



## ABAC Adjudication Panel Determination No. 133/16

**Product:** Smirnoff  
**Company:** Diageo  
**Media:** Digital  
**Complainant:** Confidential  
**Date of decision:** 11 January 2017  
**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 digital advertisements for Smirnoff (“the Company”) and arises from a complaint received 5 December 2016.
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 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”) – 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 – which places restrictions on the location of alcohol advertisements on outdoor sites such as billboards.
3. Within this framework, some of the requirements go to the placement of alcohol marketing, while others go to the content of the marketing. The ABAC is a content code, which means the standards of good marketing practice within the Code apply irrespective of where the marketing occurs (e.g. in print, in digital formats, or by broadcast mediums). Equally, the fact that the marketing is placed in a particular medium or in a particular location will not of itself generally be a breach of the ABAC. In contrast, the placement codes applying to outdoor sites or free to air television don’t go to what is contained within alcohol marketing but the codes will be potentially breached if the marketing occurs at particular timeslots or is placed near a school.
  4. For ease of public access, the Advertising Standards Bureau (ASB) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the ASB, 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 the ASB 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 ASB 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 5 December 2016.
8. The Panel endeavour 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 determined within this timeframe.

## Pre-vetting Clearance

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

## The Marketing Communications

10. The complaint relates to posts by @smirnoffaustralia, @clairemueller and @littlemissmonbon that feature the Smirnoff Pure premix alcohol drink.
11. The posts by Smirnoff are described following:
  - a) An image of an open bottle of Smirnoff Pure Ginger, Lime & Soda on a sun drenched table with a glass of straws, a bowl of lime wedges, a piece of ginger root and a yellow napkin with the caption “smirnoffaustralia Vodka and natural ingredients. That’s all! You’d be basking naked in the sun too if you had nothing to hide.”
  - b) An image of an outdoor table with a partially obscured female at one end with her hand around an open bottle of Smirnoff Pure Classic Lime & Soda. On the table are two full bottles of the product at different place settings together with several bowls of citrus wedges, sunglasses and a towel. The accompanying caption is “smirnoffaustralia Nothing like clear skies and a clear arvo schedule. Nothing like just vodka and natural ingredients. New #Smirnoff Pure – available now”.
  - c) An image of a closed bottle of Smirnoff Pure Cranberry, Apple & Soda on a marble bench with the caption “smirnoffaustralia Our cards have been laid out. Nothing to hide but vodka and natural ingredients. That’s all!”
  - d) An image of two partially obscured people sitting at an outdoor table. One person has a hand around an open bottle of Smirnoff Pure Cranberry, Apple & Soda. On the table is a bucket of ice with four different product flavours, several bowls of citrus wedges/fruit and a pair of sunglasses. The accompanying caption is “smirnoffaustralia Nothing like a lazy #Summer arvo in the sun... Nothing like just vodka and natural ingredients. Available in stores now. New #Smirnoff Pure – Nothing to hide”.
  - e) An image of a closed bottle of Smirnoff Pure Classic Lime & Soda lying on a marble bench with the caption “smirnoffaustralia Lime, Lime, Lime... Vodka and Soda that is. Nothing more, nothing less. New #Smirnoff Pure. Nothing to hide but vodka and #natural ingredients. Available now.”
12. The post by @clairemueller is an image of a closed bottle of Smirnoff Pure Ginger, Lime & Soda lying on a marble bench top casting a shadow across an artistic display of lime slices, ice cubes and ginger straws shaped to match the bottle. The accompanying caption is “clairemueller Officially summer which means it’s well and truly party season... as a glutard I’m always missing out on

beers in the sun, so pretty stoked that @SmirnoffAustralia has just released an adult premix with just soda and natural ingredients (no added sugar or preservatives) – perfect for staying on a wholefoods high horse while actually enjoying festivities #Nothingtohide #drinkresponsibly #smirnoffpure #vodkalimeandsoda #cocktail #partyseason #lime #ginger #cocktailhour #vodka #shadow #bottle #summer #itstheweekend #friyay #party #christmas #festivus #smirnoff #gf #glutenfree #wholefoods #naturalingredients #noaddedsugar

13. The post by @littlemissmonbon is an image of a closed bottle of Smirnoff Pure Ginger, Lime & Soda on a window ledge with a city skyline in the background. The accompanying caption is “littlemissmonbon It has been a long day catching up on work post Bali. I think I deserve a guilt free break... pure indulgence, no nasties! @SmirnoffAustralia #Nothingtohide

