



## ABAC Adjudication Panel Determination Nos 97 &110/22

**Product:** Smirnoff Seltzer, Johnnie Walker  
**Company:** Diageo  
**Media:** Digital TV - BVOD  
**Date of decision:** 16 December 2022  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Debra Richards  
Professor Louisa Jorm

### Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns television advertising for Smirnoff Seltzer and Johnnie Walker (“the Products”) by Diageo (“the Company”). It arises from two complaints received on 8 and 24 November 2022. The first complaint was that advertising for Smirnoff Seltzer was placed on 10Play between 4.30 and 5.00pm on Friday 4 November 2022. The second was that advertisements for Smirnoff Seltzer and Johnnie Walker were placed during The Amazing Race Australia on 10Play when watched at 6:30pm.
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 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 complaints were received on 8 and 24 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 obtained for the content of the television ads (Approval Numbers 20441 and 3737).

### **The Marketing**

10. The complaints relate to Digital TV advertising for the Products, which were accessed while viewing programs on 10Play:
  - between 4.30 and 5.00pm on Friday 4 November 2022; and
  - during The Amazing Race Australia, viewed on Friday 23 November at 6:30pm.

## The Complaint

11. The complainants object to the marketing as follows:

Complaint #	Concern
97/22	<p><i>The Smirnoff ads on Channel 10 were promoting the sale and consumption of two types of vodka seltzers, Spicy Margarita and Watermelon Margarita, both of which are rated at 7% ABV.</i></p> <p><i>The rules governing alcohol advertising clearly state that alcohol ads can only be shown during TV programs:</i></p> <ul style="list-style-type: none"><li>• <i>Between 12.00pm to 3.00pm on school days</i></li><li>• <i>Between 8.30pm and 5.00am on any day</i></li></ul> <p><i>I do not agree with companies advertising alcoholic drinks during periods when children can be watching.</i></p>
110/22	<p><i>[We see the advertising] whenever we watch child friendly programs on 10 Play, e.g. Today 23 November, 6.30pm.</i></p> <p><i>There seems to be no regulations followed for catch up TV. We often watch child friendly shows and I am always very disappointed by some of the ad content displayed including ads for M rated shows and constant advertising for alcohol.</i></p> <p><i>My 10 year old should not be exposed to regular alcohol ads during our occasional evening tv shows.</i></p>

## The ABAC Code

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

- (b)(iv) be directed at Minors through a breach of any of the Placement Rules.

13. Part 6 of the ABAC Code provides that:

**Placement Rules** means:

- (i) A Marketing Communication must comply with codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy).
- (ii) A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.
- (iii) If a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, a Marketing Communication may only be placed where the audience is reasonably expected to comprise at least 75% Adults (based on reliable, up-to-date audience composition data, if such data is available).
- (iv) A Marketing Communication must not be placed with programs or content primarily aimed at Minors.
- (v) A Marketing Communication must not be sent to a Minor via electronic direct mail (except where the mail is sent to a Minor due to a Minor providing an incorrect date of birth or age).

### **The Company's Responses**

14. The Company responded to complaint 97/22 by letter emailed on 29 November 2022. The principal points made by the Company were:

- We refer to your letter dated 17 November 2022, concerning complaint 97/22 received by ABAC in relation to 'Smirnoff Vodka products' seen on 10Play during hours when children could be watching.
- Thank you for inviting us to provide comments for the Panel's consideration in determining this complaint. We wish to confirm our longstanding support and commitment to upholding the ABAC Responsible Alcohol Marketing

Code (ABAC), as well as our best-practice global marketing standards, the Diageo Marketing Code (DMC) and Diageo Digital Code.

