



## **ABAC Adjudication Panel Final Determination Nos 119, 120, 121, 122, 125, 126, 127, 130, 132 & 136/23**

**Product:** Hard Solo  
**Company:** Carlton & United Breweries  
**Media:** Packaging and Digital – TikTok  
**Date of decision:** 8 November 2023  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Professor Richard Mattick  
Ms Jeanne Strachan

### **Introduction**

1. This final determination by the ABAC Adjudication Panel (“the Panel”) arises from ten complaints in relation to the packaging of Hard Solo (“the product”) by Carlton & United Breweries (“the Company”), as well as a TikTok social media post in relation to the product. The complaints were received on 24 and 25 July, and 2, 3, 4, 9, 11 and 21 August 2023.
2. On 3 October 2023, the Panel made a Provisional Determination finding that the packaging of Hard Solo was in breach of Part 3 (b)(i) of the ABAC by having a strong or evident appeal to minors. As permitted under the rules and procedures applying to the ABAC Scheme, the Company sought a re-hearing of the Provisional Determination and provided further submissions. The Panel has made a fresh and final determination taking into account all of the materials including the Company’s additional submissions. Given the length of the Provisional Determination and the Company’s initial and then further submissions, this final determination has been structured to capture the key issues, arguments and Panel findings. The full materials are annexed to this decision as follows:
  - the Company’s initial submissions dated 11 and 22 August respectively- Annexure A
  - the Provisional Determination (Panel’s View)- Annexure B
  - the Company’s further submissions in seeking a re-hearing from Gilbert + Tobin solicitors dated 23 October- Annexure C.

## The Marketing

- The complaints relate to the branding and packaging of the product, as well as a TikTok post made about the product.

### 375ml Can Label



### TikTok Post

The TikTok post was a product review by Russ.Eats. It can be viewed at the following link:

<https://www.tiktok.com/@russ.eats/video/7258454250693381394>

## Complaints

- The Hard Solo branding and packaging has attracted multiple complaints as detailed in the table below.

Complaint #	Concern
119/23	<ul style="list-style-type: none"> <li>The new drink named Hard Solo is all over social media telling people to try it as it tastes just like the original Solo drink and you wouldn't know it has alcohol in it. This shouldn't be allowed - that a soft drink has the same name as a product with alcohol in it.</li> <li>I'm extremely concerned about the new alcoholic product Hard Solo by CUB. My son asked if I could purchase this drink as he loves Solo not knowing that it was</li> </ul>

Complaint #	Concern
	<p><i>an alcoholic beverage. I'm extremely concerned that a child or someone underage could buy this product as its name is Solo and I believe that this is extremely dangerous.</i></p>
120/23	<ul style="list-style-type: none"> <li>● <i>I was shopping online and saw this new product. My kids drink Solo and now you want them to drink a booze filled version? What's next? 'Hard' Mount Franklin? This should be stopped.</i></li> <li>● <i>I googled Hard Solo and found this on TikTok, I don't want my kids seeing this online. <a href="https://www.tiktok.com/@russ.eats/video/7258454250693381394">https://www.tiktok.com/@russ.eats/video/7258454250693381394</a></i></li> </ul>
121/23	<ul style="list-style-type: none"> <li>● <i>I saw this Daily Mail article for "Hard Solo", and while I cannot find it in my local bottle shop (I went to three who either said they don't stock it or have never heard of it). When I googled "Hard Solo" to find out where it was stocked, the more information and images I found on "Extreme Lemon Solo". They look very familiar, basically the same can, so I was concerned that this is going to be quite confusing for people who may not be aware of one having alcohol in it, especially underage drinkers or children.</i></li> <li>● <i>Shouldn't the cans be made to be less similar - at least a different colour or not having one word different that doesn't allude to it containing booze?</i></li> </ul>
122/23	<ul style="list-style-type: none"> <li>● <i>I have teenage children and think it is completely inappropriate that a popular soft drink, frequently drunk by children and teenagers, will now be available in an alcoholic version. This is very dangerous and will exacerbate the current teen drinking problem we have in Australia.</i></li> </ul>
125/23	<ul style="list-style-type: none"> <li>● <i>Marketed to kids. My kids drink Solo - I had a sample in my fridge and my 7 year old son thought it was normal solo but in a black can.</i></li> </ul>
126/23	<ul style="list-style-type: none"> <li>● <i>I believe this product and its packaging breaches ABAC code 3b(i) that a marketing communication must not have strong or evident appeal to minors. Solo is a well-known soft drink brand in Australia, which is popular with children and teenagers, and has highly recognisable branding, packaging, and advertising. The Hard Solo product is an extension of the soft drink brand, using the same colours, icon and font on the packaging and the same can shape as the Solo soft drink. The appeal of Hard Solo to minors is evident given the established appeal of Solo to minors.</i></li> </ul>
127/23	<ul style="list-style-type: none"> <li>● <i>Hard Solo looks like a drink, Solo, that is consumed by minors. It's hard to think why they would think that this is OK in 2023.</i></li> <li>● <i>Also sounds a bit like Han Solo, which is a Star Wars character.</i></li> </ul>
130/23	<ul style="list-style-type: none"> <li>● <i>I do not think it is ok to have an alcohol brand that is a soft drink. This is directly targeting children and I have no idea how this was ever allowed.</i></li> </ul>
132/23	<ul style="list-style-type: none"> <li>● <i>The packaging of Hard Solo would be difficult to distinguish for the average teen to inadvertently pick up the wrong can of beverage if both cans were sitting next</i></li> </ul>

Complaint #	Concern
	<i>to each other in the fridge. The likeness appears to be a deliberate ploy on behalf of the manufacturer to target young people.</i>
136/23	<ul style="list-style-type: none"> <li>• <i>This is an alcoholic beverage leveraging the branding of a soft drink that is targeted at children. It's a clear breach of the code.</i></li> </ul>

## The ABAC Code

5. On 1 August 2023 a revised version of the ABAC came into operation. The commencement of the revised Code was accompanied with transitional arrangements that provide for the previous Code standards to apply to marketing communications in the market prior to 31 July 2023. As the product packaging came into the market in July 2023, the provisions of the previous Code apply.
6. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
  - (b)(i) have Strong or Evident Appeal to Minors.
7. Part 6 of the ABAC Code provides that:

### **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 confectionery or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

**Marketing Communications** means marketing communications in Australia generated by or within the reasonable control of a Marketer (apart from the exceptions listed in Section 2(b)), including but not limited to brand advertising (including trade advertising), competitions, digital communications (including in mobile and social media), product names and packaging, advertorials, alcohol brand extensions to non-alcohol beverage products, point of sale materials, retailer advertising and Marketing Collateral.



## The Panel's View

### Background to Solo, Hard Solo and this Determination

8. In 1968 a new lemon squash flavoured carbonated soft drink branded as 'Solo' was released onto the Australian beverage market. By 1973 the brand moved into the Cadbury-Schweppes stable and the core brand colour scheme and packaging design features which have stayed with the brand for 50 years had been established. While the detailed design used on Solo packaging has been refreshed from time to time, the yellow background, black lettering and distinctive font used for the Solo name have remained constant.
9. In the 1970's and 1980's the Solo name and brand identity entered popular culture via the long running 'Solo Man' TV advertisements. The Solo Man was portrayed in a variety of extreme physical pursuits such as kayaking through rapids, horse riding and windsurfing with each ad ending with the hero satisfying his thirst by downing a Solo in a highly exaggerated fashion.
10. Over the decades the Solo Man has remained a go to persona for the brand, although the hypermasculinity of the character has been used in different ways. In 2012 a parody online video series 'Sweaty Adventure Man' poked fun at the earlier TV ads. And in 2018 instead of wrestling crocodiles, a reboot of the Solo Man saw him as a dad undertaking less life threatening but still daunting tasks of making costumes for his children and assembling flat pack furniture.
11. Accompanying the ebbs and flows of Solo's marketing strategy has been the introduction of new beverages under the Solo brand and livery. Solo Extreme Lemon soft drink had a short life from 2013 to 2019. In contrast, the sugar free Solo Zero is a permanent addition and responds to market demand for low/no calorie soft drinks.
12. As a successful brand of over 50 years standing in the Australian market, Solo has become a fixture in the soft drink aisles of supermarkets, the fridges of convenience stores and appears alongside Coke, Sprite and other well known soft drinks on menus in cafes and restaurants. According to an article in the trade publication Drinks Digest, some 60 million litres of Solo are consumed each year and the product is in 1.7 million Australian households.
13. By 2009 the Australian rights to produce and market Solo was in the hands of the global beverages company Asahi. Asahi has within its range some of the world's best known alcoholic and non alcoholic beverage brands. In 2020 Asahi acquired the iconic Australian alcohol producer Carlton United Breweries. In Australia, companies within the Asahi group are responsible for soft drinks such as Solo, Pepsi, Schweppes and Sunkist. The alcohol beverage range includes the CUB staples of Carlton Draught and VB as well as Peroni, Vodka Cruisers and Woodstock Bourbon.

14. In late July 2023 the Company launched a new alcohol product- Hard Solo. Hard Solo is an alcoholic lemon beverage containing 4.5% alc/vol that shares the Solo brand name and some brand packaging features. The Company explained that it sought to serve the adult consumers of Solo with a product within the increasingly popular lemon flavoured RTD (Ready To Drink) alcohol market. Hard Solo, it is contended, leverages the brand equity in Solo but in a manner that clearly identifies the alcoholic nature of the product and does not appeal to minors.
15. It is the branding and packaging of this new product that has drawn 10 complaints to the ABAC Scheme with each complainant arguing that Hard Solo will have strong appeal to minors. Beyond the complaints, the product has been the subject of media coverage and public debate also questioning whether an alcoholic version of a long established soft drink should be permitted and if so under what conditions.
16. For instance, the trade publication Food & Drink Business on 21 August 2023 carried a story on a surveyed reaction to the Hard Solo launch from 1511 members of a 'consumer panel' maintained by the market research firm, Lewers. While the representative basis and methodology used for the results might be questioned, it is interesting in terms of the polarised responses with:
  - 45% of respondents believing the product promotes drinking alcohol to minors;
  - 38% of respondents believing the product confuses alcoholic and non-alcoholic drinks;
  - 30% of respondents believing the product to be a good extension of the Solo brand; and
  - 29% of respondents believing the product is a great idea.
17. In response firstly to the complaints, and then the Panel's Provisional Determination the Company has made very detailed submissions as to why it believes the branding and packaging of Hard Solo is consistent with ABAC standards. It is pointed out that the packaging was considered and approved by the ABAC Pre-vetting service. It is argued that the Panel in its Provisional Determination has not applied the ABAC Code consistently and its conclusion of a breach of the Part 3 (b)(i) standard was not made on a reasoned basis.
18. Each Panel determination is always decided on the merits of the marketing communication in question. The marketing item is assessed in light of the applicable Code standard(s), the concerns raised in public complaints and the response to the concerns from the responsible alcohol company. Invariably however some decisions have importance beyond the assessment of the specific marketing communication in question because the decision requires consideration of how the Code is to be understood in circumstances not previously dealt with.

19. Hard Solo is the first occasion the Panel has considered the branding and packaging of an alcoholic version of a very well established national soft drink brand. For that reason, the extensive information presented by the Company and the public interest in the issue, this determination is long and detailed. To help with understanding the issues raised in the determination and how these issues sit within the quite complicated way alcohol marketing is regulated in Australia, the decision is structured as follows:

- The broader context - Alcoholic soft drinks and regulatory requirements
- The complainants' concerns and the Provisional Determination
- The Company's submissions
- Pre-vetting approval
- Strong or Evident Appeal to Minors - General considerations
- Panel Precedents
- Guidance from the Precedents
- RTDs– significance of alcohol brand led marketing as opposed to soft drink brand led marketing
- Does the Hard Solo branding and packaging breach the ABAC Standard
- Conclusion

#### **The broader context- Alcoholic soft drinks and regulatory requirements**

20. To some extent the number of complaints and the wider media coverage of the release of the Hard Solo product is (on a smaller scale) reminiscent of the reaction to the introduction of so called alcopops some 30 years ago. While pre-mixed alcohol products have a longer history, alcopops or RTD products gained greater market profile in Australia from the early 1990's. The products come in different combinations but typically include:

- wine coolers which combine wine and fruit juice or other flavouring;
- distilled alcohol ready to drink mixed products using sweet beverages such as fruit juice or carbonated soda; and
- more recently, alcoholic seltzers combining alcohol such as vodka with seltzer water and flavouring.

21. In the 1990's the products gained a significant share of alcohol sales and with this, concerns were expressed as to the take up of the products by young adults and

underage drinkers as well as their use in irresponsible and harmful practices such as binge drinking. A commonly expressed concern was that the products, because of their taste and relatively low price, were appealing and accessible to minors.

22. These concerns and data on the consumption of alcopops was an important catalyst for regulatory reform. Licensing laws were strengthened and tax changes made to effectively increase the price of alcopops. In some respects, the creation of the ABAC Scheme itself in 1998 was part of the reforms to improve regulatory and policy settings.
23. Government regulation of alcohol is broadly based on the premise that alcohol is a lawful product and able to be consumed by adults, but it is equally recognised that alcohol misuse is the cause of considerable individual and community harm. Policy responses are centred on harm minimisation with teenagers and young adults identified as a 'priority population group' that can experience disproportionate levels of alcohol related harm.
24. As pointed out by the Company, overall trends show that alcohol consumption amongst minors has been decreasing, however when minors do drink, RTD products are a common choice. For instance the 2017 Australian Secondary Students' Alcohol and Drug Survey showed that of the secondary school students consuming alcohol in the preceding 12 month period, some 37% used RTDs with beer the second most frequent choice at 22%.
25. Hence Hard Solo comes into a regulatory environment shaped to an important extent by the earlier response to RTDs particularly in relation to the potential appeal of the product to minors. And it is here that it is critical to understand the regulatory responsibilities sourced and exercised directly by government and requirements contained in industry lead initiatives such as the ABAC Scheme.
26. Government regulation of alcohol goes to the physical alcohol products themselves, the responsible service of alcohol and the promotion and marketing of alcohol products. National requirements go directly to the packaging of alcohol products such as mandated information to be included on product packaging e.g. pregnancy warning and alc/vol percentage. All State/Territory liquor licensing regimes have detailed provisions about the responsible service of alcohol. Equally all States/Territories have guidelines on alcohol marketing and promotion. Several States have legislated power to prohibit or ban alcohol products on public policy grounds.
27. For instance the NSW Liquor Act provides that regulations can be made to declare a specified liquor product to be 'an undesirable liquor product'. A product given this designation is not permitted to be sold in NSW. Such a regulation may be recommended by the Minister amongst other things if:
  - the name of the liquor product, or its design or packaging is likely to be attractive to minors; or

- the liquor product is likely, for any reason, to be confused with soft drinks or confectionery; or
  - the liquor product is, for any reason, likely to have a special appeal to minors.
28. Beyond the regulation making power, the Department Secretary is also given a power to issue a notice to a liquor licensee prohibiting the sale or supply of a liquor product or carrying on an activity that promotes the sale of liquor if the Secretary is of the opinion:
- the name of the liquor product, or its design or packaging is likely to be attractive to minors;
  - the liquor product is likely, for any reason, to be confused with soft drinks or confectionery;
  - the liquor product is, for any reason, likely to have a special appeal to minors; or
  - the promotion is likely to have special appeal to minors because of the use of designs, names, motifs or characters in the promotion that are or are likely to be attractive to minors or for any other reason.
29. In exercising the powers in the Liquor Act, the Minister or Secretary are obliged to consult with an impacted manufacturer or permit submissions from an affected liquor licensee. While not used often, alcohol products have been removed from the market or promotional activities ceased in NSW and other jurisdictions through the use of such powers.
30. In contrast the ABAC Scheme is not directed to physical alcohol products or the responsible service of alcohol. Rather the Scheme is centred solely on the creation of and adherence to standards for alcohol marketing consistent with community expectations. As an industry lead initiative, the ABAC Scheme essentially relies on the cooperation of alcohol industry participants to meet the marketing standards, and voluntarily remove marketing communications (including brand names and product packaging) found by the Panel to be in breach of the marketing standards.
31. This means that the ABAC Scheme does not go to physical characteristics of an alcohol beverage such as colour, viscosity, alcohol content or taste. Nor do the ABAC standards go to the price of a product. And the Panel has no remit to make a moral or policy judgement about whether a product or marketing campaign is desirable or not. The Panel's role is to assess if the branding and marketing materials of an alcohol product are consistent with the standards contained in the ABAC Code.