#view #whataview #city #skyline #cityskyline #perth #perthcity #alcohol #drinkresponsibly #drink #pretty #holiday #staycation #afterworkdrinks #afterfive #buildings #views #view #vsco #smirnoff #blogger #perthblogger #epic #epicview

### **The Complaints**

14. The complainant objects to the marketing for the following reasons:
- a) Smirnoff and the other Instagram accounts are not disclosing the advertising;
  - b) The accounts who are posting these images (such as @clairemueller and @littlemissmonbon) would have under 18 followers.
  - c) The way they have created their images and the accompanying text is making this new Smirniff premixed drink to be a ‘healthy’ choice because there is no sugar or gluten.

### **The ABAC Code**

15. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
- (b) have Strong or Evident Appeal to Minors;
  - (c)(iv) suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation;
16. Definition in Part 5 of the ABAC provides:
- Strong or Evident Appeal to Minors means:
- (i) likely to appeal strongly to Minors;
  - (ii) specifically targeted at Minors;

- (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
- (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

A 'Minor' means a person who is under 18 years of age and therefore not legally permitted to purchase an alcohol beverage in Australia.

### **The Company's Response**

17. The Company responded to the complaints by letter dated 21 December 2016. The principal points made by the Company were:

- a) The advertisements in question relate to separate posts (imagery and supporting comments) featuring Smirnoff Pure on the Instagram accounts of @Smirnoff Australia, @clairemueller and @littlemissmonbon. Smirnoff Pure is the newest premix innovation from Smirnoff. It combines vodka with natural ingredients, and contains no preservatives or artificial ingredients. The campaign that supports this latest innovation is called "Nothing to Hide" and displays an almost 360 degree view of the product in mirrors, proudly showcasing the back label featuring its natural ingredients listing. In-store, numerous retailers supported the product launch with off location displays heroing the message of the premix with "Vodka and all natural ingredients". In addition, the product was promoted in digital advertising along with an amplified social media campaign on the brand's own channels.
- b) The complaint refers to posts made on @SmirnoffAustralia's, @clairemueller's and @littlemissmonbon's Instagram accounts. The complainant refers to posts featuring Smirnoff Pure on the @SmirnoffAustralia account, however, does not reference specific posts on the account. Therefore, Diageo has provided a range of the posts from this account and which the complaint may be referring to. The posts include:
  - An image of a single bottle of Smirnoff Pure (Ginger, Lime & Soda flavour), next to fresh ginger, cut limes and straws, all under sunlight. The comment that appears under the image states "Vodka and natural ingredients. That's all! You'd be basking naked in the sun too if you had nothing to hide".

- An image of a table outdoors with three bottles of Smirnoff Pure (Classic Lime & Soda flavour) amongst a camera, sunglasses, the edge of a guitar, a bowl of sliced limes, a towel, and a woman's lower torso with her hand holding one of the bottles. The statement "Drink Responsibly" appears in the bottom right hand corner of the image. The comment that appears underneath the images states "Nothing like clear skies and a clear arvo schedule. Nothing like just vodka and natural ingredients. New #Smirnoff Pure – available now".
- A simple image with a single bottle of Smirnoff Pure (Cranberry, Apple & Soda flavour) with a marble background. The comment that appears underneath the images states "Lime. Lime. Lime...Vodka and Soda that is. Nothing more, nothing less. New #Smirnoff Pure. Nothing to hide but vodka and #natural ingredients. Available now".
- An image of a table outdoors with four bottles of Smirnoff Pure (one of each flavour) in an ice bucket, one single bottle in a woman's hand, another person's lower arm resting on the table, bowls of sliced fruit, sunglasses and hand towels. . The statement "Drink Responsibly" appears in the bottom right hand corner of the image. The comment that appears underneath the images states "Nothing like a lazy #Summer arvo in the sun...Nothing like just vodka and natural ingredients. Available in stores now. New #Smirnoff Pure – Nothing to hide".
- A simple image with a single bottle of Smirnoff Pure (Classic Lime & Soda) with a marble table/background, with the statement "Drink Responsibly" in the bottom left hand corner. The comment that appears underneath the images states "Our cards have been laid out. Nothing to hide but vodka and natural ingredients. That's all! New #Smirnoff Pure. Available now."
- The Instagram post in question by @clairemueller includes an image of a single bottle of Smirnoff Pure (Ginger, Lime & Soda flavour) with a shadow of the bottle that includes ice and freshly cut ginger and limes. The comment that appears under the images states "Officially summer which means it's well and truly party season...as a glutard I'm always missing out on beers in the sun, so pretty stoked that @SmirnoffAustralia has just released an adult premix with just soda & natural ingredients (no added sugar or preservatives) – perfect for staying on a wholefoods high horse while actually enjoying festivities (emoticon happy face and peace sign) #NothingToHide". This is accompanying with a number of hashtags including #drinkresponsibly @smirnoffpure @vodkalimeandsoda among many others.

