



## ABAC Adjudication Panel Determination No 85/23

**Product:** Barely Legal  
**Company:** Blackflag Brewing  
**Media:** Social Media and GABS Website  
**Date of decision:** 28 June 2023  
**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 18 May 2023 and concerns marketing for Barely Legal (“the Product”) by Blackflag Brewing (“the Company”). The marketing involves an entry on the GABS website for the Product, and social media posts made by 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:
  - (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 18 May 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

- 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 content of the marketing.

## The Marketing Communications

- The complaint relates to marketing via the GABS website, as well as three social media posts made by the Company:

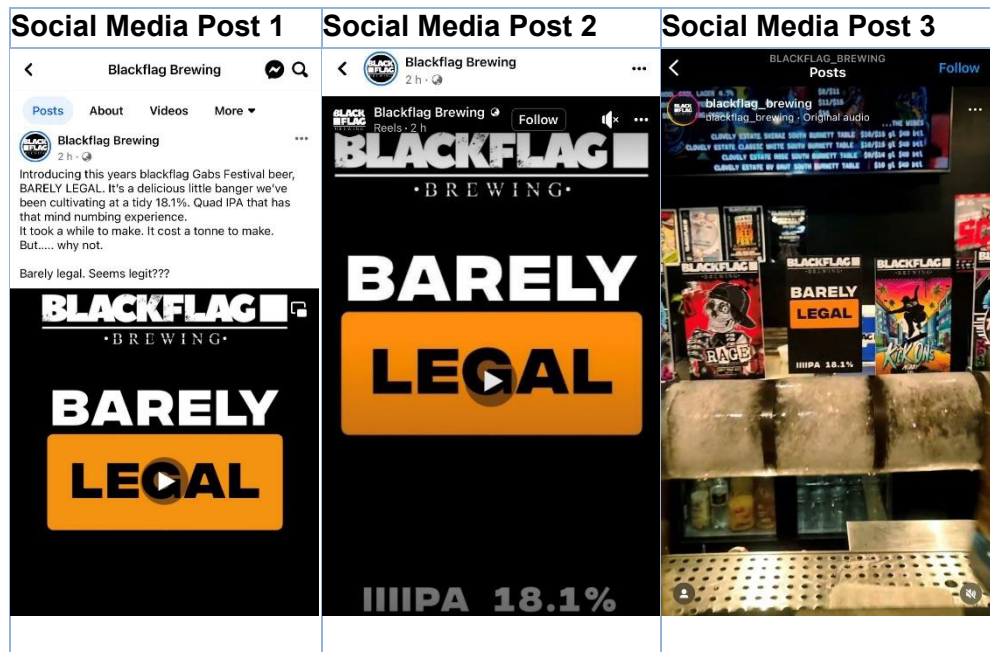
### GABS Website:

#### 34: Blackflag Brewing **BARELY LEGAL**

**STYLE:** IPA - Imperial **ABV:** 18.1 %

**COMPLEXITY:** ADVENTUROUS

Its big, bold and barely legal. Nice rounded Quad IPA packing a punch. It's bitter, boozy and something to tell your friends about.



## The Complaint

11. The complainant objects to the marketing as follows:
  - *The name “Barely Legal” insinuates sexual activity; the accompanying logo that is a carbon copy of a popular porn website logo further amplifies this.*
  - *The fact that the ABV of this beer is 18% is not only irresponsible but also goes along with the theme of “barely legal” (of age).*
  - *The tasting note of the beer that is on the GABS beer site and will be printed at the festival states “It's big, bold and barely legal .... It's bitter, boozy and something to tell your friends about” - what are they insinuating here? “Something to tell your friends about” - a double entendre.*

## The ABAC Code

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

13. The Company responded to the complaint by letter emailed on 8 June 2023, advising that it did not wish to contest the complaint and that all associated imagery and marketing was immediately removed.