32. Of course issues such as the taste of a product and its price are important as to the choices consumers make. Equally there is legitimate debate to be had about the policy settings around different styles of alcohol products. Within the shared regulatory space of alcohol and the marketing of alcohol, these questions rest directly with government and not the ABAC Scheme as such.
33. Although stated in slightly different ways, it is a common requirement in State/Territory alcohol promotional guidelines (other than the Northern Territory) that alcohol marketing must not have 'special' or 'strong' appeal to minors. Some jurisdictions specifically state that advertising or packaging that creates 'confusion with a soft drink' will offend the strong appeal to minors prohibition.
34. The ABAC also includes 'confusion with confectionery or soft drinks' within the Code definition of 'strong or evident appeal to minors'. It should be noted that the ABAC standard does not create a freestanding requirement that the branding and packaging unambiguously identify a product as being an alcohol beverage. Rather a failure to do so and the potential for product packaging to be confused with a soft drink could contribute to the packaging having a strong appeal to minors.
35. Equally however, the fact that product packaging might clearly identify that a beverage is alcoholic does not mean there is no potential for the branding and packaging to have strong appeal to minors. In fact, in most instances the packaging of an alcohol beverage does clearly establish the alcoholic nature of the product, but the packaging may nonetheless have a strong appeal to minors due to branding, design aspects and messaging.
36. Using imagery and designs on product packaging that reference or allude to soft drinks or confectionery can be a factor in why the packaging can be reasonably regarded as having strong or evident appeal to minors. Equally the packaging may have other elements that resonate strongly with youth culture or adopt branding traits that mean the impact of the packaging appeals strongly or evidently to minors.
37. Drawing this together:
  - overall policy and regulatory settings for alcohol seek to reduce the harm that alcohol misuse causes with limiting the potential harm of alcohol to minors being a key policy objective;
  - policy settings available and employed by governments include pricing (taxation) options, regulation that aims to have alcohol served responsibly, controls over physical alcohol products and provisions relating to the promotion of alcohol products that in some jurisdictions extend to prohibiting or banning products;

- alcohol promotion and marketing are a shared regulatory space between direct government regimes and industry initiatives such as the ABAC Scheme;
- both government regimes and the ABAC standards require that alcohol marketing or promotion must not have strong appeal to minors;
- some government regimes and the ABAC standards specifically reference 'confusion with soft drinks' as a potential basis as to why alcohol marketing material including product packaging may have strong appeal to minors;
- clearly establishing a product as an alcoholic beverage and not a soft drink does not mean the packaging can not have strong or evident appeal to minors; and
- while 'confusion with a soft drink' can be a factor in why packaging might have strong appeal to minors, it is entirely possible for packaging that is not confused as a soft drink still to have features which strongly appeal to minors.

### **The Complainants' concerns and the Provisional Determination**

38. The branding and packaging of Hard Solo has drawn 10 separate complaints and while each complaint is focussed on the issue of the appeal of the product to minors, there are several different points raised. Collectively the complainant's arguments raised the following points:

- that an alcoholic version of a popular soft drink should not be permitted;
- that the packaging design is basically the same as 'Extreme Solo' and will be confused with this soft drink;
- minors drinking Solo will want to try Hard Solo;
- minors could readily think Hard Solo is a soft drink;
- Solo is a well-known soft drink popular with minors;
- the Hard Solo packaging design uses the same colours, icon and font and can shape as the Solo soft drink and has evident appeal to minors as a result;
- the name Hard Solo brings to mind the Stars Wars character Hans Solo and this will appeal to minors;
- Hard Solo's branding and packaging is difficult to distinguish from the Solo soft drink and could be inadvertently selected by a minor;

- Hard Solo is a deliberate ploy to target minors to drink alcohol; and
  - a TikTok video reviewing the product was inappropriate for children.
39. In its Provisional Determination, the Panel reached a provisional conclusion that the packaging of Hard Solo did breach Part 3 (b)(i). The complaint regarding the TikTok video was dismissed as the video was not within the reasonable control of the Company.
40. The Panel's View component of the Provisional Determination is included at Annexure B. By way of summary, the Panel provisionally concluded that the Hard Solo branding and packaging had strong or evident appeal to minors taking into account:
- the core branding elements for the packaging of Hard Solo are derived from the soft drink Solo;
  - Solo soft drink has over a 50 year history within the Australian beverage market and as a result its branding is widely recognised and Solo is a staple in supermarkets, convenience stores and on menus in food outlets;
  - the branding and packaging of Hard Solo received ABAC pre-vetting approval however it needed to be understood:
    - the complaints process and pre-vetting are separate and pre-vetting approval does not bind the Panel;
    - while consistency of interpretation between pre-vetting and Panel decision makers is a key ABAC Scheme goal, on occasions different conclusions might be reached if a decision is finely balanced or a novel issue is being considered;
    - Hard Solo is a novel case in that the extension of a 'beloved' soft drink brand to an alcoholic version of the soft drink has not been previously considered by the Panel;
  - the Panel did not accept the Company's argument that several previous determinations raised issues akin to Hard Solo and supported the conclusion that the packaging is consistent with the Part 3 (b)(i) standard. Rather the Panel believed no previous determinations are precisely on point and further other Panel precedents suggest the packaging breaches the applicable standard;
  - the branding and packaging of Hard Solo adopts core brand elements of Solo soft drink namely the Solo name, font and yellow name colour, lemon tree image and 'lemon' flavour descriptor. Acknowledging the Solo branding,

the Company had taken clear measures to differentiate Hard Solo packaging from Solo soft drink packaging;

- it was accepted that the packaging establishes the product as alcoholic and a reasonable person would not mistakenly believe the product was Solo soft drink or likely confuse Hard Solo as a soft drink;
- however the test is not that the product would be mistakenly consumed by a minor due to confusion with a soft drink, but that a minor would want to drink the product because its packaging was strongly or evidently appealing;
- Company data indicates Solo soft drink is consumed 85% by adults. Soft drink consumption more generally indicates minors consume soft drink regularly; and
- usually product packaging is assessed simply on its design features/colour etc but in some cases branding references are so well established in community understanding that it would be artificial to assess the probable understanding of the packaging without regard to well understood brand attributes. Hard Solo must be assessed with regard to branding and market position of Solo soft drink.

41. The Provisional Determination drew all of these considerations together and concluded the packaging did breach the Part 3 (b)(i) standard noting:

- Solo is a soft drink of long standing that enjoys very high recognition across the community;
- the recognition of the Solo brand has been built both by the marketing activities of the various owners of the brand over many decades and the exposure of the product as a staple of the soft drink products stocked by supermarkets, convenience stores and other retailers;
- as a beverage, carbonated soft drinks are consumed across the community including significantly by minors;
- even accepting the consumer data supplied by the Company that Solo consumers are predominantly adults as opposed to minors, Solo is consumed by minors and more generally the brand is well known by minors;
- the marketing posture of the Solo brand was initially strongly adult male focussed with this moderating in more recent times with consumer data supplied by the Company showing male to female consumers to be relatively even (52% male- 48% female and more females than males consuming Solo no sugar);

- some marketing of the brand has featured minors such as the 2009 A League TVC;
- while the packaging design establishes the product as being alcoholic, the design uses Solo brand elements that will be readily recognised by consumers including minors;
- the recognition and familiarity of the Solo branding on the packaging creates an illusion of a smooth transition from a non-alcoholic to alcoholic beverage for minors; and
- taken as a whole a reasonable person would probably understand the branding and packaging design would have an evident appeal to minors.

### **The Company's Submissions**

42. The Company contends that the Hard Solo branding and packaging design is consistent with the Part 3 (b)(i) standard and does not have strong or evident appeal to minors. The Company's initial response to the complaints is included in Annexure A, and its response to the Provisional Determination and request for a rehearing is included in full in Annexure C. It is submitted that the Provisional Determination is incorrect and that the Panel has not applied the Code consistently and its conclusion has not been made on a reasoned basis. The Company's views have been consolidated and can be summarised as follows:

- Solo is an adult soft drink:
  - a well-known and 'beloved' iconic lemon soft drink with over 50 years of history;
  - the positioning of Solo has always been toward a distinctly adult demographic evidenced by the 'Solo Man' ads of the 1970s and 1980s with the tagline 'a man's drink', and while more recent ads show a broader range of adult Australians engaged in adult pursuits, the Solo Man and the undertaking of extreme activities has remained associated with the brand and cemented the its position as a lemon soft drink targeted at adults;
  - consumer data commissioned by the Company shows that around 85% of Solo consumers are over 18 years old with most of these consumers in the 20-49 age brackets;
  - the commercial success of Solo is entirely based on its appeal to and consumption by adults;



- consumer sentiment testing by the Company about Hard Solo indicated only 4% unprompted concern that the product ‘could be mistakenly consumed by minors’; and
  - RTD’s have increasing popularity among adult consumers with lemon being the most popular flavour and this flavour appeals to older Millennials and Gen X consumers.
- The Company designed the packaging of Hard Solo to target this intended adult market seeking to ensure the alcoholic and non-alcoholic products are substantially different and easily differentiable, specifically to ensure that Hard Solo did not have ‘Strong or Evident Appeal to Minors’ by retaining the Solo name and font for ‘Hard Solo’ and the lemon tree device (with a reduced size) but then making substantial changes, including:
  - predominant use of primary black and secondary yellow colour palette;
  - reduction in graphic design elements including drop shadow and use of cleaner, sharper fonts;
  - very prominent use of clear alcohol signifiers ‘Hard’ and ‘Alcoholic’ in the name of the product and in large bold lettering throughout the packaging;
  - removal of the ‘thirst crusher’ tagline and reduction in size of the lemon device; and
  - inclusion of the 18+ logo, standard drinks and ABV percentage in large and bright font in a place of increased prominence on the front of the pack to clearly demonstrate that the product contains alcohol and is for adults only.
- The Panel in the Provisional Determination has considered emerging global examples of the sale of products containing alcohol and carbonated soft drinks, however the Panel’s role is to determine whether a particular advertisement or packaging complies with the Code, and accordingly the packaging and advertising of Hard Solo needs to be determined in its own right.
- The Provisional Determination accepted that the Hard Solo packaging:
  - clearly identifies the product as being an alcohol beverage;
  - the design is mature with limited features that would be regarded as strongly appealing to minors; and

- the Panel does not take issue with the liquor product itself (noting this is beyond the Panel's remit);

hence demonstrating that the Panel agrees that the Hard Solo packaging complies with the Code, however, the ultimate conclusion is out of step with these views and therefore incorrect.

- The packaging was assessed against Part 3 (b)(i) of the Code and given ABAC Pre-vetting approval.
- Decisions on the Hard Solo branding and packaging design were informed by relevant ABAC determinations (Determinations 11/22 and 24/23) on the good faith assumption that the Panel will interpret and apply the Code consistently. Notwithstanding that the specific circumstances of Hard Solo are not exactly the same as those two products, the principles outlined in these precedents must be applied consistently in order to assess whether or not the requirements of the Code have been met, in particular:
  - 11/22 – Dismissed as the ads established that the product was marketed as an alcoholic beverage, and Bundaberg is also a well-established non-alcohol brand;
  - 24/23 – Dismissed as the labelling does use the clear alcohol descriptor of vodka and other alcohol cues and would most likely not be confused with a soft drink, noting that the additional brand recognition of the Solo brand which was used by the Panel to differentiate this decision should not act as a bar to prevent CUB from being part of an increasingly popular market (lemon flavoured RTD products);
- Determination 132 & 137/21 referred to in the Provisional Determination should be differentiated as the crucial factor in that case was the use of bright and contrasting colours which would be eye-catching to minors, and the Panel found that Hard Solo did not use colours eye-catching to minors;
- Additional determinations support the Company's contentions and the seemingly 'novel' circumstances surrounding Hard Solo packaging should not mean that the Panel can, without cogent reasoning, deviate from precedent and change its view:
  - 46/20 – Breached due to a failure to clearly identify the product as alcoholic and the popularity of lemonade with minors, whereas Hard Solo uses clear alcohol cues and is an adult drink;
  - 47/22 – Dismissed despite the use of a confectionery reference due to the context of the packaging, namely cask style packaging and

clear alcohol cues meaning the packaging would not have strong or evident appeal to minors;

- The Panel's assessment in Paragraph 86 of the Provisional Determination references nine statements, however, they are unsupported and do not explain the conclusion by reference to the definition of 'Strong or Evident Appeal to Minors', and each is rebutted on the basis that:
  - Solo is an adult drink (consumed 85% by adults), marketed to adults;
  - All carbonated soft drinks cannot be treated the same, ie dry ginger ale is targeted to adults, while raspberry lemonade is appealing to children and Solo has never been advertised in a way that would appeal to minors;
  - ABAC has no foundation to assert that 'Solo is consumed by minors and more generally the brand is well known by minors' with the only evidence referenced being a 2009 TVC that is 14 years old and appealed to adults and the nostalgia of remembering one's childhood and did not appeal to children. ABAC guidance notes reference unrelatable nostalgia as a factor which can indicate a marketing communication is unappealing to minors;
  - While the Solo brand will be considered, the test is not whether Solo is consumed and well known by minors but rather whether Hard Solo is likely to appeal to minors or have a particular attractiveness for a minor beyond the general attractiveness for an adult;
  - The marketing posture of the Solo brand between males and females is irrelevant;
  - Referencing a 14 year old TVC that features minors is anecdotal and not robust evidence, many ads feature minors but are not seeking to and do not appeal to minors, as is the case with this ad which was aimed at adults through including a flashback to the 70s;
  - There is no evidence that the Solo brand elements, and which elements in particular, will be readily recognised by consumers including minors, and how that establishes that Hard Solo is likely to appeal strongly to minors, however acknowledges that the Hard Solo design establishes the product as alcoholic;
  - Part 3 (b)(i) does not include in its test 'recognition and familiarity', Hard Solo packaging is demonstrably different to Solo packaging, and even if there is recognition and familiarity of Solo branding on Hard Solo packaging, the Panel has not articulated what the illusion is or how it has been created, and any reason as to why the illusion

would apply to minors, particularly when Solo is marketed to and consumed by adults;

- In Determination 118/22 the Panel found that the name and background images of 'Toffee Apple' and 'Creamy Soda' vodka products contribute to an illusion of a smooth transition to an alcohol product for a minor, but in the case of fruit flavoured vodka cans such as 'Lime Vodka' found the overall design was mature in nature and not eye-catching and while the fruit flavours would be familiar to minors and are also used in the names of confectionery items, non-alcoholic drinks, ice-creams and desserts, the packaging design does not make any other specific references to these similarly flavoured items, and this reasoning should apply to Hard Solo on the basis it is 'mature in nature' being black in colour and 'unexceptional';
  - Even if there is an inherent potential for Hard Solo packaging to be relatable to minors (although noting that 85% of consumers are adults) the context, being clear alcohol indicators and the black 'unexceptional' packaging means the marketing as a whole does not have strong or evident appeal to minors;
  - The code requires a 'strong or evident appeal to minors' and not just 'evident appeal', however, in any case it would not have an evident appeal given consumption data and consumer sentiment testing which was undertaken before clearer alcohol indicators and removal of 'Solo' elements;
- ABAC is designed to be consistent with community expectations in relation to the responsible marketing of alcoholic beverages in Australia. To inform the probable understanding of the marketing communication CUB has conducted social media and community interest monitoring to observe public reception to and discussion of Hard Solo since its launch. CUB has observed no media or community interest in or mention of Hard Solo, including on social media channels likely to be used by minors since the initial public discourse occurred around the time of its launch. If Hard Solo did have strong or evident appeal to minors, given it has established itself as a successful popular product, there would be some evident engagement with the product on social media channels but there is not.
  - Hard Solo is available in a 375ml can, in both 4-pack and 10-pack formats. Soft drinks do not have a monopoly on the 375ml can: it is a common format for a wide range of alcoholic beverages.
  - Solo Extreme Lemon was a precursor product to Solo Zero Sugar, aimed at adult males looking to explore the zero-sugar category. It was launched in 2013 and discontinued by 2019. Although it also used a dark primary colour

over the more traditional yellow, the product still looks very different to Hard Solo.