- The Instagram post in question by @littlemissmonbon includes an image of Smirnoff Pure (Ginger, Lime & Soda flavour) on an edge, with a blurred city skyline in the background. The comment that appears underneath the image states “It has been a long day catching up on work post Bali, I think I deserve a guilt free break...(emoticon wink face) pure indulgence, no nasties! @SmirnoffAustralia #NothingToHide”.
- c) The complaint references two sources of content, specifically the Instagram accounts of @SmirnoffAustralia , which is Diageo owned, and @clairemueller and @littlemissmonbon, which are independently owned. In the instance of the content promoting Smirnoff Pure on the @SmirnoffAustralia account no AAPS approval was received. For this particular channel, the nature of content published, the active Legal Purchase Age (LPA) age-gate and profile description (“Must be age 18+ to follow & use our hashtags. Please don’t share with those under the legal purchasing age for alcohol. Drink responsibly.”) is ABAC compliant.
- d) In the instance of the content featuring Smirnoff Pure on the @clairemueller and @littlemissmonbon accounts no AAPS approval was received. The content published on these accounts is produced and published at the discretion of the individual account holder, as such no AAPS approval was required.
- e) Leo Burnett, Diageo’s advertising agency, has engaged the influencer marketing company VAMP (Visual Amplifiers) to support the Smirnoff Pure campaign. Diageo confirms that VAMP has an arrangement in place with the Instagram account holders @clairemueller and @littlemissmonbon. Diageo, however, has no direct relationship with the accounts referenced in the complaint. The Instagram accounts mentioned are independently owned, and the content published by the account holders is created and posted at their own discretion. Through the above arrangement, Leo Burnett provided a brief to VAMP detailing the campaign to support their recruitment of potential influencers. This brief includes the Diageo Marketing Code Cheat Sheet which covers topics on responsible drinking, therapeutic, performance or functional benefits, and anti-social behaviour, among others, as well as the need for verification that influencers are 25 years of age or older. Each of the proposed influencers’ Instagram accounts, including of @clairemueller and @littlemissmonbon, were then reviewed by Diageo to ensure that they have no strong or evident appeal to minors or contradict the principles of the Diageo Marketing Code or ABAC. This review excluded the posts in question as they had not been drafted at that point. In regards to content, the arrangement with @clairemueller and @littlemissmonbon followed the same process as for other influencers engaged by VAMP on behalf of

Leo Burnett. Influencers have creative ownership over the content they produce (images and comments) so that the content is authentic and relevant to their followers. It is also within their control to adhere to the brief, DMC Cheat Sheet and VAMP recommended guidelines. Within 48 hours of going live, however, the influencers are required to supply post links to VAMP (and subsequently Leo Burnett) so it can be screened from a DMC and ABAC perspective by Leo Burnett as part of a post-moderation process. If an issue arises the process is that Leo Burnett will raise these with Diageo for further review. Leo Burnett and Diageo has the right to object to any content that is not DMC or ABAC compliant with VAMP, and to provide guidance to alter/remove the post if required. This discussion is between VAMP and the Instagram account holders whom which the commercial agreement is in place. The posts made by these influencers are not distributed by the brand via its own social media channels. Diageo believes that there is a defined level of control in pre-campaign influencer recruitment, and the post-moderation of content after it is posted to ensure it is compliant with the ABAC and the DMC. Even though Diageo is not the legal owner of the Instagram accounts, and has no direct relationship with the influencer account holders (as this is held by VAMP) Diageo is funding the campaign, and is committed to ensure that we are operating as a leading responsible digital marketer at all times.

