



ABAC Adjudication Panel Determination No 62/23

Product: Better Beer
Company: Better Beer
Media: Instagram, Competition
Date of decision: 24 May 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Louisa Jorm
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel ('the Panel') arises from a complaint regarding a Competition run by Better Beer, as well as two specific Instagram posts, the first of which tagged Better Beer and the second of which was posted to the The Inspired Unemployed Instagram account.
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 11 April 2023.
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.

The Marketing Communications

10. The complaint relates to a competition and two social media posts, as described below:

The Competition

The competition was promoted via a post made to the Better Beer and The Inspired Unemployed Instagram accounts, as described below.

Jack Steele (JS) – We’re giving away \$100K of cold hard cash.

Matt Ford (MF) – And why we’re doing it? In celebration of our new beer – The Middy.

JS – It’s the easiest 100 grand you could make in your entire life.

MF - How do you win? Simple. There’s two steps. Step 1, have any type of Better Beer in your hand. Step 2, give us your best “Day For It”. It’s that simple.

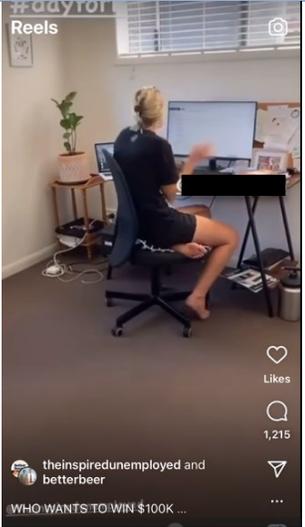
JS – Obviously the best, most creative, most cringe, most embarrassing, fucking anything, the most above and beyond you can do, without harming yourself or anyone else, wins.

MF – Last time we did a “Day For It” challenge, we gave away a phone and this is what happened:



<p>Prior “Day For It” competition entries were provided, showing people yelling “Day For It” when:</p> <ul style="list-style-type: none"> • outside a supermarket in a wetsuit pouring what looks to be a carton of milk over themselves • on a golf course, when other players are preparing to take a shot 	 <p>Reels</p> <p>theinspiredunemployed and betterbeer</p> <p>WHO WANTS TO WIN \$100K ...</p>	 <p>Reels</p> <p>theinspiredunemployed and betterbeer</p> <p>WHO WANTS TO WIN \$100K ...</p>
<ul style="list-style-type: none"> • in a library • balanced on high climbing equipment 	 <p>Reels</p> <p>... told me it was a DAY FOR IT</p> <p>Not banned from the library for this</p> <p>theinspiredunemployed and betterbeer</p> <p>WHO WANTS TO WIN \$100K ...</p>	 <p>Reels</p> <p>OUTFIT: INSPIRE ME: UNEMPLO... @THEINSPIREDUNEMPLOYE</p> <p>theinspiredunemployed and betterbeer</p> <p>WHO WANTS TO WIN \$100K ...</p>
<ul style="list-style-type: none"> • in a busy intersection, wearing just waist and head towels, and yelling through a megaphone • in a carwash with the window down 	 <p>Reels</p> <p>PSA</p> <p>Someone return this</p> <p>theinspiredunemployed and betterbeer</p> <p>WHO WANTS TO WIN \$100K ...</p>	 <p>Reels</p> <p>Day for it @theinspiredunemployed Was keen on a car wash and new phone but I think I'll need new interior</p> <p>theinspiredunemployed and betterbeer</p> <p>WHO WANTS TO WIN \$100K ...</p>

- standing on a chair in a cafe
- startling someone who is concentrating on work



- at what looks like a gym
- standing above a blowhole on some rocks at the beach



- standing mostly naked in what appears to be an industrial workplace



JS: So we're hoping this year you can go bigger and better. Yell from space. Perform at the Sydney Opera House. Fucking sing it and then walk off.

MF: [unintelligible] on your exes lawn, mowing your exes lawn. Just do whatever. Get Creative. Whatever you think you need to do to win this \$100K. Get into it.