- Solo pre-dates the first Star Wars movie and it is highly improbable that the product name would be associated or confused with the 'Hans Solo' Star Wars character.
- In relation to the TikTok video referenced by one complainant, the Company advises it did not supply the product to the creator of the video, and has no relationship with the creator or prior knowledge of the video.

### **Pre-vetting approval**

43. The ABAC Scheme consists of three components, namely the Code itself, the pre-vetting service and the public complaints process. The Company submitted its branding and packaging designs for Hard Solo to pre-vetting and was given approval. Accordingly it is important to explain the relationship between the pre-vetting service and the public complaints process.
44. The purpose of the pre-vetting service is to provide alcohol marketers with copy advice as to proposed marketing communications and the consistency of the proposals with ABAC standards. The seeking of pre-vetting advice represents both best practice and prudent risk management on behalf of an alcohol marketer. Further, pre-vetting approval is required by some media bodies prior to permitting the use of the medium for carrying alcohol advertising i.e. for free to air television and outdoor media such as billboards.
45. Pre-vetting approval however does not protect a marketing communication from being the subject of a public complaint nor does the approval bind the Panel in considering the complaint. By way of an imperfect analogy, pre-vetting is akin to obtaining highly informed opinion as to what the Code requires in relation to a marketing communication whereas the Panel decision on a complaint is the definitive ruling of what the Code requires in relation to the marketing communication.
46. The Code decision makers- the pre-vetters and the Panel members- seek to maintain consistency in how the Code is interpreted and applied. This is a key goal of the Scheme as it is important for marketers to be able to operate with confidence as to what their ABAC marketing obligations are and how to meet them. And statistically there is a very high correlation between the advice given in pre-vetting and the determinations made by the Panel when considering a public complaint about a marketing communication. In fact, over the life of the ABAC Scheme 98% of marketing items approved in pre-vetting and then subject to a subsequent Panel determination have resulted in the complaint about the marketing item being dismissed.



47. That said, on occasions a determination of the Panel will reach a different conclusion about a marketing communication than the advice given at pre-vetting. This can arise if the marketing material calls for an 'on-balance' decision when reasonable minds could disagree as to whether the marketing communication does or does not meet community expectations as embodied in the Code standards.
48. It can also arise in a novel case, where the marketing communication raises issues that have not previously been the subject of a direct Panel decision. In these cases a pre-vetter is obliged to work from Panel precedents that are not precisely on point and hence there is a prospect that the Panel may rule on the new issues in a different way than applied by the pre-vetter.
49. Hard Solo is a 'novel' case in this sense. While a range of decisions have been made on the branding and packaging of RTD's, this is the first occasion that the Panel has been called upon to decide if and how the branding and packaging of a very well established (and to use the words of the Company) 'beloved' soft drink brand can be applied to an alcoholic beverage so that the branding/packaging does not have strong or evident appeal to minors.

### **Strong or Evident Appeal to Minors - General Considerations**

50. The complaints enliven the standard contained in Part 3 (b)(i) of the Code. This standard requires that alcohol marketing communications such as brand names and product packaging must not have strong or evident appeal to minors. This standard is breached if branding and product packaging:
  - is likely to appeal strongly to minors;
  - specifically targets minors;
  - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; and
  - uses imagery, designs, motifs, animations, or cartoon characters that are likely to appeal strongly to minors or create confusion with confectionery or soft drinks.
51. The benchmark applied when assessing if an ABAC standard has been satisfied is the 'reasonable person' test. This means the Panel puts itself in the shoes of a person who has the life experiences, opinions and values commonly held by most Australians, and assesses how this reasonable person would probably understand the marketing communication.
52. The Panel has considered the Part 3 (b) standard on many past occasions. While each marketing communication must always be assessed individually, some

characteristics within marketing material which may make it strongly appealing to minors include:

- the use of bright, playful, and contrasting colours;
- aspirational themes that appeal to minors wishing to feel older or fit into an older group;
- the illusion of a smooth transition from non-alcoholic to alcoholic beverages;
- creation of a relatable environment by use of images and surroundings commonly frequented by minors;
- depiction of activities or products typically undertaken or used by minors;
- language and methods of expression used more by minors than adults;
- inclusion of popular personalities of evident appeal to minors at the time of the marketing (personalities popular to the youth of previous generations will generally not have strong current appeal to minors);
- style of humour relating to the stage of life of a minor (as opposed to humour more probably appealing to adults); and
- use of a music genre and artists featuring in youth culture.

53. It should be noted that only some of these characteristics are likely to be present in a specific marketing communication and the presence of one or even more of the characteristics does not necessarily mean that the marketing item will have strong or evident appeal to minors. It is the overall impact of the marketing communication rather than an individual element that shapes how a reasonable person will understand the item.

54. Product packaging can give rise to strong appeal to minors if it creates confusion with confectionery or a soft drink. Confusion with a soft drink might occur if:

- the packaging fails to clearly identify the product as an alcohol beverage through the use of an alcohol term like beer, ale, vodka, style of wine etc or reliance is made of more subtle alcohol references or terms understood by regular adult drinkers but less likely to be understood by minors eg IPA, NEIPA;
- the packaging has a visual design that resembles a soft drink such as the display of fruit images, bright block colours and the use of a font style or iconography found typically on soft drinks or fruit juices;
- the use of terms commonly associated with a soft drink or fruit juice e.g. orange, lemon, blueberry, pop, smash etc; and

- the type of physical package used and whether this is similar to that used by soft drinks or fruit juices e.g. prima style juice box.
55. When assessing a design of a can or bottle, it cannot be expected that a reasonable person will turn the container around the full 360 degrees and study it in fine detail. Rather it is the front of the can/bottle that will be most influential in how the person will probably understand the packaging and impressions will be most strongly shaped by larger font writing and the predominant colours and design features.
56. As explained earlier, the ABAC does not regulate the physical characteristics of a product such as its alcoholic strength, or its colour or its taste. In making this point, the Panel is not saying that the taste of a product is not an important consideration in the appeal of a product to a consumer. But it will be no defence to a concern about the appeal of product packaging to minors to contend that minors won't like the taste of the product. Equally if a product's packaging can be fairly concluded as not strongly appealing to minors, the product packaging won't be in breach of the Code because the product is contended to have a taste that minors would be drawn to.

### **Panel Precedents**

57. The Company firstly in its initial submission and then in its further submissions to the Provisional Determination cited several Panel determinations which it contended supported its argument that the branding and packaging of Hard Solo was consistent with how the Panel had applied the Part 3 (b)(i) standard. Before turning to a discussion of these previous decisions, it is useful to explain the role and status of past determinations.
58. The ABAC Adjudication Panel is not a Court or Tribunal bound by the rules of evidence nor is it obliged to follow precedents derived from past determinations. In return, the determinations of the Panel are not enforceable akin to a Court or Tribunal ruling and ultimately an alcohol company is able to choose to comply with a Panel determination or not to do so. In making that point, it must be noted that the Company has given a prior commitment to market consistently with the ABAC standards and to abide by Panel determinations. Further, in the history of the ABAC Scheme there have been very few occasions of alcohol marketers not accepting a Panel decision on a complaint.
59. While not formally binding on the Panel, determinations play an important role in the ABAC Scheme. As mentioned, consistency of Code interpretation is a key policy goal between the pre-vetters and the Panel and as a matter of equity and fair practice, like circumstances should receive like outcomes. Accordingly, Panel determinations are treated as precedents and are a foundation in decision making and used for industry and community education purposes.

60. The Company has cited the following determinations as supporting its contention that the Hard Solo branding and packaging meets the ABAC standard:
- Determination 11/22 Bundaberg Alcoholic Ginger Beer
  - Determination 24/23 Billson's Vodka Zesty Lemon.
  - Determination 46/20 Boston Brewing Peach Lemonade
  - Determination 47/22 MSC Fruit Tingle Cocktail Boxtail
  - Determination 118/22 Various Billson's Vodka Products
61. Collectively the Company argued these past determinations demonstrate that adopting specific design elements in the branding and packaging design of a product should ensure that the packaging will not have strong appeal to minors. The Company submit the precedents mean it is particularly important that the product be clearly identified as alcoholic and not likely to be confused with a soft drink.
62. The five precedents advanced by the Company do deal with the issue of the appeal of branding and packaging to minors and hence describe the considerations the Panel took into account in those cases in reaching a decision. And the clarity of packaging identifying the product as alcoholic and not a soft drink will always be one factor to consider in assessing the probable understanding of the packaging of a product. But as stressed previously, 'confusion with a soft drink' is not the test as such. The test is whether the branding and packaging would be probably understood as having strong or evident appeal to minors.
63. The Panel does not believe the decisions submitted by the Company go to the critical question in the current case of the impact of using the core branding of a 'beloved' and 'iconic' soft drink in the branding of a spin off alcohol product. Quite simply this issue has not previously been considered by the Panel.
64. The Bundaberg Alcoholic Ginger Beer determination in particular does not help the Company's arguments. This case involved a TV ad promoting a brand collaboration between the producer and owner of Bundaberg Rum and the producer of the soft drink Bundaberg Ginger Beer. The alcoholic ginger beer is a product of Bundaberg Rum (not Bundaberg Brewed Drinks, the maker of the ginger beer soft drink). Critically the branding and packaging of the product shown in the TV ad reflect the well known and core brand elements of the alcohol brand namely:
- the 'Bundy Bear' logo;

- the 'Bundaberg' name in the font and colouring used on products in the alcohol beverage range (not the soft drink); and
  - various other cues establishing the product as being an alcoholic beverage.
65. In short, the core brand elements of the alcoholic ginger beer (further reinforced by the television ad referencing the Bundy Bear character) was an adaptation of long established and well recognised branding of Bundaberg Rum products. The Panel believes the difference between the branding of the Bundaberg Alcoholic Ginger Beer being based on the well established Bundaberg Rum branding attributes as opposed to the soft drink ginger beer branding is decisive. Hard Solo branding is based on the Solo soft drink branding and this is the exact opposite of the position in Determination 11/22.
66. The Boston Brewing Peach Lemonade, Billson's Vodka Products and Boxtails Fruit Tingle decisions each deal with products using names or descriptions more commonly found on non-alcoholic products. The takeaway from these decisions is that the use of such descriptors will elevate or create an inherent risk that the product packaging may strongly appeal to minors. Whether the actual packaging breaches the standard will always be assessed on the merits of the individual design and its overall impact.
67. Billson's Zesty Lemon is a RTD vodka product. The packaging (can design) of the product was one of some 23 separate products from Billson's considered by the Panel in two determinations with the issue being whether the packaging had strong appeal to minors. As noted by the Company, the Panel held that the can design of the Zesty Lemon product did not breach the Code standard.
68. Billson's is a craft producer of both soft drinks and more recently RTDs. There are parallels with the current case as Billson's produces a non-alcoholic Zesty Lemon soda and a vodka based RTD also branded as Zesty Lemon. The major distinction between the cases goes to the brand recognition of a product from a small producer like Billson's and the mass market reach and consequent brand awareness of Solo.
69. Unlike Solo, Billson's Zesty Lemon soda has not been a staple for decades in hundreds of Coles and Woolworths supermarkets nor in thousands of fridges in stores, petrol stations or food outlets across Australia. There is no 'Billson's Man' or a 50 year history of building brand awareness through national multi-media marketing campaigns.
70. The Company acknowledged in its additional submissions that because of the established position in the market of Solo soft drink it 'should take extra steps to ensure any appeal to minors would be incidental and not strong or evident'. It is submitted these steps have been taken and that the additional brand recognition enjoyed by Solo (when compared to Billson's Zesty Lemon) should not act as a bar to Hard Solo.

71. The Panel stands by its position that the extent of the brand recognition of Solo is a relevant factor and does distinguish this case from the Billison's decision. Further the Panel referenced the same approach in Determination 67/22 White Rabbit Chocolate Stout and Determination 233/21 Moon Dog Fizzer. In both these cases a brand or type of confectionery was referenced in the alcohol marketing material. The Panel noted the reference to confectionery was an indicator of potential strong appeal to minors however neither confectionery was a longstanding household brand or a household staple likely to be recognised by minors- contrast brands such as Cadburys, Nestle, and Mars or lollies like Freddo Frogs, Cherry Ripe or Snakes Alive.

### **Guidance from the precedents**

72. The ABAC standards were first extended to cover alcohol beverage brand names and packaging on 1 November 2009. Since that time the majority of the complaints received about branding and packaging have raised concerns about strong appeal to minors.
73. While each product packaging example considered by the Panel must be assessed on its own merits, to date the packaging found in breach of the standard have tended to fall into one of the following broad categories:
- product packaging designs or types that closely resembled soft drinks or fruit juice;
  - packaging employing imagery considered strongly appealing to minors (e.g. Christmas themes, children's stories or animals); or
  - product names and/or imagery invoking foods considered popular with minors (e.g. confectionery, soft drink types, sweets and desserts).
74. RTD products such as Hard Solo combine alcohol with a carbonated soda. In examples considered by the Panel previously, the branding of the RTD has been either solely or predominantly 'led' by the alcoholic component of the beverage e.g. Jim Beam with cola or Bundaberg Rum and cola. In contrast Hard Solo in branding terms is led by the carbonated Solo soda and not the alcohol component of the beverage.
75. Given the lack of direct precedent, the Panel believes the most relevant previous decisions concern the packaging of alcohol products reflecting a brand collaboration between a non-alcohol brand and an alcohol beverage brand. Like Hard Solo, in these cases the non-alcohol product branding used on the packaging has enjoyed a much stronger market profile compared to the alcohol beverage partner branding.
76. In its Provisional Determination the Panel noted Determination 132 & 137/21 - 4 Pines Ben & Jerry's Chocolate Chip Cookie Dough Inspired Nitro Beer. This

decision concerned a brand collaboration between the craft brewer 4 Pines and the international ice cream producer Ben and Jerry's that saw the brand elements of a popular Ben and Jerry's ice cream employed on the can design of a 4 Pines beer. The Panel found that the packaging would probably be understood by a reasonable person as having strong or evident appeal to minors noting:

- Ben and Jerry's was an ice cream product popular across all age groups;
- the packaging of the 4 Pines beer has strong similarities with the well-known Ben and Jerry's Chocolate Chip Cookie Dough tub;
- the association with the popular ice cream brand would be immediately apparent to a reasonable person;
- while Ben and Jerry's marketing does have a focus towards adult consumers, this did not mean the product is not recognised nor consumed by minors;
- the reference to Chocolate Chip Cookie Dough inspired flavouring references a relatable and popular flavour that a minor would find appealing;
- while it is unlikely that the product would be confused with confectionery or soft drink due to a prominent reference to 'beer' on the front of the product, the packaging suggests a smooth transition from a non-alcoholic to an alcoholic beverage;
- the use of bright and contrasting colours would likely be eye-catching for minors; and
- taken as a whole, a reasonable person would understand the packaging as likely to appeal strongly to minors.

