



## ABAC Adjudication Panel Determination No 56/23

**Product:** Smirnoff  
**Company:** Diageo  
**Media:** Digital - Snapchat  
**Date of decision:** 9 May 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 31 March 2023 and concerns marketing for Smirnoff Seltzer Vodka Cocktails (“the Product”) by Diageo (“the Company”) on Snapchat.
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 31 March 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 obtained for the content of the marketing (Approval number 3737).

## The Marketing Communication

- The complaint relates to marketing for Smirnoff Seltzer Vodka Cocktails on Snapchat.



## The Complaint

- The complainant objects to the marketing as follows:
  - An ad for Smirnoff seltzer vodka spicy margarita and watermelon margarita appeared on a Snapchat account of a 15-year girl.

- *The Snapchat app was signed into her own account, where her age was registered as 15. Therefore, Smirnoff should have made use of available age restriction controls to exclude minors.*
- *The ABAC scheme has a responsibility to protect minors from seeing advertisements related to alcohol and therefore the ad is in breach of ABAC responsibility towards minors through a breach placement laws [3 (b)(iv)].*
- *This is also in breach of Snap Advertising policies - which states "Ads for alcohol products must be age targeted to at least 18 +"*

## **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:

- 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).
- A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.
- 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).
- A Marketing Communication must not be placed with programs or content primarily aimed at Minors.
- 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 Response

14. The Company responded to the complaint by letter emailed on 19 April 2023. The principal comments made by the Company were:

- 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**

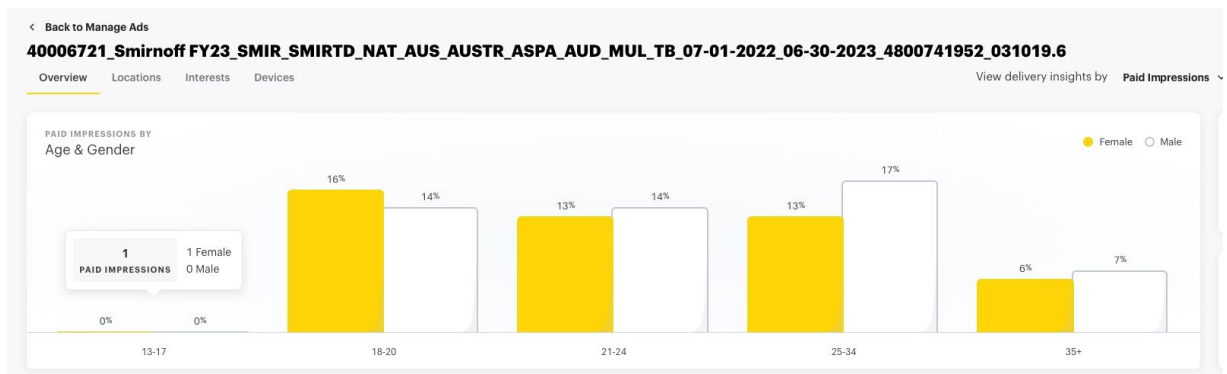
- The DMC supports our approach to innovative marketing, while at the same time ensuring we stay true to our core values and pro-actively market responsibly to adults. At the heart of the DMC, is our commitment to ensuring all our activities depict and encourage only responsible moderate drinking, and 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 Seltzer advertisements 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.
- Please find below our responses to the specific questions posed by ABAC to Diageo for response.

### **Response to complaint**

- Smirnoff advertises over Snapchat. There were two ads in the market for Smirnoff Seltzers over the time period in which this Complaint was received by ABAC.