JS: Obviously you've got to tag Better Beer and The Inspired Unemployed in your Story or Reel to win.

MF: The comp starts now, all Easter long weekend until Monday at 6pm.

JS: And we're stocked at BWS and Dan Murphy's so go in any other day besides Good Friday to get your piss. Or a pub that sells Better Beer.

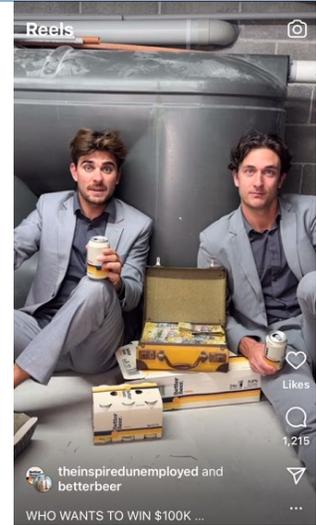
MF: Okay. So is that pretty much it?

JS: I think so.

MF: Alright.

JS: Goodbye.

MF: See you Monday.



Social Media Post 1

Post 1 is a 14 second video posted as a Story to The Inspired Unemployed Instagram page. It is accompanied by "Kickstart My Heart" by Motley Crue and shows a number of people holding cans of Better Beer, physically fighting, smashing Better Beer cans into their heads and holding two cans of Better Beer above their heads and pouring the contents into their mouth. The video was captioned "WWE Smackdown", the words "Day for Ittttt" were shown and "@betterbeer" and "@theinspiredunemployed" were included. Following is a screenshot of the video:



Social Media Post 2

The following is a description of a video Instagram post, a little over 40 seconds long, in which Better Beer was tagged. The video includes a number of scenes where a partially dressed person carrying a trident made out of Better Beer cans yells “Day For It”:

<p>BETTERBEER Tagged</p>		
<p>Standing on a counter in the library.</p>	<p>In a supermarket fridge.</p>	<p>On the floor of a public toilet.</p>

		
<p>On top of a supermarket fridge.</p>	<p>At a pub...</p>	<p>...where he pours a glass of beer over himself.</p>

The Complaint

11. The complainant objects to the communications as follows:
- *Better Beer is running a promotion in conjunction with The Inspired Unemployed (<https://www.instagram.com/reel/Cqph0DLpkaB/>). As part of this promotion, the company is encouraging individuals to post videos tagging the beer.*
 - *The Inspired Unemployed Instagram page is posting the user stories to its page and commenting on the users' videos.*
 - *The user stories/videos posted/promoted to the inspired unemployed Instagram story breach the code in multiple ways, depending on the individual story.*
 - *In the uploaded file, there was a story shared by the Inspired Unemployed. I believe this breaches 3.a.i, 3.a.ii, 3.b.ii of the ABAC responsible marketing code.*
 - *Generally, a large number of videos tagged in this competition I believe are in breach of section 3.a.ii. The tagged videos for better beer can be found at the linke (<https://www.instagram.com/betterbeer/tagged/>). An example of this could be <https://www.instagram.com/p/CqzgJaVAqco/>, in which the user undertakes public nuisance activities dressed in only his underwear and holding a Better Beer trident. The Better Beer account has commented positively on this video.*

- *I believe this competition, the related videos promoted and shared and the endorsement/encouragement by the brand and The Inspired Unemployed constitutes a breach of the ABAC Responsible Alcohol Marketing Code.*

The ABAC Code

12. Part 2 of the ABAC Code provides that the Code APPLIES to all Marketing Communications in Australia generated by or within the reasonable control of a Marketer, except as set out in Section 2(b). This includes, but is not limited to:

...

- Competitions

...

13. 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;
- (a)(ii) show (visibly, audibly or by direct implication) or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage;
- (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.