77. Another brand collaboration was between the brewer One Drop Brewing and the cereal manufacturer Kellogg's. The product packaging of Kellogg's Corn Flakes Nitro Milkshake IPA was considered in Determination 75, 80 & 81/19 and held to breach the strong appeal to minors standard. In this case the Panel noted:

- the strong impression created by use of the familiar Kellogg's name, font style, rooster character and corn flakes description clearly establishes the product's direct association with corn flakes;
- indications that the product is a style of beer are less prominent than the corn flakes references;
- the 'milkshake' descriptions, while less prominent than the corn flakes reference add some weight to creating confusion with a soft drink i.e. a non-alcoholic drink such as a breakfast milk drink;

- in absolute terms corn flakes are consumed far more by adults than minors, although available data indicates under 18 year olds consume corn flakes at a higher rate than the general population;
  - the corn flakes imagery is highly recognisable and would likely be readily identified by minors and the novelty of the corn flakes connection with a 'Nitro Milkshake' is likely to be strongly appealing to minors; and
  - taken as a whole, a reasonable person would likely believe the packaging has strong or evident appeal to minors.
78. In both the 4 Pines and One Drop Brewing decisions arguments were made that the respective brands of the collaborating partners- Ben and Jerry's ice cream and Kelloggs Corn Flakes - were for products that appealed and were more heavily consumed by adults rather than minors. While the consumption of the products was to be taken into account, the Panel was mindful of the high recognition of both brands amongst minors, the resultant familiarity and relatability of the brands to minors, and the impact this would have on the probable understanding of the alcohol product brand.
79. Both decisions are also consistent with other determinations where alcohol packaging or marketing has employed brand elements of well-known non-alcoholic products (e.g. Determination 70/20 Howler Choc Milk Stout and Determination 70/21 Milo Imperial Brown Ale).
80. The Company in its additional submissions argued the 4 Pines determination could be distinguished from Hard Solo as the packaging of the 4 Pines product employed bright and contrasting colours and this is not the case with the Hard Solo packaging. This argument is not accepted. The 4 Pines decision referenced multiple points contributing to the conclusion of strong appeal to minors and while colour was one of the indicators, it was not of itself a decisive factor.

**RTDs- significance of alcohol brand led marketing as opposed to soft drink brand led marketing**

81. As explained, the critical difference between say the branding of Bundaberg Alcoholic Ginger Beer and Hard Solo is that the alcoholic ginger beer branding is based on the Bundaberg Rum long established alcohol product branding elements whereas Hard Solo is based on the long established Solo soft drink branding. But why is this of any significance given that they are both RTD alcohol products?
82. The answer lies in the very different regulatory settings and public policy postures applying to the marketing of alcohol beverages as opposed to soft drinks. As mentioned, alcohol marketing is subject to and constrained by requirements sourced in direct government regulation and the standards contained in the ABAC. Collectively these requirements seek to permit adults to responsibly choose to consume alcohol while minimising the harm that can arise from alcohol misuse.



83. In relation to minors, the regulatory regime and marketing standards for alcohol products do not permit:
- marketing messages that strongly or evidently appeal to minors;
  - product branding and packaging with strong or special appeal to minors;
  - use of alcohol branding on clothing, toys or other merchandise for use primarily by minors;
  - the depiction of minors or persons under the age of 25 in marketing material;
  - generally the screening of alcohol ads on free to air television at times likely to have a higher audience of minors;
  - placement of alcohol ads on billboards within 150 metres of a school;
  - alcohol marketing over any medium if the reasonably expected audience is 25% or greater of minors (20% from 1 January 2024); and
  - placement of alcohol ads with any program or content on TV, radio or cinema primarily aimed at minors.
84. Further, if a media platform enables the exclusion of minors from receiving alcohol marketing, then an alcohol company is required to utilise that capacity. While there are some stipulations applicable to marketing products to children that capture soft drinks, there is no equivalent restrictive marketing regime applying to a soft drink brand compared to that in place for alcohol beverage brands. In general terms it is permitted to openly market soft drinks to minors.
85. This means that all alcohol RTDs products must be marketed consistently with the regime outlined above. But if the core brand elements of the RTD have been derived from a soft drink brand as opposed to an alcohol brand, then those distinctive brand elements of the RTD have been built and can be maintained without the limitations applying to alcohol products.
86. So neither an ad for Bundaberg Alcoholic Ginger Beer or Hard Solo could be placed on a billboard adjacent to a school but there is no constraint on an ad for Solo being placed on the billboard. This highlights the importance of both the clear distinction between Solo soft drink packaging and marketing and that used for Hard Solo and consideration of the Solo brand and its appeal to minors. These issues are canvassed in the section below.

### **Does the Hard Solo branding and packaging breach the ABAC Standard**

87. The Company has explained that its aim in developing Hard Solo has been to leverage the brand equity in Solo and create a light RTD for adults. In doing this the Company has acknowledged the potential for the branding and packaging

design to appeal to minors or at least for this concern to be raised. In essence the Company contends the branding and packaging does not strongly appeal to minors because:

- Hard Solo's packaging and can design are clearly distinguishable from Solo and as a result the product will not be confused with the Solo soft drink product;
- the packaging design is mature and adult in nature; and
- soft drink Solo is predominantly consumed by adults and has been marketed towards adults.

88. The Company placed weight on the design of the Hard Solo can and related packaging being clearly distinguishable from Solo and that the packaging design clearly establishes the product as an alcoholic beverage. The can design for Hard Solo and Solo is shown below. Hard Solo uses several core elements from the long established soft drink brand namely:

- the 'Solo' name in the font employed on the soft drink
- the lemon tree image and
- the 'lemon' flavour descriptor.



89. The Hard Solo design has clear cues on the front of the can that the product is an alcoholic beverage. These are the term 'alcoholic' qualifying the lemon flavour descriptor, the 18+ stamp and the relatively large font alc/vol % information. The term 'hard' may be understood by some but not all consumers as referring to an

alcoholic beverage. 'Hard' is a term used to designate alcohol in the USA and other countries but it has a relatively recent history in Australia.

90. Community research conducted by the ABAC Scheme in 2021 tested if the terms 'hard lemon' and 'hard seltzer' were understood to be referring to an alcohol or non-alcoholic product. Only 32% of people identified 'hard lemon' as meaning an alcoholic beverage whereas 18% thought it was a non-alcoholic drink and 50% were unsure. 'Hard seltzer' had greater recognition as referring to alcohol, with 52% of respondents believing the description was to alcohol, 9% to a soft drink and 39% unsure.
91. The colour scheme of Hard Solo utilises the inverse of the black and yellow of the Solo soft drink. In other words, the background colour of Hard Solo is black whereas the soft drink has a yellow background. Both products employ yellow on black for the 'Solo' name. As one complainant noted, a dark background and yellow Solo name was also used on the 'Solo Extreme' variant in the market between 2013 and 2019. Given the product had a short life and has not been available for some years, it is unlikely to currently shape attitudes to Solo soft drink or Hard Solo.
92. The Panel acknowledges that the Company has endeavoured to achieve its intention of leveraging the Solo brand equity on an alcohol beverage in a manner that establishes that the two products are related but separate. It is accepted that the Hard Solo packaging does establish the product is alcoholic and as such a reasonable person looking at the can would most probably understand that they were viewing an alcoholic beverage and not a soft drink.
93. This aligns with 'consumer sentiment' research conducted by the Company which the Company advised that 'just 4% of survey participants expressed an unprompted concern that the product could be mistakenly consumed by minors'. The question of whether the branding and packaging of a product has strong or evident appeal to minors is not, however, answered by the product packaging demonstrating the product is alcoholic.
94. The prime objective of the Part 3 (b)(i) standard is not to avoid a minor *mistakenly* drinking an alcohol product. The objective is to avoid marketing in a manner that results in a minor *wanting* to drink the product because the marketing is strongly appealing. And this question is answered from the standpoint of a reasonable person who brings to the assessment the knowledge, opinions, values and life experiences that can be expected to be found in a majority of the Australian community.
95. The Company submits the design and colour palette used on the Hard packaging is sleek and mature and elements on the Solo soft drink can and packaging that might have appeal to minors have been removed from the Hard Solo packaging. Assessing the probable appeal to minors of a colour scheme and design elements is a little challenging. Certainly Hard Solo is not using bright colours generally

considered eye-catching to minors, although the black and yellow combination are contrasting colours.

96. In support of the proposition that Solo soft drink does not strongly appeal to minors, the Company argued that Solo has always skewed towards adults and provided data that indicated that approximately 85% of Solo consumers are adults. It was submitted that the product was especially popular in the 20 to 29 and 30 to 49 age brackets.
97. It should be noted that of the 15% of Solo consumers who are minors, according to the Company's data, the large majority are found in the 15 to 17 age group. This aligns with ABS figures on Dietary Behaviour drawn from the National Health Survey 2020/21 which shows that infants and young children have low consumption levels of sugar sweetened drinks, with consumption of the drinks in minors increasing with age. ABS figures report that 3.6% of the Australian population are aged 15 to 17. The Company's data indicated 15 to 17 year olds were 10% plus of Solo consumers.
98. There is no easily accessible public data on the consumption of Solo specifically by age group, although as noted earlier the product is apparently in 1.7 million homes. More generally the Australian Institute of Health and Welfare (AIHW) produces reports on various aspects of Australian children and youth including nutrition. The nutrition report (last updated on 25/6/21) includes a section on the consumption of sugar sweetened and diet drinks. This report shows that at least once a week:
  - 69% of young people aged 15-24 consumed sugar sweetened drinks or diet drinks;
  - 71% of males and 54% of females aged 15 to 18 consumed sugar sweetened drinks; and
  - soft drinks are the largest category of discretionary foods consumed by persons aged 14 to 18
99. In contrast, a report from Roy Morgan in 2017 (Young Australians Survey) indicated that children aged 6 to 14 had a higher consumption rate of soft drinks than persons aged over 14. This market research indicated that 57.8% of children aged 6 to 13 had consumed a carbonated soft drink in the previous 7 day period. The figure for persons aged 14 and above was 42.7%.
100. In terms of soft drink products, Coca-Cola Amatil products (Coca-cola, Fanta, Sprite) have the largest market share in Australia at almost 40%. The soft drink products in the Asahi range account for around 16%. Information on flavour preference of soft drinks, particularly by age group was not readily revealed by an internet search. Overall it appears cola is by far the most popular flavour in Australia followed by lemonade/lemon (Canstar survey 2020).

101. The Company argued in its additional submission that while the general data on soft drinks might indicate minors are significant consumers, this does not mean all soft drinks are the same with some having greater appeal to minors than others. It relies on the market research commissioned by it to assert Solo is a soft drink that appeals to and is consumed by adults and not minors.
102. The Company further contended that over its history the positioning of Solo soft drink has been skewed towards adults and not minors. Certainly the grounding of the brand via the Solo Man television advertisements could be fairly described as being directed towards adult men and the theme and tone of these ads were akin to beer ads. That said, the peak of this phase of the brand's marketing was in the 1970's and 1980's and will be recalled by an older audience rather than a minor born after 2005.
103. Clearly the strongly male focus of Solo marketing of its first decades in the market (e.g. 'A man's drink' strapline) has not constrained the current take up of the product by women. The Company's research data shows almost an even split between male and female consumers and in fact this research shows more women than men consume the sugar free 'Solo Zero' variant.
104. Not surprisingly given a 50 year antecedence, the Solo brand marketing has not always been laser focussed on adults. In 2009 Solo was a sponsor of TV coverage of the A League national football competition. A TV ad aired at this time commences with a group of boys (aged in early teens) playing 'crushed can' street football with a can of Solo. Later scenes show older males playing with the crushed solo can. The ad suggests Solo has been a part of life from childhood to older teenage years and then adulthood as males at different phases of life are shown. Football superstar of the era, Harry Kewell, is shown at the end of the ad.
105. The Company contends in its additional submission, that not much can be read into this example of Solo marketing involving minors. It points out the ad was 14 years ago and simply because minors are shown in an ad does not mean the marketing is being directed towards minors as such.
106. The Company further submitted that beyond the initial launch of Hard Solo there had not been engagement with the product on social media channels used by minors. The argument advanced in the additional submission was that if the product was proving popular with minors then this would be reflected in social media.
107. In contrast to the Company's submission on this point, a [report](#) released on 3 November 2023 by the Foundation for Alcohol Research & Education (FARE) suggests that videos under the hashtags #hard solo and #hardsoloalcoholic on the social media platform TikTok had 10.2 million and 741,700 views respectively. It was claimed that as a platform TikTok has a large youth following amongst 13 to 24 year olds.

108. It should be noted that the Company has not had an opportunity to comment on the FARE report and that none of the videos on TikTok have been created by the Company- in fact TikTok does not permit paid alcohol advertising. Further a quick review of the Hard Solo videos on TikTok indicate that most were posted immediately after the launch of the product and appear to have been made in almost all instances by adults (noting assessing age on appearance can be fraught with risk of error). Views and likes of the videos are however ongoing.
109. The Panel is not a research body and it does not purport to assess the quality and robustness of claims made from time to time about alcohol marketing. Equally, while data supplied by the Company on the consumers of Solo and other claims made by the Company are taken on face value, it is at best providing a point in time snapshot of consumers. Consumer preferences for products change over time as would appear to be the case with Solo given the balance between male and female consumers notwithstanding the male centric nature of the brand.
110. Against this backdrop the Panel is to decide how the Hard Solo branding and packaging would be probably understood by a reasonable person in terms of its likely appeal to minors. If Hard Solo was a new alcohol product with no Solo soft drink parent, then the branding and can design would be unexceptional given the packaging clearly identifies the product as being an alcohol beverage and the design is mature with limited features that would be regarded as strongly appealing to minors.
111. But Hard Solo must be assessed with significant regard to the reasonable person's exposure to the branding and market position of Solo soft drink. A brand that has a long and storied history. A brand that is a staple in many households and is certainly prominent in major food and drink retailers. It is also a brand that has not been developed subject to the standards and regimes that apply to alcohol products in terms of where its marketing can be placed and the messaging it can contain.
112. The Panel has reflected carefully on the Company's submissions and the detailed rebuttal of the Provisional Determination conclusion of a breach of the Part 3 (b)(i) standard. This has meant that the Panel has examined more past decisions and endeavoured to assess how a reasonable person would understand the packaging of Hard Solo when the branding of the product is led by the core elements of Solo soft drink. The views and concerns of the complainants have been looked at afresh.
113. The Panel believes that the branding and packaging does have strong or evident appeal to minors. In reaching this conclusion the Panel noted:
- Hard Solo is a RTD alcohol product with a packaging design leveraging the core branding elements of Solo soft drink;

- Solo enjoys very high recognition of its brand name and packaging design features gained from a 50 plus year position within the Australian beverage market and long term national multi-media marketing activities;
- the high profile of the Solo brand is reflected in the soft drink being a household staple in an estimated 1.7 million homes and being a fixture in the soft drink shelves of supermarkets, convenience store and petrol station fridges;
- there are no previous ABAC determinations considering RTD packaging with core branding elements derived from a well established 'iconic' soft drink brand. The most applicable precedents concern packaging adopting well known non-alcohol product branding elements and these precedents provide guidance in this case;
- the precedents cited by the Company explain how certain packaging/branding cases have been decided but do not go to the critical issue of packaging branding being 'led' by well established 'beloved' soft drink branding elements;
- as a soft drink, the Solo brand has been built and is maintained by marketing activities that are not subject to the standards and restrictions accompanying the marketing of alcohol beverages eg featuring minors in the 2009 A League TVC when minors cannot be shown in alcohol beverage marketing;
- a reasonable person would probably understand that irrespective of the intended demographic targets for the marketing of Solo soft drink and the product's regular consumers, the ubiquity of the product in retailers and long term marketing activities means the brand is familiar across age groups including minors;
- as a beverage class, carbonated soft drinks are consumed across the community including significantly by minors;
- consumer data supplied by the Company indicate that Solo consumers are predominantly adults as opposed to minors, however on the Company's data:
  - 15% of Solo consumers are minors;
  - the great bulk of the minors consuming Solo fall within the 15 to 17 age group and equate to 10% plus of all Solo consumers; and
  - 15 to 17 year olds comprise only 3.6% of the Australian population.
- consumer data supplied by the Company provides a point in time snapshot of Solo soft drink consumers and consumers of a product can change over

time suggested by the current relatively even male to female split of Solo consumers notwithstanding the hypermasculinity of Solo marketing in the brand's foundation decades;

- a reasonable person would probably understand that the packaging establishes Hard Solo as an alcohol beverage and even with the use of the core 'Solo' name and other brand elements the packaging would not be confused with the packaging of a soft drink;
- the applicable standard however is not centred upon avoiding minors confusing an alcohol beverage with a soft drink but avoiding minors being drawn to an alcohol beverage due to the beverage's marketing being strongly or evidently appealing to minors;
- the use of the core Solo soft drink branding elements on the Hard Solo packaging combined with the high profile of Solo results in minors:
  - being highly familiar with the Solo brand;
  - being able to relate to the Hard Solo branding and packaging;
  - Hard Solo creating an illusion of being a smooth transition from a non-alcoholic product to an alcoholic due to this familiarity and relatability of Solo to minors; and
  - taken as a whole a reasonable person would probably understand the Hard Solo branding and packaging design would have a strong or evident appeal to minors.

