcohol while conducting their respective roles. The umpire is seen sitting on his chair performing his role whilst drinking beer. The role of an umpire requires a high degree of alertness and is therefore in breach of 3 (d) Alcohol and safety. Further the same can be said about the ball boy and the tennis players, both are performing roles that require a high degree of alertness and physical coordination, and both are shown to be using alcohol. Once again, we believe this is in breach of section 3 (d).*

- *3 (c) Responsible depiction of the effects of alcohol:*

*Under the marketing communication the following text is written “WIMBLEDON MOAN TAKES THE BACON! ??”. The competition entrants were required to moan after consuming a beer. The text highlights the use of alcohol has contributed to a personal achievement and success and therefore in breach of 3 (c) Responsible depiction of the effects of alcohol.*

- *Alcohol marketing should portray safe use of alcohol and a responsible depiction of the effects of alcohol. This communication clearly does neither.*

## **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 letter emailed on 28 November 2022. The principal comments made by the Company were:
  - ABAC Guidance notes for Part 3 (d) outline the types of activities that require a high degree of alertness, including walking on a cliff edge and driving a motor vehicle. Tennis does not fall into any of the guidance categories.
  - ABAC has addressed our Proprietary 'MOAN' when taking a sip of Better Beer a number of times now and this one is no different.

## The Panel's View

14. Better Beer launched in Australia in November 2021 and has recently started selling its product in New Zealand. To mark its expansion, the Company invited New Zealanders over 18 years of age to enter a 'Better Moan' competition, similar to a competition previously conducted in Australia. The successful entry was awarded a \$20,000 travel voucher.
15. The competition required participants to post a story of their best moan with a Better Beer. It is the posting of the winning video to the Company's Instagram page, and the accompanying text, that has drawn this complaint.
16. The Instagram video is a parody of the grunts and moans which some professional tennis players release while competing. The video shows two men playing while drinking from a can of Better Beer. After a taste of the product, the players moan as do a spectator, ball boy, and a chair umpire. The text accompanying the video reads:

WIMBLEDON MOAN TAKES THE BACON! 🏆

Congrats to the [@kindofabigdeal\\_nz](https://www.instagram.com/kindofabigdeal_nz) boys. This video encapsulates the true spirit of the moan. Well deserved lads. \$20K travel voucher coming your way 🌍 🚀

17. The complainant has raised two concerns, namely:
  - the video shows tennis players and people in ancillary roles consuming alcohol, which breaches Part 3 (d) by showing the consumption of alcohol

before or during activities that require a high degree of alertness or physical coordination; and

- the accompanying text shows the consumption of alcohol as contributing to personal achievement and success and is therefore in breach of Part 3 (c).

18. Whilst the post was in relation to a competition held for New Zealanders, the post was made to an Instagram page used to market Better Beer in Australia, and therefore falls within the remit of the ABAC Scheme.
19. The Panel will consider each of the concerns raised in turn. This assessment is to be from the standpoint of 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.

### **Alcohol use and safety**

20. The complainant's principal concern is that the video shows people drinking beer while undertaking activities that require a high degree of alertness and physical coordination. 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.
21. The Company has responded by explaining that:
  - ABAC Guidance notes for Part 3 (d) outline the types of activities that require a high degree of alertness, including walking on a cliff edge and driving a motor vehicle; and
  - tennis does not fall into any of the guidance categories.
22. The policy intent of the Part 3 (d) standard is that alcohol marketing should not model alcohol consumption before or in conjunction with activities that are inherently dangerous such as driving a motor vehicle or swimming. This is because alcohol impacts on a person's physical and mental capacities, reduces coordination and can contribute to a loss of inhibitions and the making of poor judgements.
23. It should be noted that the intent of the standard is not about the depicted activity being less successfully performed by alcohol use reducing coordination and

alertness, but rather the impact of alcohol on coordination and alertness causing a risk to safety.

24. Clearly the video shows alcohol consumption occurring in several dimensions namely:
- watching a game of tennis as a spectator;
  - officiating a game of tennis as a chair umpire;
  - being a ball boy in a game; and
  - playing tennis.
25. It is not inherently dangerous to watch tennis while drinking. And while in reality it would not be permitted in a tournament for an umpire to drink, it is not dangerous to officiate a game and consume alcohol. The umpire might make less accurate calls if drinking alcohol, but a reasonable person would not consider that alcohol would likely lead to an unsafe outcome.
26. The most 'physical' of the depictions in the video are the players and the ball boy character. There are a large number of sports or physical pursuits that are inherently dangerous to drink alcohol and undertake ranging from contact sports to diving or rock climbing etc. Within this very wide spectrum, tennis would be regarded as a lower risk of physical injury. Of course, injury is possible with any physical activity involving running and movement, but tennis is a relatively safe sport played across age groups including into senior years.
27. Further it is clear that the 'game' being depicted in the video is a parody to emphasise the 'moaning' of the players and the other roles shown and a reasonable person would not take the video as a genuine call to action to play tennis while consuming alcohol. While humour will not excuse the depiction of irresponsible alcohol impacted behaviour, it is a factor in how a reasonable person interprets an item of marketing.
28. Weighing these factors together, the Panel does not believe that a reasonable person would understand that the Part 3 (d) standard has been breached.

### **Part 3 (c)(ii)**

29. The second issue which concerned the complainant goes to the video and the accompanying text. It is contended the text, which announces the winner of the moan competition, highlights the use of alcohol towards personal success and achievement.

30. 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 personal, business, social, sporting, sexual or other success.
31. It is not entirely clear the point that the complaint is making. It seems the contention is that because the post announces that the video won the competition, and the video shows the competition entrants consuming alcohol, then alcohol has led to the success of winning the prize.
32. It is not permitted to suggest in an alcohol marketing communication that alcohol use causes or contributes to the achievement of personal or other success. This means that the content of the marketing communication - in this case the Instagram post - must not convey the message that alcohol use leads to success.
33. The ABAC does not seek to limit the avenues in which alcohol beverages might be marketed. 'Competitions' are expressly included in Part 2 (a) as an example of a marketing communication falling within the scope of the Code. By definition, a competition results in a winner and hence 'success'. It would be a non-sequitur to interpret the Code to mean an alcohol company's competition cannot have a winner because this means showing alcohol leading to success or achievement.
34. The issue is whether a reasonable person would understand that the post is suggesting that alcohol use leads to personal success or achievement. The Panel does not believe the post would be understood in this way. The more likely understanding is that the post is showing the video which won the moan competition and taken as a whole, the post would not be taken as suggesting alcohol leads to success in life.
35. The complaint is dismissed.