The Company's Response

14. The Company responded to the complaint by email on 23 May 2023. The primary comments made by the Company were:

- Better Beer is committed to the ABAC code and we have weekly catch ups on adjudications that ABAC releases that are discussed with the team. We will continue to use the pre vetting service when we feel like there is a competition or challenge that could potentially breach the ABAC Code - as we have been doing for other major campaigns in the past and future. On this occasion we saw no risk with a 'Day for it' Challenge and did not get pre approval.
- As discussed – we do not control what the Inspired Unemployed repost on their personal page and the 2 posts out of 500 entries that have slipped through their own internal filter. Both Matt and Jack are also committed to ABAC and removed these posts as soon as we spoke to them on the weekend of the competition.

Better Beer Response Regarding Day for It 100k Giveaway competition

3 (a)(i) – Rapid or excessive consumption of alcohol

- This competition has no reference to consumption of alcohol and does not require or imply entrants to actually consume the beverage. We mention that they must 'include the expression "Day for it" with any Better beer Merchandise or Branding'

3 (a)(ii) – Irresponsible or offensive behaviour

- The Day for It 100k Giveaway competition did not imply to create irresponsible behaviour. The Competition required entrants to send in their best version of a 'Day For It' and to be as creative as they can be. We did not ask them to be holding or drinking Better Beer. See T & C's Link still on our website for references to ABAC:

<https://www.betterbeer.com.au/blogs/news/day-for-it-easter-competition>

Better Beer Response on Inspired Unemployed Reshared posts on ‘The Inspired Unemployed Platform – Not on the Better Beer managed pages.

WWE Post

3 (a)(i) – Rapid or excessive consumption of alcohol

- The Company Better Beer agrees that this is not the responsible way to consume alcohol and it was requested by Better Beer for the Inspired Unemployed to remove this video which was done. This video was taken down in under 3 hours of resharing on Instagram Stories.

3 (a)(ii) – Irresponsible or offensive behaviour

- We agree this post implies irresponsible behaviour and it was requested from Better Beer to Inspired Unemployed to remove this video which was done. This video was taken down in under 3 hours of resharing on Instagram Stories.

3 (b)(ii) – Depiction of Minors

- As this was a reshared video, we have not been able to get the names and DOB’s of the participants. Our visual assessment is that these people are around mid 20s

Tommy Gallus

3 (a)(i) – Rapid or excessive consumption of alcohol

- ABAC has determined on several occasions (for example, in decisions 158/21, 117/15 & 125/22), that it is not a breach of Part 3 (a)(i) of the Code to show a quantity of cans with no other cues to indicate they have been rapidly consumed. It is entirely reasonable to assume the cans have been collected over a period of time, possibly by multiple individuals or members of a household, in order to construct the trident.

3 (a)(ii) – Irresponsible or offensive behaviour

- We do not see this screen shot to be a breach of this code.

3 (b)(ii) – Depiction of Minors

- As this was a reshared video, we have not been able to get the names and DOB’s of this participant. Our visual assessment is that he is in his Mid 20s.

The Panel's View

Background

15. Better Beer came onto the Australian market in November 2021 and since that time its marketing has attracted several complaints leading to Panel determinations. On each occasion the complaints have related to marketing over social media platforms and generally have involved techniques to engage users of the platforms to create content referencing Better Beer products.
16. As well as being a standard method to promote brands and products, social media is particularly relevant to the Company due to the involvement of partial owners of the Company, Jack Steele and Matt Ford. Messrs Steele and Ford are the comedy duo known as The Inspired Unemployed who built a large following over social media platforms such as Instagram, Facebook and Tik Tok prior to their involvement with Better Beer.
17. On this occasion, the complaint relates to a competition run by the Company over Easter 2023 to mark the introduction of a new mid-strength beer (Middy) to the Company's range. The competition was explained and promoted by The Inspired Unemployed on their social media accounts, but references to the Company by The Inspired Unemployed make the relationship between the two quite clear.
18. The competition offered a substantial cash prize of \$100,000. It involved social media users creating content that at a minimum required a person to be holding a Better Beer product and secondly saying or referring to the strapline - 'Day for It'. The posts containing the user generated content also needed to tag both the Company and The Inspired Unemployed. Further terms and conditions were provided on the Company's Website and included that contestants were required to be aged at least 18.
19. The complaint goes to the posts and videos created by users in response to the competition. It is argued that a range of posts show and encourage the irresponsible consumption of alcohol, and also irresponsible or offensive behaviour. To support their concerns, the complainant has pointed to an Instagram post promoting the competition, as well as two competition entries, the first of which tagged Better Beer on Instagram, and the second of which was posted as a Story to The Inspired Unemployed Instagram page.
20. There are several aspects to unpick arising from the complaint, namely:
 - is the user generated content 'alcohol marketing communications' to which the ABAC standards apply; and
 - if so, have ABAC standards been breached.