### **Diageo Marketing Code (DMC) and Diageo Digital Code**

- The DMC supports our approach to innovative marketing, while at the same time ensuring we stay true to our core values and pro-actively market responsibly to adults. At the heart of the DMC, is our commitment to ensuring all our activities depict and encourage only responsible moderate drinking, and never target those who are younger than the legal purchase age (LPA) for alcohol.
- Compliance with the DMC is mandatory for all employees of Diageo, our subsidiaries, and joint ventures where Diageo has a controlling interest. It also applies to third parties engaged by Diageo who help market our brands. DMC review and sign-off must be included at each key stage of the innovation process and archived on our online approval tool, the Diageo Content Hub. The DMC applies to all activities intended to market our beverage brands, including the Smirnoff Vodka advertisement referred to in the Complaint.
- In addition, our Diageo Digital Code ensures that we have the right governance, risk and compliance structure necessary to safeguard our reputation and leadership in the digital space. As part of the Diageo Digital Code, at a global level, we work with digital partners to tackle current and emerging digital challenges. In 2018, we built and implemented an industry-leading approach to digital marketing, called the Trusted Marketplace, which amongst other elements ensures compliance by digital publishers with our 75% LPA+ control.

### **Placement**

- In partnership with our media agency, Foundation, we have conducted a thorough review into our advertising activities for Smirnoff Seltzer Vodka Cocktails. The placement of Diageo advertisements with the 10Play video on-demand platform takes into consideration the following controls:

#### ***Use of age-verification & targeting:***

As per Diageo's Digital Code, Diageo only places advertisements where the audience is 75%+ above the LPA and where demographic

targeting of all placements to people above the LPA can be applied. According to OzTAM BVOD data between January and November 2022, 94% of 10Play's audience is 18+, above our 75% minimum.

***Avoiding programs 'primarily aimed at minors':***

Diageo does not purchase media space where our advertisements are placed next to or within programs primarily aimed at children. This would not only breach ABAC, but our own DMC and Diageo Digital Code.

- For noting, catch up TV or broadcast video on demand, like all digital channels, does not have time restrictions with regards to alcohol advertising unlike free-to-air TV, which Smirnoff Vodka marketing communication is not currently running on. We believe all due diligence has been taken to ensure adherence to the ABAC Code during the making and placement of this advertisement. Below is our response to the specific questions outlined in your email.

**Alcohol Advertising Pre-vetting Service Approval**

- The packaging of the products in the marketing communication were submitted to the pre-vetting service for final approval on 23 February 2022, with approval received on 24 February 2022 (ABAC Approval 20830).
- The two Smirnoff Seltzer ads were also submitted to the pre-vetting service for final approval on 30 September 2022, with approval received on 30 September 2022 (ABAC Approval 3737).

**Utilisation of Available Age Restriction Controls**

- Age restriction controls were utilised to exclude Minors from viewing these marketing communications. Our media agency, Foundation, purchased the media from Ten. This involves utilising 10Play's first party data based on logged in information to target the 18+ demographic. In conjunction, targeting exclusions 'away from kids' content' was applied. The agreement that is established means that targeting, as agreed, is controlled by Ten. Please also refer to the response below for further screening through the 'whitelist' of programs.

## Content not primarily aimed at minors

- Foundation, in collaboration with 10Play, created a 'whitelist' of programs, where Smirnoff Seltzer marketing communications could be shown based on the percentage of 10Play users aged 18+ and excluding any family or kid content. This 'whitelist' is reviewed every quarter based on genre type, share of total impressions/inventory and age of average viewership being at least 75% P18+ to ensure that our brands uphold the ABAC and DMC placement rules. Below is the list of 10Play programs that Smirnoff Seltzer marketing communications has been shown on in the past month and which the complaint could be in relation to. Of note is that all program audience figures are no less than 90% 18+.

Advertiser	show	Show Rating	Programs P18+ 2022	Programs P18+ Oct 22
Diageo	all_4_adventure	PG	93.60%	93.20%
Diageo	bachelor_in_paradise_us	M	96.10%	96.30%
Diageo	bachelorinparadise_au	PG	94.10%	95.40%
Diageo	bed_of_roses	PG	95.90%	98.10%
Diageo	blue_bloods	M	96.00%	96.00%
Diageo	bull	M	95.40%	95.30%
Diageo	celebrity_masterchef_australia	PG	95.30%	95.70%
Diageo	charmed	PG	94.90%	96.20%
Diageo	crime_scene_kitchen	PG	95.80%	96.40%
Diageo	csi_miami	M	96.30%	96.40%
Diageo	csi_las_vegas	MA15+	95.90%	95.90%
Diageo	dark_matter	MA15+	95.50%	96.00%
Diageo	elementary	M	93.10%	92.20%
Diageo	extraordinary_humans	PG	95.30%	94.80%
Diageo	fbi_most_wanted	M	95.90%	95.90%
Diageo	first_dates_au	PG	94.60%	94.70%
Diageo	five_bedrooms	M	95.00%	94.90%
Diageo	gogglebox	M	94.60%	94.60%
Diageo	good_chef_bad_chef	G	95.10%	95.40%
Diageo	graveyard_carz	PG	94.90%	93.00%
Diageo	have_you_been_paying_attention	M	94.60%	94.80%
Diageo	hot_in_cleveland	PG	96.50%	96.40%
Diageo	hughesy_we_have_a_problem	M	95.40%	95.70%
Diageo	humans	MA15+	93.90%	94.10%