114. By way of completeness, one of the complainants expressed concerns about a TikTok post having strong or evident appeal to minors. The post was a review of Hard Solo by popular food and drink vlogger, Russ.Eats.
115. 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.
116. In response to the complaint, the Company advised that:
- it has no agreement with Russ.Eats;
  - any advertising for Hard Solo has been limited to retailer and venue point-of-sale materials and retailer-led digital advertising. There is no out-of-home, TV, radio or influencer marketing campaign associated with this product;



- it has not provided Russ.Eats with product for review, nor any other influencers or personalities; and
  - the Russ.Eats posts were made without our knowledge.
117. The Code applies to marketing communications in Australia generated by or within the reasonable control of a producer, distributor or retailer of alcohol. Based on the response provided by the Company, the Panel concludes that the Russ.Eats TikTok post was not within its reasonable control and therefore is not a marketing communication for ABAC purposes.

## **Conclusion**

118. As stated, this has been a novel case in that the use of an iconic soft drink brand as the lead branding element for an alcohol beverage has not previously been considered by the Panel. The release of Hard Solo has generated public interest and concern reflected in the complaints. For these reasons the Panel has endeavoured to explain the context for the decision and how the ABAC requirements sit within the wider regulatory framework applying to alcohol.
119. The Company has responded to the complaints in a detailed manner reflecting the thoughtful way in which it developed the branding and packaging design of Hard Solo. It has clearly been mindful of the potential for the product to raise concerns about its potential appeal to minors and it has attempted to deal with these issues including by constructive engagement with the ABAC pre-vetting service.
120. The Panel has found that the branding and packaging design does breach the Code standard on strong or evident appeal to minors. In doing this, the Panel is not saying that Hard Solo as a physical beverage offends the ABAC standard. Nor is the Panel finding that Hard Solo is an undesirable liquor product. These are not questions for the ABAC Scheme but rather sit with government within the shared regulatory environment applying to alcohol and alcohol marketing.
121. Accordingly, the Panel finds that the packaging for Hard Solo is in breach of Part 3 (b)(i) of the ABAC Code.

## **Annexure A: Company's Response to Complaint - 11 & 22 August 2023**

The principal comments made by the Company were:

### **Alcohol Advertising Pre-vetting Service Approval**

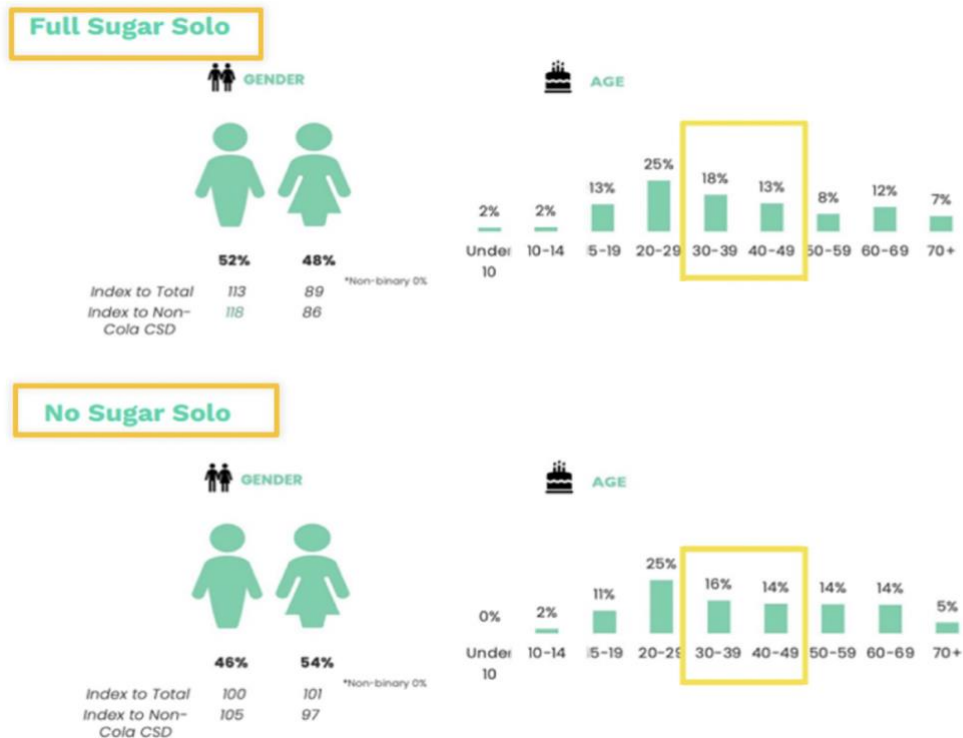
- Pre-vetting approval was sought under application number 254-2023 and was granted on 6 April 2023 under approval number 5687, in relation to the following assets:
  - 6 x 4 x 375ml carton
  - 4 x 375ml pack
  - 375 ml can
  - 10 x 375ml carton
  - 3 x 10 x 375ml shipper

### **Responsibility toward Minors**

- The name of the product, 'Hard Solo – Alcoholic Lemon' (Hard Solo), has been chosen to clearly convey the alcoholic nature of the product, and to ensure that it cannot be confused for a soft drink.
- Solo is a much-loved and iconic soft drink with over 50 years of history. The positioning of the product has always skewed to an adult demographic, from the original 'Solo Man' ads of the 1970s and 1980s (tag line: a man's drink), to more recent iterations showing a broader range of 18+ Australians engaged in various adult pursuits.
- As such we do not accept that the original Solo product is primarily consumed by minors or holds any specific appeal for minors beyond the appeal it holds for an adult. To support this, consumer data, provided as part of the AAPS pre-vetting process, shows that 83% of Solo consumers are aged 20+ (approximately 85% aged 18+), with the product especially popular in the 20-29 and 30-49 age brackets.<sup>1</sup>

---

<sup>1</sup> Tgarage, *Beverage Bernard Landscape 2022*, conducted for Asahi Lifestyle Beverages.



Source: Tgarage Beverage Bernard Landscape 2022, conducted for Asahi Lifestyle Beverages

- In particular, complaint 126/23 claimed that “Solo is a well-known soft drink brand in Australia, which is popular with children and teenagers ... the appeal of Hard Solo to minors is evident given the established appeal of Solo to minors.” The consumption data above refutes this claim, as does initial consumer sentiment testing conducted for Carlton & United Breweries in September 2022: just 4% of survey participants expressed an unprompted concern that the product could be mistakenly consumed by minors.<sup>2</sup> The same survey indicated a high appeal (88%) and purchase intention (82%) among adults with children at home, further suggesting that concerns about mistaken use by minors are misplaced.<sup>3</sup>
- For further context, RTDs are increasingly popular among adult alcohol consumers and lemon is the most popular individual flavour, as demonstrated by the success of products like Suntory -196 Double Lemon and Brookvale Union Vodka Lemon Squash. The flavour of these RTDs moves away from the traditional sweeter profiles associated with the light RTD category in order to appeal to older Millennial and Gen X consumers.

<sup>2</sup> Tgarage, *Alcoholic Solo Concept Test September 2022*, conducted for Asahi Lifestyle Beverages.

<sup>3</sup> Tgarage, *Alcoholic Solo Concept Test September 2022*, conducted for Asahi Lifestyle Beverages.

- Given this background, we saw Hard Solo as an opportunity to create a light RTD for adults who enjoy Solo and like RTDs, using the existing brand equity of a much-loved and iconic drink to stay relevant with older consumers.
- In designing the packaging for Hard Solo, we have aimed to responsibly leverage brand equity while also crucially ensuring the alcoholic and non-alcoholic products are substantially different and easily differentiable.
- The design elements that have been retained from the Solo can are the use of the 'Solo font' for the name 'Hard Solo', and the lemon tree device.
- Other elements have been removed or amended, including:
  - All other text on the can has been rendered in a minimalist sans-serif to cue a more adult interpretation.
  - The ovoid roundel device on the Solo can has been removed.
  - The use of highly contrasting yellow, black and silver has been stripped back to a restrained black background with yellow font.
  - Drop shadow has been removed, resulting in a 'flatter' and more mature appearance.
  - The cross-hatched diamond background of the original can has been rendered in a flat black on black design.
  - The trademark 'thirst crusher' has been removed.
  - Other devices including 'since 1973' have been removed to further reduce identification with the non-alcoholic Solo can.
  - The '5% crushed lemons' (within a lemon pictorial) device has been removed and replaced with minimalist text 'made with crushed lemons' to further reduce identification with the non-alcoholic Solo can.
- All of these design changes have been undertaken to emphasise clearly that this is a different product, and to prompt consumers to recognise the product is not to be confused with the Solo soft drink.
- To differentiate further and to ensure that Hard Solo cannot be confused for Solo:
  - The size of the flavour profile indicator 'lemon' has been reduced on the Hard Solo can.

- The word 'alcoholic' has been added to the name of the product, and deliberately increased in size and presented in bold lettering compared to the flavour indicator 'lemon'.
  - The Hard Solo can prominently displays a '18+' stamp on the front of the packaging design above the alcohol volume statement.
- Hard Solo is available in a 375ml can, in both 4-pack and 10-pack formats. Soft drinks do not have a monopoly on the 375ml can: it is a common format for a wide range of alcoholic beverages, including but not limited to:
  - Mainstream, traditional lager
  - A wide variety of craft beer styles
  - Alcoholic ginger beer
  - Alcoholic cider
  - Zero alcohol beer
  - Dark RTDs
  - Light RTDs
  - Alcoholic seltzers
- The traditional Solo colour palette is distinguished by a bright primary yellow background with additional shades of yellow that give visual depth to the can. Silver and black are used as secondary colourings on the original Solo can.
- The Hard Solo packaging employs a visually stark black background to give the product a distinctly mature look and feel. Elements like the silver ovoid roundel device have been removed, and graphic design elements such as drop shadow or contrasting cross hatching have been avoided to produce a can that is visually 'flatter' in appearance, avoiding the '3D' or 'popping' effects that may be more potentially appealing to minors.
- Solo Extreme Lemon was a precursor product to Solo Zero Sugar, aimed at adult males looking to explore the zero-sugar category. It was launched in 2013 and discontinued by 2019. Although it also used a dark primary colour over the more traditional yellow, the product still looks very different to Hard Solo. Solo Extreme Lemon featured heavier use of silver/grey contrast on a black background, where Hard Solo uses a black-on-black contrast. Solo Extreme Lemon featured more engaging fonts and an overall 'busier' graphic design style, as opposed to Hard Solo's sleek and mature appearance.

- When we first commenced development of this product, we were not willing to proceed unless we could be assured that Hard Solo would be clearly distinguishable from Solo soft drink, and that in designing the can and any associated collateral, we left no opportunity for confusion. In particular, the following changes have been implemented:
  - Use of primary black and secondary yellow colour palette, completely differentiating the product from the yellow Solo soft drink can.
  - Reduction in graphic design elements including drop shadow and use of cleaner, sharper fonts.
  - Very prominent use of the clear alcohol signifiers 'Hard' and 'Alcoholic' in the name of the product and in large, bold lettering throughout the packaging.
  - Removal of the 'thirst crusher' tagline and reduction in the size of the lemon device.
  - Inclusion of the 18+ logo, standard drinks and ABV percentage in large and bright font in a place of increased prominence on the front of pack, to clearly demonstrate that the product contains alcohol and is for adults only.
  
- In designing this packaging we relied on ABAC precedent, both through our early and comprehensive engagement with pre-vetting, and through close observation of ABAC rulings on fruit flavoured or soft drink-adjacent RTDs. In particular, we considered the examples of 11/22 Bundaberg Alcoholic Ginger Beer and 24/23 Billson's Vodka Zesty Lemon.
  
- Although the Bundaberg Alcoholic Ginger Beer complaint relates to a television advertisement rather than packaging, it raises many of the same issues of 'strong or evident appeal to minors' and 'confusion with the non-alcoholic product' through the depiction of non-alcoholic Bundaberg Ginger Beer within the advertisement for Bundaberg Alcoholic Ginger Beer.
  
- In this determination the panel found the advertisement did not breach the Code on the basis that "the ads establish the product being marketed as an alcohol beverage through a combination of the voiceover identifying the product as 'new Bundaberg Alcoholic ginger beer'; the images of the product can which identifies the product as alcoholic; and the use of the Bundy Bear character that is commonly associated with the alcohol spirit of rum and not soft drinks." The panel found "a reasonable person would likely understand that this is conveying that the alcohol beverage contains the soft drink but the product itself is not a soft drink," and that "any appeal of the ads to minors is incidental and not strong or evident."

- Consistent with this decision, with Hard Solo we have increased the number, placement and visual weight of alcohol cues on the front of the packaging, including the double alcohol indicators in the name, 'Hard Solo – Alcoholic Lemon', and prominent identification of the 18+ logo, standard drinks and ABV percentage in a strongly contrasting colour. 'Solo' in the name and the lemon tree device are used as trademarks, and are to be understood as signifiers that the beverage takes cues from the lemon flavour profile of the Solo soft drink, but is not itself a soft drink.
- We also noted a similar interpretation in the Billson's Vodka Zesty Lemon decision. The panel found that "to some extent the product names, or variations thereof are used on soft drinks ... and hence would be familiar to minors" and utilisation of the "outlines of the shapes of fruits ... enhances the relatability of the packaging to minors," however "the labelling does use the clear alcohol descriptor of vodka and other alcohol cues and would most likely not be confused with a soft drink."
- Consistent with this decision, we have kept the trademark device of the lemon tree on the Hard Solo packaging, and balanced this creative decision by increasing the weighting of the alcohol signifiers on the front of the can. We have also gone to significant lengths to ensure the mature, black packaging does not resemble the Solo soft drink can, while maintaining the minimum amount of yellow to allow adults to recognise the product as coming from the same manufacturer, and having the familiar lemon taste profile.
- In response to complaint 127/23, the packaging does not have Strong or Evident appeal to Minors, by having a similar name to Star Wars character "Han Solo", who features in entertainment and on products commonly watched or used by children.
- The Solo brand is celebrating its 50th year anniversary this year, having been introduced to the Australian market in 1973. Its release pre-dates the first entry in the Star Wars franchise by some four years.