The user generated posts and videos

21. The ABAC applies to all alcohol marketing communications in Australia generated by or within the reasonable control of a marketer. 'Marketer' means a producer, distributor or retailer of alcohol beverages. It is clear that the Company's own social media pages are within the Code's ambit. But what is the status of posts by The Inspired Unemployed and tagged third party posts?
22. While Messrs Steele and Ford are partial owners of the Company, this does not mean each and every social media post or content created by them can be regarded as the actions of the Company nor is most of the social media content created under the name 'The Inspired Unemployed' related to alcohol as a product.
23. That said, the relationship between the Company and Messrs Steele and Ford is clear and on occasions the content created by them under The Inspired Unemployed guise is equally clearly created with the aim of marketing the Better Beer brand and/or individual Better Beer products. On this occasion the relationship between the Company, the competition and Messrs Steele and Ford is explicit. This includes for instance, the post on Facebook from the Inspired Unemployed announcing the competition expressly directing users to the Company's Website for the competition's terms and conditions.
24. This means the Company can be taken to be the entity responsible for the competition. Further the posts about the competition on the social media accounts of Steele/Ford as The Inspired Unemployed are within reasonable control of the Company and hence within the ambit of the ABAC Scheme.
25. Content and posts made by private individuals on social media platforms mentioning alcohol are not generally 'alcohol marketing communications' captured by the ABAC Scheme. What can bring such content into the remit of the Scheme is actions by an alcohol marketer which can be regarded as 'generating' the content or which give the alcohol marketer 'reasonable control' over the content.
26. Tagged posts, while not created by the Company, appear on the Company's Instagram account. Once on the Company's account, the Company assumes responsibility for the post and can have the post removed from its account. There is a moderation responsibility for alcohol marketers in relation to their own accounts and this means the third party post tagged on the Company's social media accounts becomes a marketing communication for ABAC purposes.

27. Drawing this together:

- the Company has initiated the competition and ‘competitions’ are a recognised marketing technique that fall within the notion of an alcohol marketing communication for ABAC purposes;
- social media posts by The Inspired Unemployed promoting Better Beer and specifically the competition are within the ambit of the ABAC standards; and
- content created by private individuals in response to the competition and which tag the Company and The Inspired Unemployed will appear on accounts controlled by both entities respectively and become the responsibility of the Company for ABAC purposes.

Have ABAC Standards been breached

28. The complaint goes to the competition itself and the ‘entries’ in the form of the content created by private individuals. The ABAC does not seek to endorse nor prohibit any type of marketing but rather requires all alcohol marketing communications meet the good standards of marketing practice contained in the ABAC. A competition can be designed in a manner that is fully consistent with the ABAC requirements but equally could be structured in a way that is a breach of an ABAC standard.

29. The Company’s terms and conditions for the competition specified that videos entered were required to meet ABAC standards and entries from New Zealand needed to comply with the ASA Advertising Standards Code (the New Zealand ABAC equivalent). It was stated that entries not meeting these criteria would not be accepted. The rules impose the obligation on the Company to screen and moderate content prior to it being posted on its own accounts and that of The Inspired Unemployed.