- The two advertisements received Alcohol Advertising Pre-vetting Service Final Approval on 30 September 2022, with approval number 3737.
- Available age targeting and age restrictions controls were utilised to exclude minors from viewing the Smirnoff Seltzer ads on Snapchat. However, there was a brief period of less than one hour when only age targeting was in place.
- Age targeting for the ads was set at 18 – 44-year-olds when the ads went live. The check box setting called ‘Age restrictions required’, which applies more accurate age targeting by restricting those who get served ads, was not manually checked by Foundation, Diageo’s agency managing the media buy for this campaign. Snapchat’s automatic tools quickly updated this setting, but a small number of impressions were delivered in the brief period prior to that update taking effect.
- Foundation is currently working with Snapchat to investigate if the platform can automatically restrict Diageo ads without any lag time to ensure zero impressions before the automatic tool updates settings. This would avoid any potential issues relating to manual human error in the future.
- Snapchat has age restrictions controls available that are capable of excluding Minors from the audience. In addition, 79%+ of the audience on the Snapchat platform in Australia is registered as adults (18+).
- The marketing communications were not placed within programs or content primarily aimed at minors. The formats used were Snapchat ads and these are not placed around specific content or programming. Rather they are served in a story-like feed to the audience based on the demographic and interest targeting applied.
- As stated previously, when the advertisements initially went live, ‘Age restrictions required’ was left unchecked by Foundation, Diageo’s agency managing the media buy for this campaign. Between this time and when Snapchat’s automatic tools updated the setting, a small number of impressions were delivered. In theory, the ads could have been served to registered users under the age of 18 during this period as the age targeting controls are less accurate compared to age restrictions. However, upon investigation of this complaint, both Foundation and Snapchat’s ad management tools identified that there was one paid impression of 8.7 million that was delivered during the campaign period to a user registered as under the age of 18.

- As this seemed highly unusual, this was investigated further. This investigation revealed a technical issue arising from a change in one user's age between the time when age targeting of 18 – 44 year olds was applied and when the total campaign impressions were reported. What this means is that the ad was served to a user registered as 18+, however, when the campaign impressions were reported, that same registered user has changed their profile to under the age of 18.
- Therefore, whilst there was a small window when this may have occurred, what the data reveals is that age targeting was effective and the issue of a under 18 user seeing the ad was the result of the user changing the age associated with their profile.
- Below illustrates the impressions for the campaign across age demographics.



- We believe all due diligence on the part of Diageo has been taken to ensure adherence to the Code during the placement of these advertisements. Age targeting was effective in this instance; however, the investigation of this complaint did reveal a manual human error that could have in theory resulted in registered users under the age of 18 potentially seeing an alcohol ad. As a result, Foundation is seeking to further enhance controls to exclude under 18s from being served marketing communications by exploring whether the 'Age restriction controls' check box can be automatically selected for Diageo media-buys on the platform.

## The Panel's View

### Introduction

15. This determination deals with marketing by the Company using the social media platform Snapchat. While Snapchat was first released in 2012 and the ABAC Placement Rules came into operation in late 2017, this is the first occasion a determination has considered Snapchat.

16. Snapchat is an app that enables the sharing between users of stories through texts, photos and videos. An initial feature of the platform was that messages were only visible for a short time. Over time the options on the app have expanded and now include the option of sharing video or photograph stories for longer periods. The app is also known for the use of filters to customise messages, photos and videos.
17. Amongst the social media platforms, Snapchat is currently the sixth most used by Australians with reportedly 4.5 million active users each month. This compares to 18.5 million monthly users of Facebook, 17.5 million monthly visitors to YouTube and 10 million monthly Instagram users. Other public data suggests that around 34% of the Australian population aged 13 and over are within the reach of advertising over Snapchat.
18. The platform has been monetised through paid advertising. Marketers have a range of options to serve ads to Snapchat users including single image or video ads, story ads, filters and commercials. The differences between these types of ads go to their length and complexity as well as to whether a Snapchat user can immediately skip the ad or it must be viewed for a few seconds before being able to be skipped.
19. The terms of service issued by Snapchat advise the app is available for persons aged 13 and upwards. Users are required to give their date of birth when joining the platform. Beyond this, the platform uses a range of analytic tools to interrogate data about its users that enables the targeting of marketing towards particular demographic groups. This includes data that indicates the age of a Snapchat user irrespective of the age entered when subscribing to the app.
20. From 27 February 2023 until 31 March the Company was advertising Spicy Margarita and Watermelon Seltzer Vodka on Snapchat. It seems it was using the option of a video ad which was served to Snapchat users within the Company's targeted audience. This audience was stated to be adults aged 18 to 44.
21. The complaint states that on 21 March, a 15-year-old girl was using Snapchat when served with an ad for the Smirnoff Seltzer Vodka products. Further, the complaint states that the minor was using her own Snapchat account and this account had her age correctly entered as 15. The complainant goes on to point out that this is a breach of both the ABAC Placement Rules and the Snapchat terms of service regarding alcohol products.

### **The ABAC Placement Rules**

22. The complainant's concern is not about the content of the Company's advertisement but that it was served to the Snapchat account of a 15-year-old minor. This brings into play the ABAC Placement Rules. The Rules have the policy aim that to the extent possible alcohol advertising should be directed towards adult audiences and away from minors.