#### **Russ.Eats TikTok Post**

- Carlton & United Breweries has no agreement with Russ.Eats.
- Any advertising for Hard Solo has been limited to retailer and venue point-of-sale materials and retailer-led digital advertising. There is no out-of-home, TV, radio or influencer marketing campaign associated with this product.
- Carlton & United Breweries has not provided Russ.Eats with product for review, nor any other influencers or personalities.
- The Russ.Eats posts were made without our knowledge.

- Carlton & United Breweries did not review or approve any posts made by Russ.Eats. Carlton & United Breweries is committed to the Alcohol Beverages Advertising Code and has robust internal review processes in place to ensure that marketing materials adhere to the provisions of the code.
- The Russ.Eats social media posts were made without our knowledge, review or approval, and are therefore not within our reasonable control.

### **Additional comments**

- Carlton & United Breweries would also like to address a claim made in complaint 122/23: “This is very dangerous and will exacerbate the current teen drinking problem we have in Australia.” Although there is more work to do to ensure people under the age of 18 are not consuming alcohol, the unambiguous trend in Australia’s alcohol consumption statistics shows that increasingly, minors are avoiding alcohol.
- Data from the Australian Institute of Health and Wellbeing (AIHW) National Drug Strategy Household Survey 2019 showed that over the period 2001 to 2019 the average age at which Australians tried their first drink of alcohol increased from 14.7 to 16.2, and over the period 2007 to 2019, the proportion of Australians aged 14-17 who have never consumed a full standard drink of alcohol increased from 39% to 73%.<sup>4</sup> We note that DrinkWise has also reported based on the AIHW dataset that 87% of parents aren’t giving their teenagers alcohol.<sup>5</sup>
- We are very proud of the work we’ve undertaken in conjunction with bodies like ABAC and DrinkWise to ensure that people under the age of 18 are not consuming our products. We continue to invest in our commitment to responsible marketing and to evolve our practices in line with community attitudes.
- Carlton & United Breweries is committed to ensuring our promotional and marketing material is always compliant with the ABAC Code. Our goal is for consumers to enjoy our products responsibly and in moderation, and to uphold community standards when it comes to the placement and content of our advertising.

---

<sup>4</sup> AIHW, *National Drug Strategy Household Survey 2019*, accessed at <https://www.aihw.gov.au/getmedia/330e61ce-620a-4639-896f-0b6cfbb03678/PHE221-Factsheets-Younger-People-30062023.pdf.aspx>.

<sup>5</sup> DrinkWise in consultation with AIHW, “87% of parents aren’t giving their underage teens alcohol” calculated based on the *National Drug Strategy Household Survey 2019*, accessed at <https://drinkwise.org.au/parents/talking-to-your-teen-about-alcohol/#>.



## Annexure B: Provisional Determination Panel View – 3 October 2023

### The Panel's View

#### Introduction

16. In 1968 a new lemon squash flavoured carbonated soft drink branded as 'Solo' was released onto the Australian beverage market. By 1973 the brand moved into the Cadbury-Schweppes stable and the core brand colour scheme and packaging design features which have stayed with the brand for 50 years had been established. While the detailed design used on Solo packaging has been refreshed from time to time, the yellow background, black lettering and distinctive font used for the Solo name have remained constant.
17. In the 1970's and 1980's the Solo name and brand identity entered popular culture via the long running 'Solo Man' TV advertisements. The Solo Man was portrayed in a variety of extreme physical pursuits such as kayaking through rapids, horse riding and windsurfing with each ad ending with the hero satisfying his thirst by downing a Solo in a highly exaggerated fashion.
18. Over the decades the Solo Man has remained a go to persona for the brand, although the hypermasculinity of the character has been used in different ways. In 2012 a parody online video series 'Sweaty Adventure Man' poked fun at the earlier TV ads. And in 2018 instead of wrestling crocodiles, a reboot of the Solo Man saw him as a dad undertaking less life threatening but still daunting tasks of making costumes for his children and assembling flat pack furniture.
19. Accompanying the ebbs and flows of Solo's marketing strategy has been the introduction of new beverages under the Solo brand and livery. Solo Extreme Lemon soft drink had a short life from 2013 to 2019. In contrast, the sugar free Solo Zero is a permanent addition and responds to market demand for low/no calorie soft drinks.
20. As a successful brand of over 50 years standing in the Australian market, Solo has become a fixture in the soft drink aisles of supermarkets, the fridges of convenience stores and appears alongside Coke, Sprite and other well known soft drinks on menus in cafes and restaurants. According to an article in the trade publication Drinks Digest, some 60 million litres of Solo are consumed each year and the product is in 1.7 million Australian households.
21. By 2009 the Australian rights to produce and market Solo was in the hands of the global beverages company Asahi. Asahi has within its range some of the world's best known alcoholic and non alcoholic beverage brands. In 2020 Asahi acquired the iconic Australian alcohol producer Carlton United Breweries. In Australia, companies within the Asahi group are responsible for soft drinks such as Solo,

Pepsi, Schweppes and Sunkist. The alcohol beverage range includes the CUB staples of Carlton Draught and VB as well as Peroni, Vodka Cruisers and Woodstock Bourbon.

22. In late July 2023 the Company launched a new alcohol product - Hard Solo. Hard Solo is an alcoholic lemon beverage containing 4.5% alc/vol that shares the Solo brand name and some brand packaging features. It is the branding and packaging of this new product that has drawn 10 complaints to the ABAC Scheme with each complainant arguing that Hard Solo will have strong appeal to minors. Beyond the complaints, the product has been the subject of media coverage and public debate also questioning whether an alcoholic version of a long established soft drink should be permitted and if so under what conditions.
23. For instance, the trade publication Food & Drink Business on 21 August 2023 carried a story on a surveyed reaction to the Hard Solo launch from 1511 members of a 'consumer panel' maintained by the market research firm, Lewers. While the representative basis and methodology used for the results might be questioned, it is interesting in terms of the polarised responses with:
  - 45% respondents believing the product promotes drinking alcohol to minors;
  - 38% respondents believing the product confuses alcoholic and non-alcoholic drinks;
  - 30% respondents believing the product to be a good extension of the Solo brand; and
  - 29% respondents believing the product is a great idea.
24. In response to the complaints, the Company has made very detailed submissions as to why it believes the branding and packaging of Hard Solo is consistent with ABAC standards. It is pointed out that the packaging was considered and approved by the ABAC Pre-vetting service.
25. This is an important decision as internationally there have been other examples of alcoholic versions of well-established soft drinks being released and hence the question on how the branding, packaging and marketing of such products sits with the ABAC standards potentially will arise beyond this individual case. For that reason, the extensive information presented by the Company and the public interest in the issue, the determination is quite detailed and structured as follows:
  - The broader context - Alcoholic soft drinks and regulatory requirements.
  - The complainants' concerns and the Company's response.
  - Pre-vetting approval and ABAC precedents.

- Strong or Evident Appeal to Minors- General considerations.
- Does the branding and packaging breach the ABAC Standard.
- Conclusion and Provisional Determination.

### **The broader context- Alcoholic soft drinks and regulatory requirements**

26. To some extent the number of complaints and the wider media coverage of the release of the Hard Solo product is (on a smaller scale) reminiscent of the reaction to the introduction of so called alcopops some 30 years ago. While pre-mixed alcohol products have a longer history, alcopops or Ready To Drink (RTDs) products gained greater market profile in Australia from the early 1990's. The products come in different combinations but typically include:
- wine coolers which combine wine and fruit juice or other flavouring;
  - distilled alcohol ready to drink mixed products using sweet beverages such as fruit juice or carbonated soda; and
  - more recently, alcoholic seltzers combining alcohol such as vodka with seltzer water and flavouring.
27. In the 1990's the products gained a significant share of alcohol sales and with this, concerns were expressed as to the take up of the products by young adults and underage drinkers as well as their use in irresponsible and harmful practices such as binge drinking. A commonly expressed concern was that the products, because of their taste and relatively low price, were appealing and accessible to minors.
28. These concerns and data on the consumption of alcopops was an important catalyst for regulatory reform. Licensing laws were strengthened and tax changes made to effectively increase the price of alcopops. In some respects, the creation of the ABAC Scheme itself in 1998 was part of the reforms to improve regulatory and policy settings.
29. Government regulation of alcohol is broadly based on the premise that alcohol is a lawful product and able to be consumed by adults, but it is equally recognised that alcohol misuse is the cause of considerable individual and community harm. Policy responses are centred on harm minimisation with teenagers and young adults identified as a 'priority population group' that can experience disproportionate levels of alcohol related harm.
30. As pointed out by the Company, overall trends show that alcohol consumption amongst minors has been decreasing, however when minors do drink, RTD products are a common choice. For instance the 2017 Australian Secondary Students' Alcohol and Drug Survey showed that of the secondary school students

consuming alcohol in the preceding 12 month period, some 37% used RTDs with beer the second most frequent choice at 22%.

31. Hence Hard Solo comes into a regulatory environment shaped to an important extent by the earlier response to RTDs particularly in relation to the potential appeal of the product to minors. And it is here that it is critical to understand the regulatory responsibilities sourced and exercised directly by government and requirements contained in industry lead initiatives such as the ABAC Scheme.
32. Government regulation of alcohol goes to the physical alcohol products themselves, the responsible service of alcohol and the promotion and marketing of alcohol products. National requirements go directly to the packaging of alcohol products such as mandated information to be included on product packaging e.g. pregnancy warning and alc/vol percentage. All State/Territory liquor licensing regimes have detailed provisions about the responsible service of alcohol. Equally all States/Territories have guidelines on alcohol marketing and promotion. Several States have legislated power to prohibit or ban alcohol products on public policy grounds.
33. For instance the NSW Liquor Act provides that regulations can be made to declare a specified liquor product to be 'an undesirable liquor product'. A product given this designation is not permitted to be sold in NSW. Such a regulation may be recommended by the Minister amongst other things if:
  - the name of the liquor product, or its design or packaging is likely to be attractive to minors; or
  - the liquor product is likely, for any reason, to be confused with soft drinks or confectionery; or
  - the liquor product is, for any reason, likely to have a special appeal to minors.
34. Beyond the regulation making power, the Department Secretary is also given a power to issue a notice to a liquor licensee prohibiting the sale or supply of a liquor product or carrying on an activity that promotes the sale of liquor if the Secretary is of the opinion:
  - the name of the liquor product, or its design or packaging is likely to be attractive to minors;
  - the liquor product is likely, for any reason, to be confused with soft drinks or confectionery;
  - the liquor product is, for any reason, likely to have a special appeal to minors; or

- the promotion is likely to have special appeal to minors because of the use of designs, names, motifs or characters in the promotion that are or are likely to be attractive to minors or for any other reason.
35. In exercising the powers in the Liquor Act, the Minister or Secretary are obliged to consult with an impacted manufacturer or permit submissions from an affected liquor licensee. While not used often, alcohol products have been removed from the market or promotional activities ceased in NSW and other jurisdictions through the use of these powers.
  36. In contrast the ABAC Scheme is not directed to physical alcohol products or the responsible service of alcohol. Rather the Scheme is centred solely on the creation of and adherence to standards for alcohol marketing consistent with community expectations. As an industry lead initiative, the ABAC Scheme essentially relies on the cooperation of alcohol industry participants to meet the marketing standards, and voluntarily remove marketing communications (including brand names and product packaging) found by the Panel to be in breach of the marketing standards.
  37. This means that the ABAC Scheme does not go to physical characteristics of an alcohol beverage such as colour, viscosity, alcohol content or taste. Nor do the ABAC standards go to the price of a product. And the Panel has no remit to make a moral or policy judgement about whether a product or marketing campaign is desirable or not. The Panel's role is to assess if the branding and marketing materials of an alcohol product is consistent with the standards contained in the ABAC Code.
  38. Of course issues such as the taste of a product and its price are important as to the choices consumers make. Equally there is legitimate debate to be had about the policy settings around different styles of alcohol products. Within the shared regulatory space of alcohol and the marketing of alcohol, these questions rest directly with government and not the ABAC Scheme as such.
  39. Although stated in slightly different ways, it is a common requirement in State/Territory alcohol promotional guidelines (other than the Northern Territory) that alcohol marketing must not have 'special' or 'strong' appeal to minors. Some jurisdictions specifically state that advertising or packaging that creates 'confusion with a soft drink' will offend the strong appeal to minors prohibition.
  40. The ABAC also includes 'confusion with confectionery or soft drinks' within the Code definition of 'strong or evident appeal to minors'. It should be noted that the ABAC standard does not create a freestanding requirement that the branding and packaging unambiguously identify a product as being an alcohol beverage. Rather a failure to do so and the potential for product packaging to be confused with a soft drink could contribute to the packaging having a strong appeal to minors.

41. Equally however, the fact that product packaging might clearly identify that a beverage is alcoholic does not mean there is no potential for the branding and packaging to have strong appeal to minors. Using imagery and designs on product packaging that reference or allude to soft drinks or confectionery can be a factor in why the packaging can be reasonably regarded as having strong or evident appeal to minors. This can occur even if the packaging establishes the product as an alcohol beverage.
42. Drawing this together:
- overall policy and regulatory settings for alcohol seek to reduce the harm that alcohol misuse causes with limiting the potential harm of alcohol to minors being a key policy objective;
  - policy settings available and employed by governments include pricing (taxation) options, regulation that aims to have alcohol served responsibly, controls over physical alcohol products and provisions relating to the promotion of alcohol products that in some jurisdictions extend to prohibiting or banning products;
  - alcohol promotion and marketing are a shared regulatory space between direct government regimes and industry initiatives such as the ABAC Scheme;
  - both government regimes and the ABAC standards require that alcohol marketing or promotion must not have strong appeal to minors; and
  - some government regimes and the ABAC standards specifically reference 'confusion with soft drinks' as a potential basis as to why alcohol marketing material including product packaging may have strong appeal to minors.

### **The Complainants' concerns and the Company's response**

43. The branding and packaging of Hard Solo has drawn 10 separate complaints and while each complaint is focussed on the issue of the appeal of the product to minors, there are several different points raised. Collectively the complainant's arguments raised the following points:
- that an alcoholic version of a popular soft drink should not be permitted;
  - that the packaging design is basically the same as 'Extreme Solo' and will be confused with this soft drink;
  - minors drinking Solo will want to try Hard Solo;
  - minors could readily think Hard Solo is a soft drink;

- Solo is a well-known soft drink popular with minors;
- the Hard Solo packaging design uses the same colours, icon and font and can shape as the Solo soft drink and has evident appeal to minors as a result;
- the name Hard Solo brings to mind the Stars Wars character Hans Solo and this will appeal to minors;
- Hard Solo's branding and packaging is difficult to distinguish from the Solo soft drink and could be inadvertently selected by a minor;
- Hard Solo is a deliberate ploy to target minors to drink alcohol; and
- a Tik Tok video reviewing the product was inappropriate for children.