30. The competition’s judging criteria went to originality, creativity, and humour in how contestants showed a Better Beer product and used the strapline - ‘Day for it’. As explained by Mr Steele - ‘Obviously the best, most creative, most cringe, most embarrassing, fucking anything, the most above and beyond you can do, without harming yourself or anyone else, wins.’

31. Given the prize money and the popularity of The Inspired Unemployed, not surprisingly some 500 videos were ‘entered’ i.e tagged to appear on the respective social media accounts. It's not clear how many of these entries were permitted to appear on the social media accounts, but ultimately 8 videos were selected as finalists and followers of The Inspired Unemployed then had the chance to vote for their favourite.

32. Assessment of the consistency of a marketing communication with an ABAC standard is from the standpoint of the probable understanding of the marketing by a reasonable person. A 'reasonable person' means that the life experiences, values, and opinions held by most of the community is the benchmark.
33. The Panel has scanned entries and reviewed the eight finalist's videos. While the complexity of the videos and the themes vary, it is fair to say the videos are light hearted and reflect a larrikin sense of humour consistent with that of the content produced more generally by The Inspired Unemployed. It is also fair to say that alcohol consumption is depicted in some of the entries in a manner inconsistent with ABAC standards.
34. In making that assessment, the Panel believes a reasonable person knows the difference between a highly staged and exaggerated depiction of alcohol use for the purposes of hopefully winning a large cash prize and a serious depiction of how alcohol should be actually consumed. That said, the humour reflects an assumed common understanding that alcohol contributes to stupid and risky behaviour and that this behaviour is implicitly acceptable.

Conclusion and Finding

35. When announcing the competition, a video post was posted to both the Better Beer and The Inspired Unemployed Instagram accounts. It showed Matt Ford and Jack Steel sitting with a case full of cash, verbally providing information about the competition. The video also included entries made to a previous "Day For It" challenge, and included footage of people yelling "Day For It" in various locations and situations, including when standing on rocks near a coastal blowhole and mostly naked at a workplace.
36. This video itself is inconsistent with the ABAC standard in Part 3 (a)(ii) which provides that an alcohol marketing communication must not show or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an alcohol beverage. This is because some of the clips of the videos received to the earlier competition are inconsistent with ABAC standards.
37. This explanatory video set the tone for the entries received in 2023 competition and not surprisingly some of the entries also modelled rapid alcohol consumption and alcohol related anti-social activity. Most entries were consistent with ABAC standards, and some were clever, funny and showed a great deal of effort by the contestants.
38. One entry which is evidently a breach of the responsible depiction of alcohol use is Social Media Post 1 supplied by the complainant. It is a 14 second video posted as a Story to The Inspired Unemployed Instagram page and shows a man holding cans of Better Beer, physically fighting, smashing the cans into their heads as well as rapid consumption.

39. A reasonable person would understand that the video shows and encourages the rapid and excessive consumption of alcohol, and also irresponsible and offensive behaviour. The Panel finds that the post breaches Parts 3 (a)(i) and (ii).
40. The complainant is also concerned that this video breaches Part 3 (b)(ii) by depicting a person who is or appears to be a minor. The Company does not know the ages of the people in the video, however, the Panel does not believe that they look under the age of 18, and a review of related social media accounts does not support the supposition that they are minors.
41. The second post expressly referred to by the complainant was one of the finalists. It depicted a partially clothed man yelling “Day For It” in different locations, including the State library, supermarket fridge, public toilet and pub. The video does not show excessive consumption, but the final scene of the man pouring beer over himself in a public bar does depict alcohol related anti-social behaviour.
42. The Panel finds that the following videos breach the Part 3 (a) standard:
- the post of Messrs Steele and Ford announcing the competition in relation to the clips of previous competition entries; and
 - Social Media posts 1 and 2 supplied by the complainant.
43. The complaint is upheld.