23. There are five Placement Rules, but the circumstances of the complaint mean that Rule 2 is the operative requirement. This rule provides that an alcohol marketer must utilise Available Age Restriction Controls to exclude minors from viewing its marketing communications.
24. 'Available Age Restriction Controls' is defined by the Code to mean age restriction, targeting or affirmation technologies available to restrict a marketing communication to adults, but this does not require a third party platform, website or account that is not primarily related to alcohol to be age restricted in its entirety before it can be used to place a marketing communication.
25. Snapchat does have age restriction controls. A marketer is able to select 'regulated content' for the advertising of products with legal restrictions as to their use such as alcohol. The effect of this is that age targeting automatically goes to users aged 18 and over. Further a marketer can manually select an age target range eg 25 to 45 year olds and this means ads will only be served to users in this age range.
26. The Company advised that through an error its agent did not initially select 'regulated content' when activating the campaign but did apply the age targeting facility and limited its ads to Snapchat users aged 18 to 44. The fact that the alcohol ads should have been 'regulated content' was automatically identified by Snapchat's system and the regulated content setting was applied. There was a short time frame involved in this automatic measure taking effect resulting in some 104 impressions of the ad being served before the regulated content setting applied. To give some context, this was 104 impressions of the ad of the 400,000 impressions served on the first day of the campaign.
27. It is at this point that the position outlined in the complaint and the position as advised by the Company and elaborated by Snapchat becomes very difficult to reconcile. The complainant contended that a 15 year old girl received the ad and that this minor had an account that had correctly recorded her date of birth.
28. In contrast the advice from the Company and confirmed and expanded upon through direct questioning of Snapchat by the ABAC Chief Executive Officer was that:
  - some 8.7 million impressions of the ad were served to Snapchat users during the period of the campaign including the 400,000 impressions on the first day of the campaign;
  - as mentioned, only 104 of the 8.7 million impressions were served before the 'regulated content' setting came into operation and all 8.7 million when age targeting had been selected for users aged 18 to 44;

- the analytics ran by Snapchat on who received the ad identified that not a single Snapchat user with a reported age of under 18 received the ad;
  - however after the receipt of the ad a single Snapchat user had altered their personal details on the app to reduce their stated age to under 18.
29. In order to further investigate this curious situation, the complainant was contacted and requested if the minor and their parents/guardians would be prepared to disclose their details so Snapchat could undertake further review. The complainant responded by advising that they had contacted the minor's family but the family wished to remain anonymous.

### **Conclusion**

30. The age restriction controls available on Snapchat appear to be robust and the data collection and analytics capability of the platform highly developed. The platform can identify each of its users that receive paid advertising and produce all manner of reports that enable marketers to assess and customise their marketing campaigns over Snapchat. While this insight into its users might raise public interest questions such as individual privacy, in the current case it has allowed a detailed examination of the complaint.
31. The following points can be accepted as occurring:
- the Company ran a campaign over Snapchat for its alcoholic seltzers;
  - the Company through its agent applied age targeting to direct the ads to the age group 18 to 44 but failed initially to select the regulated content setting;
  - Snapchat's controls however automatically applied the regulated content setting;
  - some 104 of 8.7 million impressions of the ad were served to users before the regulated content setting applied but these ads were still served to users aged 18 and over;
  - Snapchat data shows no user with personal details giving their age as under 18 received the ad however 1 user subsequent to receiving the ad altered their personal details to state they are under 18;
  - while Snapchat can identify the user who changed their personal details, it will not disclose this information consistent with its privacy obligations; and

- the complainant was asked to assist further by seeking permission to disclose the name of the minor receiving the ad, but advised permission would not be given.
32. The Placement Rule obligation on the Company is to apply the highest level of available age restriction controls. When marketing over Snapchat, 'regulated content' is the highest level of available age restriction controls. That said, advice from Snapchat is that there appears to be little to no practical difference between 'regulated content' and setting age targeting to at least 18 and over. Both settings will exclude minors receiving alcohol ads.
  33. The Snapchat data as to who received the Company's ad is in direct contradiction to the scenario outlined in the complaint. On the balance of probabilities, it seems likely the complainant has been mistaken or misled in believing the ad was received by a 15 year old Snapchat user or at least a user whose profile identified themselves as 15 years old as at the time the ad was served.
  34. Drawing all this together, the Panel believes that there has been no breach of the ABAC Placement Rule 2. Age controls were applied which excluded minors from receiving the marketing as required by the rule.
  35. The complaint is dismissed.