- f) As a platform, Instagram's account holders are more than 75%+ above the legal purchase age (LPA). For users to be able to view content on the @SmirnoffAustralia Instagram account, users must be 18 years of age or older. The Instagram accounts of @clairemueller and @littlemissmonbon are public and do not contain the same age-gating mechanism. However, Diageo does not believe that the content on their accounts, or the specific post featuring Smirnoff Pure, has strong or evident appeal to minors. The content published to the account owners' communities is an embodiment of their personal lifestyle, and is in alignment with the Smirnoff Pure's product proposition which is "Nothing To Hide".
- g) Prior to Leo Burnett engaging the influencer through VAMP, the existing content on each potential influencer account is screened to ensure that there is no strong or evident appeal to minors. Furthermore, the people who hold the accounts @clairemueller and @littlemissmonbon are verified to be 25 years of age or older.
- h) Diageo does not believe that making statements relating to sugar or gluten imply a therapeutic benefit. They are merely statements of fact. Having said that, Diageo's Smirnoff Pure campaign does not make such statements. The Instagram posts which referenced sugar and gluten were from the accounts of @clairemueller and @littlemissmonbon. As those



references have not been made by Diageo as part of the Smirnoff Pure campaign and were not included in the campaign brief by Leo Burnett to VAMP, Diageo asked the account holders to amend their posts as part of the post- moderation process.

- i) The Smirnoff product that appears within the advertisements in question includes the word “Pure”. The product itself only includes vodka and natural ingredients. These are true statements. Diageo does not believe that by stating that the product only contains natural ingredients this suggests that it offers a therapeutic benefit. It is a true nature statement.
- j) The statement “You’d be basking naked in the sun too if you had nothing to hide” follows the statement “Vodka and natural ingredients. That’s all!” and appears on the @SmirnoffAustralia Instagram account. The statement appears under an image of a single bottle of Smirnoff Pure (Ginger, Lime & Soda flavour), next to fresh ginger, cut limes and straws, all under sunlight. The intent of the statement is to showcase the product for it’s simple ingredient list of all natural ingredients.
- k) We are pleased to have had this opportunity to confirm our long-standing support for the ABAC Scheme and commitment to uphold the Responsible Alcohol Marketing Code (ABAC).

## **The Panel’s View**

### Introduction

- 18. Digital media platforms such as Instagram have revolutionised the way in which people communicate and interact. Launched in late 2010, Instagram had gained over one hundred million active users within eighteen months and over three hundred million users within four years. In April 2012, Instagram was acquired by Facebook.
- 19. Not surprisingly, digital media has also transformed the channels available to brand owners to promote their products and services. Alcohol companies have accessed the medium and this determination concerns the Instagram accounts of the Company and two third parties who have been identified as Instagram “influencers”.
- 20. An “influencer” is a social media account holder, generally with a large number of followers. The person’s views on fashion, activities, politics etc are influential as the person appeals to the demographic of the followers. A key to the appeal of an influencer is that their opinions and lifestyle choices are authentic. An endorsement of a product by an influencer can be a powerful contribution to the standing and appeal of the product’s brand attributes.
- 21. While the Instagram account of the Company is clearly marketing for which the Company is responsible, the Panel needs to establish the status of the two influencer accounts and the posts that refer to Smirnoff.

Are the posts within the scope of the ABAC scheme

22. Not every mention of an alcohol product on a social media platform is an alcohol marketing communication for the purposes of the ABAC scheme. The scheme clearly applies to direct marketing by a Company via its own social media sites but posts by ostensibly private individuals that refer to an alcohol product as a starting point could be assumed not to be alcohol marketing as such. The Code provides that a social media post will be within the purview of the ABAC scheme if:
- It is accessible in Australia; and
  - The post is within the reasonable control of a producer, distributor or retailer of alcohol beverages.
23. The complaint identifies three Instagram accounts as containing posts of concern. The Company's own site and two accounts held by private individuals. The threshold question is whether the Company had "reasonable control" over the posts on these two private sites.
24. The Company has stated that it does not have control over the content of the two influencer Instagram accounts, nor is the Company in a commercial arrangement with either person. However, it seems that the Company does have a measure of control over the references to its products via the commercial relationship between the individual Instagram account holders and the firm "Vamp" which has been engaged by the Company's advertising agency. Vamp is an "influencer marketing company".
25. As explained by the Company, the control it and its advertising agency exercises over the two influencer Instagram sites and posts arise from:
- It's advertising agency engaging the influencer marketing company to support the campaign;
  - Vamp's securing a commercial arrangement with the two influencers to reference the Company's product on their Instagram accounts;
  - An entitlement to review the two influencers Instagram accounts to "ensure that they have no strong or evident appeal to minors or contradicted the principles of the ABAC";
  - The supply via Vamp to the two influencer account owners of company marketing materials and guidelines; and
  - A post moderation process which presumably would facilitate the removal of Instagram posts referencing the Company's products if this was required by the Company.
26. In summary, the Company states that it believes that there is a "defined level of control" exercised by the Company over the content on the influencer accounts arising from the pre-campaign influencer recruitment and the post moderation of content. Based on this information, the Panel concludes that the posts on the

two influencer Instagram sites are alcohol beverage marketing to which the ABAC Standards apply and that the Company is accountable for the posts even though the actual content of the posts was devised by the owners of the site and not directly by the Company.