Diageo	humans	MA15+	93.90%	94.10%
Diageo	hunted	PG	94.20%	94.60%
Diageo	hunted_australia	PG	94.20%	94.60%
Diageo	i_shouldnt_be_alive	M	95.70%	95.00%
Diageo	just_forLaughs	M	95.60%	96.90%
Diageo	just_forLaughs_australia	M	95.50%	95.60%
Diageo	kinne_tonight	M	94.20%	95.00%
Diageo	las_finest	M	96.10%	96.50%
Diageo	lie_with_me	M	95.70%	95.10%
Diageo	london_irish	M	95.30%	95.00%
Diageo	lucas_key_ingredient	G	94.90%	92.40%
Diageo	making_it_australia	PG	94.80%	95.40%
Diageo	marleys_ghosts	M	95.50%	94.70%
Diageo	mirror_mirror	M	94.10%	94.10%
Diageo	mom	M	94.70%	94.80%
Diageo	my_life_is_murder	PG	95.90%	95.80%
Diageo	ncis	M	95.40%	95.20%
Diageo	neighbours	PG	96.00%	95.40%
Diageo	no_time_to_lose	PG	94.70%	96.30%
Diageo	one_born_every_minute_au	M	94.20%	93.60%
Diageo	out_of_the_blue	PG	97.00%	96.30%
Diageo	photonis_ultimate_forces_challenge	PG	95.60%	96.00%
Diageo	playing_for_keeps	M	93.40%	95.50%
Diageo	restoration_man	PG	94.90%	94.00%
Diageo	rush	M	96.10%	96.00%
Diageo	science_of_thrills	PG	95.60%	93.80%
Diageo	secrets_of_the_brain	PG	96.30%	95.90%
Diageo	south_park	MA15+	93.60%	92.70%
Diageo	survivor_nz	PG	96.00%	96.40%
Diageo	survivor_south_africa	PG	96.30%	97.10%
Diageo	survivor_us	PG	96.00%	95.90%
Diageo	the_late_late_show	M	95.00%	95.80%
Diageo	the_late_show	M	95.20%	95.20%
Diageo	the_amazing_race_australia	PG	94.90%	94.90%
Diageo	the_bay	MA15+	96.90%	96.90%
Diageo	the_bold_and_the_beautiful	PG	96.30%	96.10%
Diageo	the_bold_and_the_beautiful_fast_tracked	PG	95.10%	94.10%
Diageo	the_bridge_us	MA15+	95.90%	96.80%
Diageo	the_cheap_seats	M	94.50%	94.60%
Diageo	the_dog_house	PG	95.00%	95.20%
Diageo	the_dog_house_australia	PG	94.60%	94.50%
Diageo	the_graham_norton_show	M	94.80%	95.00%
Diageo	the_project	NC	95.40%	95.60%
Diageo	the_real_love_boat_australia	M	95.60%	95.50%
Diageo	the_secret_life_of_us	M	95.40%	96.80%
Diageo	this_is_us	M	95.30%	94.50%
Diageo	todd_sampsons_body_hack	MA15+	94.70%	94.70%
Diageo	tommy	M	92.70%	92.90%
Diageo	water_rats	M	96.40%	97.40%
Diageo	wildfire	PG	94.90%	96.30%
Diageo	would_i_lie_to_you_au	PG	94.70%	94.70%

15. The Company provided an additional response by letter emailed on 5 December 2022. It contained information specific to complaint 110/22 about marketing seen when watching The Amazing Race on 10Play. The principal points made by the Company were:

**Alcohol Advertising Pre-vetting Service Approval**

- The two Johnnie Walker advertisements were submitted to the pre-vetting service for approval on 1 October 2021, with approval received on 17 November 2021 (ABAC Approval 20441), and on 1 November 2022 with approval received 2 November 2022 (ABAC Approval 4110).