44. The Company contends that the Hard Solo branding and packaging design is consistent with the Part 3 (b) (i) standard and does not have strong or evident appeal to minors. The very detailed submissions from the Company can be summarised as follows:

- Solo is a well-known and 'beloved' Australian brand but it is mistaken to believe Solo soft drink is primarily consumed by minors or has any specific appeal for minors beyond the appeal it holds for adults. Specifically:
  - the positioning of Solo has always been towards adults (particularly adult men) and not minors eg 'Solo Man' advertising;
  - consumer data commissioned by the Company shows that 83% of Solo consumers are aged 20+ (approximately 85% aged 18+), with the product especially popular in the 20-29 and 30-49 age brackets; and
  - consumer sentiment testing by the Company about Hard Solo indicated little unprompted concern that the product 'could be mistakenly consumed by minors'.
- RTD's have increasing popularity among adult consumers with lemon being the most popular flavour and this flavour appeals to older Millennials and Gen X consumers.
- The Company is seeking to leverage the Solo brand equity while ensuring the alcoholic and non-alcoholic products are substantially different and easily differentiable by retaining the Solo name and font for 'Hard Solo' and the lemon tree device but then making substantial changes, including:

- the name 'Hard Solo – Alcoholic Lemon' clearly conveys the alcoholic nature of the product, and ensures that it cannot be confused for a soft drink;
  - removal of various Solo soft drink packaging design elements;
  - use of a black background (as opposed to yellow on the soft drink);
  - reducing the size of the 'lemon' flavour indicator and ensuring the 'alcoholic' text is comparatively larger; and
  - inclusion of an 18+ stamp.
- Decisions on the Hard Solo branding and packaging design were informed by relevant ABAC determinations ( Determinations 11/22,and 24/23 ) and are contended to be consistent with these Panel precedents. Further, the packaging was assessed and given ABAC Pre-vetting approval.
45. The Company also addressed some specific concerns and comments made in several complaints and advised:
- Hard Solo is available in a 375ml can, in both 4-pack and 10-pack formats. Soft drinks do not have a monopoly on the 375ml can: it is a common format for a wide range of alcoholic beverages.
  - Solo Extreme Lemon was a precursor product to Solo Zero Sugar, aimed at adult males looking to explore the zero-sugar category. It was launched in 2013 and discontinued by 2019. Although it also used a dark primary colour over the more traditional yellow, the product still looks very different to Hard Solo.
  - Solo pre-dates the first Star Wars movie and it is highly improbable that the product name would be associated or confused with the 'Hans Solo' Star Wars character.
  - In relation to the Tik Tok video referenced by one complainant, the Company advises it did not supply the product to the creator of the video, and has no relationship with the creator or prior knowledge of the video.

#### **Pre-vetting approval and ABAC precedents**

46. The ABAC Scheme consists of three components, namely the Code itself, the pre-vetting service and the public complaints process. The Company submitted its branding and packaging designs for Hard Solo to pre-vetting and was given approval. Accordingly it is important to explain the relationship between the pre-vetting service and the public complaints process.



47. The purpose of the pre-vetting service is to provide alcohol marketers with copy advice as to proposed marketing communications and the consistency of the proposals with ABAC standards. The seeking of pre-vetting advice represents both best practice and prudent risk management on behalf of an alcohol marketer. Further, pre-vetting approval is required by some media bodies prior to permitting the use of the medium for carrying alcohol advertising i.e. for free to air television and outdoor media such as billboards.
48. Pre-vetting approval however does not protect a marketing communication from being the subject of a public complaint nor does the approval bind the Panel in considering the complaint. By way of an imperfect analogy, pre-vetting is akin to obtaining legal advice as to what the ABAC requires in relation to a marketing communication whereas the Panel decision on a complaint is akin to a Court actually deciding and interpreting the ABAC in relation to the marketing communication.
49. The Code decision makers- the pre-vetters and the Panel members- seek to maintain consistency in how the Code is interpreted and applied. This is a key goal of the Scheme as it is important for marketers to be able to operate with confidence as to what their ABAC marketing obligations are and how to meet them. And statistically there is a very high correlation between the advice given in pre-vetting and the determinations made by the Panel when considering a public complaint about a marketing communication. In fact, over the life of the ABAC Scheme 98% of marketing items approved in pre-vetting and then subject to a subsequent Panel determination have resulted in the complaint about the marketing item being dismissed.
50. That said, on occasions a determination of the Panel will reach a different conclusion about a marketing communication than the advice given at pre-vetting. This can arise if the marketing material calls for an 'on-balance' decision when reasonable minds could disagree as to whether the marketing communication does or does not meet community expectations as embodied in the Code standards.
51. It can also arise in a novel case, where the marketing communication raises issues that have not previously been the subject of a direct Panel decision. In these cases a pre-vetter is obliged to work from Panel precedents that are not precisely on point and hence there is a prospect that the Panel may rule on the new issues in a different way than applied by the pre-vetter.
52. Hard Solo is a 'novel' case in this sense. While a range of decisions have been made on the branding and packaging of RTD's, this is the first occasion that the Panel has been called upon to decide if and how the branding and packaging of a very well established (and to use the words of the Company) 'beloved' soft drink brand can be applied to an alcoholic beverage so that the branding/packaging does not have strong or evident appeal to minors.

53. The Company cited two Panel determinations which it contended provided precedents supporting its arguments that the branding and packaging of Hard Solo was consistent with how the Panel had applied the Part 3 (b) (i) standard - Determination 11/22 Bundaberg Alcoholic Ginger Beer and Determination 24/23 Billson's Vodka Zesty Lemon. While those two decisions outline the relevant Code standard and characteristics to be weighed when assessing if a marketing communication might have strong or evident appeal to minors, neither directly deals with the circumstances of the current case.
54. The Bundaberg Alcoholic Ginger Beer determination concerned a television ad and not product packaging as such. The case involved a brand collaboration between the producer and owner of Bundaberg Rum and the producer of the soft drink Bundaberg Ginger Beer. The alcoholic ginger beer is a product of Bundaberg Rum (not Bundaberg Brewed Drinks, the maker of the ginger beer soft drink). Critically the branding and packaging of the product reflect the well known and core brand elements of the alcohol brand namely:
- the 'Bundy Bear' logo
  - the 'Bundaberg' name in the font and colouring used on products in the alcohol beverage range (not the soft drink)
  - various other cues establishing the product as being an alcoholic beverage
55. In short, the core brand elements of the alcoholic ginger beer (further reinforced by the television ad featuring the bundy bear character) was an adaptation of long established and well recognised branding of Bundaberg Rum products. This is the opposite position to the current case, with Hard Solo utilising core branding elements from the Solo soft drink.
56. The second precedent advanced by the Company concerned a RTD vodka product branded as Billson's Zesty Lemon. The packaging (can design) of the product was one of some 23 separate products from Billson's considered by the Panel in two determinations with the issue being whether the packaging had strong appeal to minors. As noted by the Company, the Panel held that the can design of the Zesty Lemon product did not breach the Code standard.
57. Billson's is craft producer of both soft drinks and more recently RTD's. There are parallels with the current case as Billson's produces a non-alcoholic Zesty Lemon soda and a vodka based RTD also branded as Zesty Lemon. The major distinction between the cases goes to the brand recognition of a product from a small producer like Billson's and the mass market reach and consequent brand awareness of Solo.
58. Unlike Solo, Billson's Zesty Lemon soda has not been a staple for decades in hundreds of Coles and Woolworths supermarkets nor in thousands of fridges in stores, petrol stations or food outlets across Australia. There is no 'Billson's Man'

or a 50 year history of building brand awareness through national multi-media marketing campaigns.

59. While the Panel has not previously considered the branding of and packaging of an alcoholic version of a well-established soft drink brand it has made determinations which deal with issues of relevance to the current case. One decision worth noting is Determination 132 & 137/21- 4 Pines Ben & Jerry's Chocolate Chip Cookie Dough Inspired Nitro Beer
60. This decision concerned a brand collaboration between the craft brewer 4 Pines and the international ice cream producer Ben and Jerry's that saw the brand elements of a popular Ben and Jerry's ice cream employed on the can design of a 4 Pines beer. The Panel found that the packaging would probably be understood by a reasonable person as having strong or evident appeal to minors noting:
- Ben and Jerry's was an ice cream product popular across all age groups;
  - the packaging of the 4 Pines beer has strong similarities with the well-known Ben and Jerry's Chocolate Chip Cookie Dough tub;
  - the association with the popular ice cream brand would be immediately apparent to a reasonable person;
  - while Ben and Jerry's marketing does have a focus towards adult consumers, this did not mean the product is not recognised nor consumed by minors;
  - the reference to Chocolate Chip Cookie Dough inspired flavouring references a relatable and popular flavour that a minor would find appealing;
  - while it is unlikely that the product would be confused with confectionery or soft drink due to a prominent reference to 'beer' on the front of the product, the packaging suggests a smooth transition from a non-alcoholic to an alcoholic beverage;
  - the use of bright and contrasting colours would likely be eye-catching for minors; and
  - taken as a whole, a reasonable person would understand the packaging as likely to appeal strongly to minors.
61. In the 4 Pines decision and consistently with other decisions where alcohol packaging has employed brand elements of well-known non-alcoholic products (e.g. Determination 70/20 Howler Choc Milk Stout) the Panel had regard to available public information about the consumers and marketing focus of Ben and Jerry's. This is to assist establish the context of how a reasonable person would probably understand the packaging.

## **Strong and Evident Appeal to Minors - General Considerations**

62. The complaints enliven the standard contained in Part 3 (b)(i) of the Code. This standard requires that alcohol marketing communications such as brand names and product packaging must not have strong or evident appeal to minors. This standard might be breached if branding and product packaging:
- specifically targets minors;
  - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; and
  - uses imagery, designs, motifs, animations, or cartoon characters that are likely to appeal strongly to minors or create confusion with confectionery or soft drinks.
63. The benchmark applied when assessing if an ABAC standard has been satisfied is the 'reasonable person' test. This means the Panel puts itself in the shoes of a person who has the life experiences, opinions and values commonly held by most Australians, and assesses how this reasonable person would probably understand the marketing communication.
64. The Panel has considered the Part 3 (b) standard on many past occasions. While each marketing communication must always be assessed individually, some characteristics within marketing material which may make it strongly appealing to minors include:
- the use of bright, playful, and contrasting colours;
  - aspirational themes that appeal to minors wishing to feel older or fit into an older group;
  - the illusion of a smooth transition from non-alcoholic to alcoholic beverages;
  - creation of a relatable environment by use of images and surroundings commonly frequented by minors;
  - depiction of activities or products typically undertaken or used by minors;
  - language and methods of expression used more by minors than adults;
  - inclusion of popular personalities of evident appeal to minors at the time of the marketing (personalities popular to the youth of previous generations will generally not have strong current appeal to minors);
  - style of humour relating to the stage of life of a minor (as opposed to humour more probably appealing to adults); and

- use of a music genre and artists featuring in youth culture.
65. It should be noted that only some of these characteristics are likely to be present in a specific marketing communication and the presence of one or even more of the characteristics does not necessarily mean that the marketing item will have strong or evident appeal to minors. It is the overall impact of the marketing communication rather than an individual element that shapes how a reasonable person will understand the item.
66. Product packaging can give rise to strong appeal to minors if it creates confusion with confectionery or a soft drink. Confusion with a soft drink might occur if:
- the packaging fails to clearly identify the product as an alcohol beverage through the use of an alcohol term like beer, ale, vodka, style of wine etc or reliance is made of more subtle alcohol references or terms understood by regular adult drinkers but less likely to be understood by minors eg IPA, NEIPA;
  - the packaging has a visual design that resembles a soft drink such as the display of fruit images, bright block colours and the use of a font style or iconography found typically on soft drinks or fruit juices;
  - the use of terms commonly associated with a soft drink or fruit juice e.g. orange, lemon, blueberry, pop, smash etc; and
  - the type of physical package used and whether this is similar to that used by soft drinks or fruit juices e.g. prima style juice box.
67. When assessing a design of a can or bottle, it cannot be expected that a reasonable person will turn the container around the full 360 degrees and study it in fine detail. Rather it is the front of the can/bottle that will be most influential in how the person will probably understand the packaging and impressions will be most strongly shaped by larger font writing and the predominant colours and design features.
68. As explained earlier, the ABAC does not regulate the physical characteristics of a product such as its alcoholic strength, or its colour or its taste. In making this point, the Panel is not saying that the taste of a product is not an important consideration in the appeal of a product to a consumer. But it will be no defence to a concern about the appeal of product packaging to minors to contend that minors won't like the taste of the product. Equally if a product's packaging can be fairly concluded as not strongly appealing to minors, the product packaging won't be in breach of the Code because the product is contended to have a taste that minors would be drawn to.

## Does the Hard Solo branding and packaging breach the ABAC Standard

69. The Company has explained that its aim in developing Hard Solo has been to leverage the brand equity in Solo and create a light RTD for adults. In doing this the Company has acknowledged the potential for the branding and packaging design to appeal to minors or at least for this concern to be raised. In essence the Company contends the branding and packaging does not strongly appeal to minors because:

- Hard Solo's packaging and can design are clearly distinguishable from Solo and as a result the product will not be confused with the Solo soft drink product
- the packaging design is mature and adult in nature and
- soft drink Solo is predominantly consumed by adults and has been marketed towards adults

70. The Company placed weight on the design of the Hard Solo can and related packaging being clearly distinguishable from Solo and that the packaging design clearly establishes the product as an alcoholic beverage. The can design for Hard Solo and Solo is shown below. Hard Solo uses several core elements from the long established soft drink brand namely:

- the 'Solo' name in the font employed on the soft drink
- the lemon tree image and
- the 'lemon' flavour descriptor



71. The Hard Solo design has clear cues on the front of the can that the product is an alcoholic beverage. These are the term 'alcoholic' qualifying the lemon flavour descriptor, the 18+ stamp and the relatively large font alc/vol % information. The term 'hard' may be understood by some but not all consumers as referring to an alcoholic beverage. 'Hard' is a term used to designate alcohol in the USA and other countries but it has a relatively recent history in Australia.
72. Community research conducted by the ABAC Scheme in 2021 tested if the terms 'hard lemon' and 'hard seltzer' were understood to be referring to an alcohol or non-alcoholic product. Only 32% of people identified 'hard lemon' as meaning an alcoholic beverage whereas 18% thought it was a non-alcoholic drink and 50% were unsure. 'Hard seltzer' had greater recognition as referring to alcohol, with 52% of respondents believing the description was to alcohol, 9% to a soft drink and 39 % unsure.
73. The colour scheme of Hard Solo utilises the inverse of the black and yellow of the Solo soft drink. In other words, the background colour of Hard Solo is black whereas the soft drink has a yellow background. Both products employ yellow on black for the 'Solo' name.
74. The Panel acknowledges that the Company has endeavoured to achieve its intention of leveraging the Solo brand equity on an alcohol beverage in a manner that establishes that the two products are related but separate. It is accepted that the Hard Solo packaging does establish the product is alcoholic and as such a reasonable person looking at the can would most probably understand that they were viewing an alcoholic beverage and not a soft drink.
75. This is supported by 'consumer sentiment' research conducted by the Company which the Company advised showed that 'just 4% of survey participants expressed an unprompted concern that the product could be mistakenly consumed by minors'. The question of whether the branding and packaging of a product has strong or evident appeal to minors is not, however, answered by the product packaging demonstrating the product is alcoholic.
76. The prime objective of the Part 3 (b) (i) standard is not to avoid a minor *mistakenly* drinking an alcohol product. The objective is to avoid marketing in a manner that results in a minor *wanting* to drink the product because the marketing is strongly appealing. And this question is answered from the standpoint of a reasonable person who brings to the assessment the knowledge, opinions, values and life experiences that can be expected to be found in a majority of the Australian community.
77. The Company submits the design and colour palette used on the Hard packaging is sleek and mature and elements on the Solo soft drink can and packaging that might have appeal to minors have been removed from the Hard Solo packaging. Assessing the probable appeal to minors of a colour scheme and design elements is a little challenging. Certainly Hard Solo is not using bright colours generally

considered eye-catching to minors, although the black and yellow combination are contrasting colours.