Are the posts consistent with ABAC standards

27. The complainant expresses concern about the posts in respect to three matters, namely:
  - That the two influencer Instagram posts do not describe that their posts are in fact advertising;
  - That the influencer accounts would have followers who are under the age of 18; and
  - That the product is presented as a healthy choice.
28. The appeal of a digital influencer is that their content is authentic and resonates with their digital followers. Information on the Vamp website indicates that their approach is to financially compensate influencers. It is argued that if the influencer's commitment to a product is genuine then it is appropriate that their creative efforts in referencing the product is appropriately supported. It is not the practice however that any relationship between a brand owner and the reference to the brand by the influencer is expressly acknowledged in all cases.
29. By contrast, in broadcast media settings it is generally required that advertising is clearly identified so that it cannot be mistaken as editorial comment. Irrespective of the appropriate merits of this situation, the fact is that there is no ABAC Standard which requires that alcohol marketing be clearly identified as marketing material as such. Accordingly, the fact that the posts on the influencers Instagram accounts are not clearly identified as advertising is of itself not a breach of any ABAC Standard.
30. The next issue raised by the complaint is that the two influencer sites would have followers under eighteen years of age. The Company advises that its own Instagram site has age gated restrictions but the two other sites "are public and do not contain the same age-gating mechanism". Presumably therefore, the complainant's point is valid in that under 18 year olds may well be amongst the group of followers of these two sites.
31. The ABAC is a content based code of practice rather than a placement based code. What this means is that a marketing item will not be in breach of the Code simply because it can be viewed by under 18 year olds. Equally, the marketing item which in its content can be said to be strongly appealing to minors will not be saved simply because its audience could be shown to be predominantly adult.
32. There is no Code standard, which requires alcohol marketing on a digital platform to be subject to an age-gating mechanism. It is best practice that age restriction mechanisms be used – as was the case with the Company's

Instagram account – but a failure to extend this approach to the two influencer accounts will not of itself be a breach of a Code standard.

33. What the Code standard does require is that alcohol marketing not have strong or evident appeal to under 18 year olds. This standard will be breached for instance if the marketing is targeted at minors or has a particular attractiveness for a minor beyond the general attractiveness it has for an adult.
34. In assessing if the standard has been breached, the Panel is to have regard to the probable understanding of the marketing communication on a reasonable person, taking the content of the marketing as a whole. The reference to “a reasonable person” is drawn from the common law system and means that the opinions, attitudes and values held in a majority of the community is to be the benchmark.
35. The posts feature a picture of the product in different settings and short accompanying text. The Panel does not believe the posts can fairly be regarded as having strong or evident appeal to under 18 year olds.
36. The third concern raised by the complainant is that the product is presented as a healthy choice. Section c(iv) of the Code provides that alcohol marketing must not suggest that the consumption of an alcohol beverage offers any therapeutic benefit.
37. The Company contends that the posts make factual statements about the product’s ingredients. It is noted that the Company asked the two private account holders to amend their posts as part of the post–moderation process to remove references to sugar and gluten, although it is argued these references did not assert a therapeutic benefit.
38. The Panel does not believe the posts on the Company site account breach the standard. The posts state the product contains vodka and “natural ingredients: and make no assertion that use of the product would result in a health benefit.
39. The two influencer posts go further than the Company posts in the claims of “no nasties”, “guilt free” @littlemissmonbon and @clairemueller statements of “as a glutard I’m always missing out on beers in the sun”... and “perfect for staying on a wholefoods high horse while actually enjoying festivities”.
40. On balance the Panel does not believe the posts breach the standard. In reaching this conclusion the Panel has noted:
  - The posts do not claim a positive benefit from the consumption of the product i.e. the product will help your health;
  - At it’s highest the post of @clairemuller implies the consumption of the product is consistent with a wholefoods diet and its use is available to a person with a gluten intolerance; and
  - A reasonable person would interpret the posts as implying that, compared to other alcohol products eg beer, the product has certain

attributes but these attributes do not make the product beneficial for health or wellbeing.

41. The complaint is dismissed.