**Utilisation of Available Age Restriction Controls**

- Age restriction controls were utilised to exclude Minors from viewing these marketing communications. Our media agency, Foundation, purchased the media from Ten. This involves utilising 10Play’s first party data based on logged in information to target the 18+ demographic. In conjunction, targeting exclusions ‘away from kids’ content was applied. The agreement that is established means that targeting is controlled by Ten.

**Viewership data**

The registered logged in users on 10Play watching The Amazing Race was 98.8% 18+ (307k) (Adobe Analytics, 10Play AU IP 1<sup>st</sup> Party Data 2022-16/10/22).

- 94.9% of logged in users that watch The Amazing Race are 18+, according to OzTAM data over the period of January to 31 October 2022.
- Please see below audience breakdown for 10Play The Amazing Race:

<b>10 Play VPM TARA 2022</b>	<b>Demos %</b>
C00-04	1%
C05-12	2%
C13-17	2%
F18-24	4%

F25-39	19%
F40-54	22%
F55-64	12%
F65+	7%
M18-24	2%
M25-39	9%
M40-54	11%
M55-64	5%
M65+	4%

- 91% of FTA viewers that watch The Amazing Race are 18+ according to OzTAM 2022 data.
- Please see below the demographic breakdown comparing The Amazing Race on 10Play versus free to air linear broadcast according to *OzTAM data average in 2022*

The Amazing Race Australia	10 Play	Linear
0-17	5%	9%
18-64	84%	73%
65+	11%	18%

### **Content not primarily aimed at Minors**

- The Amazing Race is not primarily aimed at Minors, nor does it have content primarily aimed at minors. Foundation, in collaboration with 10Play, created

a 'whitelist' of programs where Diageo advertisements could be shown. This 'whitelist' is established based on the percentage of 10Play users aged 18+ and excluding any family or kids content. This list is reviewed every quarter based on genre type, share of total impressions/inventory and age of average viewership being at least 75% P18+. The Amazing Race met the requirements above and is on this 'whitelist'. We would be happy to provide you with any further information should you require.

## **The Panel's View**

16. This determination arises from complaints relating to television advertisements for Smirnoff Vodka and Johnnie Walker seen while two individual complainants viewed programs via the Digital TV app 10Play. The complainants don't raise a concern about the content of the advertising as such but rather they believe it was inappropriate that the ads were seen with programs and at a time of day that means the ads will be seen by minors.
17. A key element of the ABAC is that alcohol advertising should not have strong appeal to minors and that marketing should be directed towards adult audiences and to the extent possible away from minors. Therefore the question for this determination is whether the placement of the ads with programs accessed over 10Play is a breach of the ABAC obligations.

## **ABAC Placement Rules**

18. The complainants have argued that alcohol advertising was shown at times when children would be watching, with one complainant identifying The Amazing Race Australia as a program during which alcohol advertising was seen. This concern requires an assessment of the ABAC Placement Rules. The aim of the Rules is to limit the exposure of alcohol marketing to minors.
19. There are five Placement Rules, three of which are directly relevant in the current case namely:
  - if a media platform on which the ad appears has age restriction controls to exclude minors, then these controls must be used - Rule 2;
  - if age restrictions controls cannot exclude minors, then an ad can only be placed where the audience is reasonably expected to comprise at least 75% adults - Rule 3; and