## The Panel's View

14. This determination concerns marketing for a product created by the Company for inclusion in the 2023 GABS Craft Beer and Cider Festival. The festival is an annual event for the craft brew industry featuring specially brewed beers and ciders. The Company entered a beer branded as 'Barely Legal' which attracted considerable public criticism to its branding and messaging and was subsequently withdrawn.
15. The criticism of the marketing of the product carried both in the festival tasting notes published by GABS on their website and directly by the

Company via social media posts went to concerns also reflected in the complaint namely:

- the branding was a play on the logo used by an online pornography platform;
- the 'Barely Legal' name relates to a genre of pornography featuring models/performers aged or presented to be 18 years old;
- the high 18% ABV of the product was irresponsible particularly noting the pornography connotations; and
- together the branding, marketing and high ABV was totally irresponsible.

16. In response to the public criticism carried in various media outlets the Company explained it had no intention to offend or message inappropriately but it accepted it had made a misstep and withdrew the product under the Barely Legal branding. The Company did not contest the ABAC complaint or offer further explanation beyond that which had been conveyed in media reporting.

17. As noted in paragraph 2, alcohol as a product and alcohol marketing sits within a shared regulatory space. To some extent the criticisms made about the product marketing raises issues of taste, decency and the portrayal of sex and sexuality contained in the AANA Code of Ethics and applicable to all products, including but not limited to, alcohol marketing.

18. At a higher level, the public reaction to the product marketing also demonstrates that alcohol marketers must operate with an understanding of the implicit social and corporate licence that comes with involvement in the alcohol industry. This unwritten licence captures community expectations of what is acceptable for a product such as alcohol that has a potential to do harm if used irresponsibly.

19. For its part, the Panel's role is to assess the marketing of the product against the ABAC standards raised by the nature of the complainant's concerns. There are two standards raised, namely 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 - Part 3 (a)(ii); or
- 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 - Part 3 (a)(iv).

20. In assessing if a Code standard has been breached, the Panel adopts the standpoint of the probable understanding of the marketing item by a reasonable person. This means the attitudes, values and life experiences shared by most members of the community is the benchmark. If a marketing communication can be interpreted in several ways, the most probable understanding is to be preferred over a possible but less likely interpretation.
21. The marketing identified by the complainant goes to both the GABS website and the Company's social media posts. The tasting notes on the GABS website read as follows:

### 34: Blackflag Brewing

#### **BARELY LEGAL**

**STYLE:** IPA - Imperial **ABV:** 18.1 %

**COMPLEXITY:** ADVENTUROUS

Its big, bold and barely legal. Nice rounded Quad IPA packing a punch. It's bitter, boozy and something to tell your friends about.

22. In addition, the Company has made several posts to its Instagram account showing the product's logo, which is similar to the logo of an online pornography website but substitutes the product name – 'Barely Legal' – in place of the pornography website's name. The word 'Barely' is shown in white against a black background, beneath which the word 'Legal' is shown in black against an orange background. Social Media Post 1 includes the following text:

Introducing this years blackflag Gabs Festival beer, BARELY LEGAL. It's a delicious little banger we've been cultivating at a tidy 18.1%. Quad IPA that has that mind numbing experience.

It took a while to make. It cost a tonne to make.

But..... why not.

Barely legal. Seems legit???

23. The Panel believes the branding and marketing communications are in breach of the Code standards. In reaching this conclusion the Panel noted:
- the name "Barely Legal" invokes a term that describes a genre of pornography and the adaption of the pornography website logo clearly associates the marketing with pornography;
  - the pornography connotations and the legal age for the consumption of alcohol does give rise to an association that a reasonable person would probably understand as irresponsible;

- while the ABAC does not regulate physical beverages, the statements in the tasting notes of 'It's *big, bold and barely legal*' and '*...packing a punch*', encourage the choice of the product by elevating references to the product's alcohol strength and intoxicating effect; and
- equally the social media posts also encourage the choice of the product based on its strength i.e. '*its a delicious little banger we've been cultivating at a tidy 18.1%. Quad IPA that has that mind numbing experience*'.

24. The complaint is upheld. It is noted that the marketing was removed prior to the complaint being received.