- an ad must not be placed with programs or content primarily aimed at minors - Rule 4.
20. It should be noted that Placement Rule 1 requires that marketers meet the obligations contained in media industry codes going to the placement of alcohol advertising. There is a code - the Commercial Television Industry Code of Practice - that places time of day restrictions on when alcohol advertising can be broadcast on free to air TV. This code however does not apply to programs accessed on digital platforms such as Broadcast Video on Demand including 10Play. This means there is no time-of-day restriction on alcohol ads with programs seen via the 10Play app.
  21. Digital transmissions via 10Play do have an age restriction capacity and this means Placement Rule 2 applies. This arises because 10Play requires an account to be opened and the account holder to provide a date of birth. With this information, both the 10 Network and alcohol marketers can exclude account holders aged under 18 years old from being served alcohol ads. The alcohol company advised this facility was used.
  22. It is fair to say that the impact of Placement Rule 2 is more meaningful when social media is accessed via internet-connected devices such as phones and tablets. This is because many people including minors have a personal device and personal social media accounts on platforms such as Instagram. These platforms now have quite effective age restriction controls to exclude minors from seeing alcohol marketing. In contrast, 10Play has an age restriction capacity, but in practical terms the account will be held by an adult and the shows will be co-viewed by all people in the household including children.
  23. Placement Rules 3 and 4 go to the reasonably expected audience and the nature of the program with which the alcohol ad was placed. Rule 3 provides that an alcohol ad may only be placed where the audience is reasonably expected to comprise at least 75% adults. It is possible to assess the audience of TV programs through the ratings system and the Company has supplied a list of programs during which the advertisements were shown, along with the percentage of audience over 18 years old. In all cases the audience of the programs with which the ads were placed was over 75% adults.
  24. The first complainant was unable to specify the actual program with which the ad was seen. The second complainant identified the program as The Amazing Race Australia. The Company supplied ratings data for the Amazing Race which shows

that the audience over both linear free to air TV and accessed 'on demand' on 10Play meets the 75% adult benchmark.

25. Rule 4 provides an alcohol ad must not be placed with programs or content primarily aimed at minors. 'Primarily aimed' means the program must be more than being of interest to minors. It means that the program has minors as its primary focus. This can be assessed by considering factors such as:
  - the subject matter of the program and whether the subject matter has themes likely to predominately appeal to children or adolescents;
  - the use of familiar children's characters or whether children and adolescents are principal characters within the program;
  - the storyline and whether the complexity of the plot suggests its target audience is adult;
  - the use of language and the presence of adult themes such as violence and the portrayal of sexuality; and
  - the actual audience of the program.
26. As mentioned, the actual program the first complainant saw the ad with was not identified. This means it is not possible for the Panel to assess Rule 4. The second complainant saw the ad with the Amazing Race.
27. The Amazing Race Australia is an Australian offshoot of a long running American adventure reality game show. The format involves multiple teams of two people as they navigate through various countries to complete physical and mental challenges. The final team to complete the series of challenges in a given episode is eliminated until one team remains at the end of the series.
28. The program is PG rated and currently airs on free-to-air TV at 7:30pm. The show is hosted by Beau Ryan (a former professional rugby league footballer) and involves travels through Turkey, Greece, Belize, Morocco, Mexico and Colombia. The contestants are not celebrities nor children.
29. While the show has appeal across age groups, it cannot be fairly said to be primarily aimed at under 18-year-olds. It does not have a particular attractiveness for a minor beyond the general attractiveness it has for an adult.

## Conclusion

30. It is acknowledged that the complainants have raised a genuine concern regarding alcohol ads being placed with programs seen at a time of day when the same ads would not be screened on free to air television. In fact, it is reasonable to surmise that the complainants expected the free to air broadcast time restrictions to apply equally to programs accessed via 10Play.
31. Broadcast Video on Demand enables account holders to watch programs at any time at the choice of the viewer. This means programs with content and themes that would not be considered suitable for children, and which would not be broadcast until later in the evening on free to air TV can be seen at prime children's viewing periods at the discretion of the account holder. It also means that there are no time-of-day restrictions for alcohol ads inserted with programs accessed through 10Play and similar platforms.
32. The code applying to free to air TV is apparently going to be reviewed in the near future. It would be timely to examine the interplay between free to air expectations and those applying to Broadcast Video on Demand. However, as things stand the Panel's role is to apply the ABAC requirements and it is clear that the Company has acted in accordance with its obligations. Further it should be noted the Company applies internal controls including the use of the periodically reviewed 'whitelist' of suitable programs, to ensure compliance with the Code.
33. The Panel finds that there has been no breach of the ABAC requirements and accordingly, the complaints are dismissed.