78. In support of the proposition that Solo soft drink does not strongly appeal to minors, the Company argued that Solo has always skewed towards adults and provided data that indicated that approximately 85% of Solo consumers are adults. It was submitted that the product was especially popular in the 20 to 29 and 30 to 49 age brackets.
79. There is no easily accessible public data on the consumption of Solo specifically by age group, although as noted earlier the product is apparently in 1.7 million homes. More generally the Australian Institute of Health and Welfare (AIHW) produces reports on various aspects of Australian children and youth including nutrition. The nutrition report (last updated on 25/6/21) includes a section on the consumption of sugar sweetened and diet drinks. This report shows that at least once a week:
  - 69% of young people aged 15-24 consumed sugar sweetened drinks or diet drinks
  - 71% of males and 54% of females aged 15 to 18 consumed sugar sweetened drinks
  - soft drinks are the largest category of discretionary foods consumed by persons aged 14 to 18
80. A report from Roy Morgan in 2017 (Young Australians Survey) indicated that children aged 6 to 14 had a higher consumption rate of soft drinks than persons aged over 14. This market research indicated that 57.8% of children aged 6 to 13 had consumed a carbonated soft drink in the previous 7 day period. The figure for persons aged 14 and above was 42.7%.
81. In terms of soft drink products, Coca-Cola Amatil products (Coca-cola, Fanta, Sprite) have the largest market share in Australia at almost 40%. The soft drink products in the Asahi range account for around 16%. Information on flavour preference of soft drinks, particularly by age group was not readily revealed by an internet search. Overall it appears cola is by far the most popular flavour in Australia followed by lemonade/lemon. (Canstar survey 2020)
82. The Company contended that over its history the positioning of Solo soft drink has been skewed towards adults and not minors. Certainly the grounding of the brand via the Solo Man television advertisements could be fairly described as being directed towards adult men and the theme and tone of these ads were akin to beer ads. That said, the peak of this phase of the brand's marketing was in the 1970's and 1980's and will be recalled by an older audience rather than a minor born after 2005.



83. Not surprisingly given a 50 year antecedence, the Solo brand marketing has not always been laser focussed on adults. In 2009 Solo was a sponsor of TV coverage of the A League national football competition. A TV ad aired at this time commences with a group of boys (aged in early teens) playing 'crushed can' street football with a can of Solo. Later scenes show older males playing with the crushed solo can. The ad suggests Solo has been a part of life from childhood to older teenage years and then adulthood as males at different phases of life are shown. Football superstar of the era, Harry Kewell, is shown at the end of the ad.
84. Against this backdrop the Panel is to decide how the Hard Solo branding and packaging would be probably understood by a reasonable person in terms of its likely appeal to minors. If Hard Solo was a new alcohol product with no Solo soft drink parent, then the branding and can design would be unexceptional given the packaging clearly identifies the product as being an alcohol beverage and the design is mature with limited features that would be regarded as strongly appealing to minors.
85. Generally a new alcohol product brand comes with neither the advantages or disadvantages of existing community perceptions about particular brand attributes. Hard Solo however must be assessed with regard to the reasonable person's exposure to the branding and market position of Solo soft drink. To do otherwise would be entirely artificial. The success and market exposure of the soft drink in shaping a reasonable person's understanding must be considered consistently with the Panel's approach in determinations such as:
- Determination 37A/14- Duff Beer Packaging - the impact of the Simpsons TV show.
  - Determination 34/19 - Jedi Juice Packaging - the impact of the Star Wars universe.
  - Determination 70/20 - Howler Choc Milk Stout- brand awareness of Milo.
86. The Panel believes that the branding and packaging does have strong or evident appeal to minors. In reaching this conclusion the Panel noted:
- Solo is a soft drink of long standing that enjoys very high recognition across the community;
  - the recognition of the Solo brand has been built both by the marketing activities of the various owners of the brand over many decades and the exposure of the product as a staple of the soft drink products stocked by supermarkets, convenience stores and other retailers;
  - as a beverage, carbonated soft drinks are consumed across the community including significantly by minors;

- even accepting the consumer data supplied by the Company that Solo consumers are predominantly adults as opposed to minors, Solo is consumed by minors and more generally the brand is well known by minors;
  - the marketing posture of the Solo brand was initially strongly adult male focussed with this moderating in more recent times with consumer data supplied by the Company showing male to female consumers to be relatively even (52% male- 48% female and more females than males consuming Solo no sugar);
  - some marketing of the brand has featured minors such as the 2009 A League TVC;
  - while the packaging design establishes the product as being alcoholic, the design uses Solo brand elements that will be readily recognised by consumers including minors;
  - the recognition and familiarity of the Solo branding on the packaging creates an illusion of a smooth transition from a non-alcoholic to alcoholic beverage for minors; and
  - taken as a whole a reasonable person would probably understand the branding and packaging design would have an evident appeal to minors
87. By way of completeness, one of the complainants expressed concerns about a TikTok post having strong or evident appeal to minors. The post was a review of Hard Solo by popular food and drink vlogger, Russ.Eats.
88. 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.
89. In response to the complaint, the Company advised that:
- It has no agreement with Russ.Eats.
  - Any advertising for Hard Solo has been limited to retailer and venue point-of-sale materials and retailer-led digital advertising. There is no out-of-home, TV, radio or influencer marketing campaign associated with this product.
  - It has not provided Russ.Eats with product for review, nor any other influencers or personalities.
  - The Russ.Eats posts were made without our knowledge.

90. The Code applies to marketing communications in Australia generated by or within the reasonable control of a producer, distributor or retailer of alcohol. Based on the response provided by the Company, the Panel concludes that the Russ.Eats TikTok post was not within its reasonable control and therefore is not a marketing communication for ABAC purposes.

### **Conclusion and Provisional determination**

91. As stated, this has been a novel case in that the use of an iconic soft drink brand as the lead branding element for an alcohol beverage has not previously been considered by the Panel. The release of Hard Solo has generated public interest and concern reflected in the complaints. For these reasons the Panel has endeavoured to explain the context for the decision and how the ABAC requirements sit within the wider regulatory framework applying to alcohol.
92. The Company has responded to the complaints in a detailed manner reflecting the thoughtful way in which it developed the branding and packaging design of Hard Solo. It has clearly been mindful of the potential for the product to raise concerns about its potential appeal to minors and it has attempted to deal with these issues including by constructive engagement with the ABAC pre-vetting service.
93. The Panel has provisionally found that the branding and packaging design does breach the Code standard on strong or evident appeal to minors. In doing this, the Panel is not saying that Hard Solo as a physical beverage offends the ABAC standard. Nor is the Panel finding that Hard Solo is an undesirable liquor product. These are not questions for the ABAC Scheme but rather sit with government within the shared regulatory environment applying to alcohol and alcohol marketing.
94. Under the rules and procedures applying to the ABAC Scheme a decision that a product name and packaging is in breach of a Code standard results in a two-step process. The first step is for the Panel to make a provisional determination detailing the breach. The Company then has an opportunity to seek a rehearing of the determination by making further submissions. After this step, the Panel will make a fresh determination involving all the materials, including any submissions from the Company.
95. Accordingly, the Panel makes a provisional determination that the packaging for Hard Solo is in breach of Part 3(b)(i) of the ABAC Code.

# Annexure C: Company's Rehearing Request – 23 October 2023

(Attachments omitted as include confidential information)

Partner Janet Whiting  
Contact Sarah Martin  
T +61 3 8656 3313  
smartin@gtlaw.com.au  
Our ref JMW: SM:1056278



L 25, 101 Collins Street  
Melbourne VIC 3000 AUS  
GPO Box 90 Melbourne VIC 3001  
T +61 3 8656 3300 F +61 3 8656 3400  
www.gtlaw.com.au

23 October 2023

Jayne Taylor  
Chief Executive Officer  
ABAC Scheme

By email: [complaints@abac.org.au](mailto:complaints@abac.org.au)

Dear Ms Taylor

## ABAC Adjudication Panel Provisional Determination No. 119-122, 125-127, 130, 132 and 136/23: Hard Solo (the Provisional Determination)

We act for Carlton & United Breweries (**CUB**). We have been provided with a copy of your email of 3 October 2023 attaching the Provisional Determination.

For the reasons set out in this communication we submit that the conclusion in the Provisional Determination that the packaging of Hard Solo Alcoholic Lemon (**Hard Solo**) is in breach of Part 3(b)(i) of the ABAC Responsible Alcohol Marketing Code (the **Code**) is incorrect. CUB submits that there is no breach of the Code and indeed the reasoning of the ABAC Pre-vetting Service Final Approval received on 6 April 2023 for the packaging of Hard Solo (the **Pre-vetting Approval**) is sound and should remain.

We respond to the Provisional Determination in detail, as set out below.

### 1 Introduction

CUB is committed to meaningful and constructive dialogue with ABAC to ensure that all CUB products remain in keeping with the Code, and this has been evidenced through CUB's engagement with the pre-vetting and formal adjudication processes, and the periodic Code reviews.

CUB's position is that the packaging for Hard Solo is not in breach of Part 3(b)(i) of the Code. In our view, the Panel has not applied the Code consistently and the conclusion in the Provisional Determination has not been made on a reasoned basis.

In this instance, CUB engaged extensively with ABAC throughout the Pre-vetting Approval process. It has also made detailed submissions in response to the complaints as to why the branding and packaging of Hard Solo is consistent with the Code.

### 2 International markets and our evolving community standards

We refer to the Panel's views expressed in paragraph 25 of the Provisional Determination that "[t]his is an important decision as internationally there have been other examples of alcoholic versions of well-established soft drinks being released and hence the question on how the branding, packaging and marketing of such products sits with the ABAC standards potentially will arise beyond this individual case". It is clear that the Panel has considered some emerging global examples of the sale of products containing alcohol and carbonated soft drinks. With

respect to international contexts, these are relevant as they can also guide an understanding of likely community expectations and standards as they evolve for our own market. Indeed, the ABAC scheme is designed to be consistent with community expectations of alcohol marketing and sets out a framework to provide certainty as to community expectations in relation to the responsible marketing of alcoholic beverages in Australia. However, within this context, ABAC's role is to determine whether a particular advertisement or packaging complies with the Code. Accordingly, the packaging and advertising of Hard Solo needs to be determined in its own right.

Specifically, as to the Panel's comments at paragraph 25 that *"the question on how the branding, packaging and marketing of such products sits with the ABAC standards potentially will arise beyond this individual case"*, we note that, as a result, it is even more important that the Code is properly and consistently applied by the Panel. The Provisional Determination as drafted does not adequately justify the decision reached, with the result that it risks creating inconsistencies and uncertainties for future innovation.

### **3 Context to the development of Hard Solo to ensure no "Strong or Evident Appeal to Minors"**

#### **3.1 Solo is an adult soft drink**

As the Panel is aware, Solo is an iconic lemon soft drink with over 50 years of history. Importantly, since its launch in 1973, the positioning of the product has been towards a distinctly adult demographic as is evidenced by the original 'Solo Man' ads of the 1970s and 1980s (tag line: a man's drink) displaying an Australian man taking part in adventurous and extreme sports to "earn" the drink. Solo Man has always been portrayed as a highly masculine adult man. And while more recent advertisements show a broader range of adult Australians engaged in various adult pursuits, the Solo Man has remained associated with the product and brand and, along with other masculine marketing techniques<sup>1</sup>, has cemented the brand's position in the market as a lemon soft drink that is targeted at adults.

Our consumer data shows that around 85% of Solo consumers are over 18 years old, with most of these consumers in the 20-49 year old category (see **Annex A**). The commercial success of Solo is entirely based on its appeal to and consumption by adults.

#### **3.2 The development of Hard Solo and the target market**

Given the overwhelming adult consumer base for Solo as a product, it was deemed appropriate to develop Hard Solo. Hard Solo as a product is wholly predicated on the fact that Solo is consumed by and marketed to adults, particularly those in the 20-49 year old category. It is against this background that CUB designed the packaging of Hard Solo to target this intended adult market. We have included at **Annex B** a PowerPoint explaining the target market.

In designing the packaging for Hard Solo, CUB sought to ensure the alcoholic and non-alcoholic products are substantially different and easily differentiable, specifically to ensure that Hard Solo did not have a "Strong or Evident Appeal to Minors". This is discussed in further detail below; however, in summary, the only design elements that have been retained from the Solo can are the use of the Solo font for the name "Hard Solo" and the lemon tree device (and further we

---

<sup>1</sup> These include showing men undertaking various extreme activities.

note that the size of the lemon device has been reduced). All other features have been changed.

#### 4 Application of the Code and existing reasoning of ABAC

As is further demonstrated below, the views expressed in the Provisional Determination demonstrate that the Panel does in fact agree that the Hard Solo packaging complies with Part 3(b)(i) of the Code (and that the ultimate conclusion reached, is out of step with these views and therefore incorrect).

We note that there are a significant number of areas where the Panel accepts the position put forward by CUB. In particular, the Panel acknowledges that the Hard Solo packaging clearly indicates that it is an alcoholic beverage. By way of example:

- (i) Paragraph 71 of the Provisional Determination states that “[t]he Hard Solo design has clear cues on the front of the can that the product is an alcoholic beverage”.
- (ii) Paragraph 74 states that “[i]t is accepted that the Hard Solo packaging does establish the product is alcoholic and as such a reasonable person looking at the can would most probably understand that they were viewing an alcoholic beverage and not a soft drink. This is supported by ‘consumer sentiment’ research conducted by the Company which the Company advised showed that ‘just 4% of survey participants expressed an unprompted concern that the product could be mistakenly consumed by minors’.”

The Panel also acknowledges that the Hard Solo packaging does not have a particular attractiveness for minors. For example:

- (i) At paragraph 77, the Panel agrees that “[c]ertainly, Hard Solo is not using bright colours generally considered eye-catching to minors, although the black and yellow combination are contrasting colours”.
- (ii) Similarly, the Panel acknowledges that the packaging is “unexceptional” because it “clearly identifies the product as being an alcohol beverage and the design is mature with limited features that would be regarded as strongly appealing to minors” (paragraph 84).

For completeness (and although, as noted by the Panel, beyond the scope of its remit), we note that the Panel does not take issue with Hard Solo itself as a product. We refer to paragraph 93 which states that “[t]he Panel is not saying that Hard Solo as a physical beverage offends the ABAC standard. Nor is the Panel finding that Hard Solo is an undesirable liquor product.”

During the Pre-vetting Approval process, compliance with Part 3(b)(i) of the Code was specifically addressed. ABAC acknowledged the appropriateness of the Hard Solo during this process.

The Pre-vetter also determined that the Hard Solo packaging: (i) clearly indicates that it is an alcoholic beverage; and (ii) does not have a particular attractiveness for minors.

To assist the Panel, a copy of the Pre-vetting Approval documentation is at **Annex C**. Specifically, the Pre-vetting Approval found that the Hard Solo packaging:



*"differentiates itself significantly enough from the Solo soft drink packaging to avoid confusion with soft drink*

*uses a design that is mature and adult*

*uses clear alcohol cues*

*and while the Solo brand is a key part of the design, the market data [you] provided indicates that the Solo doesn't appear to have strong appeal to minors beyond incidental appeal."*

## 5 Supporting Authorities

When developing the branding and packaging for Hard Solo, CUB carefully considered prior ABAC determinations, particularly ABAC determinations on similar products that used soft drink brands on their packaging on the good faith assumption that the Panel will interpret and apply the Code consistently. As indicated at paragraph 49 of the Provisional Determination *"it is important for marketers to be able to operate with confidence as to what their ABAC marketing obligations are and how to meet them"* and further that *"98% of marketing items approved in pre-vetting and then subject to a subsequent Panel determination have resulted in the complaint about the marketing item being dismissed"*.

CUB's position remains that the precedent set by Determination 11/22 Bundaberg Alcoholic Ginger Beer and Determination 24/23 Billson's Vodka Zesty Lemon (both of which resulted in the complaints being dismissed and a finding of no breach of the Code) should be considered in this context, despite the Panel's attempt to differentiate them on the basis that *"neither directly deals with the circumstances of this current case"* (see paragraph 53). Notwithstanding that the specific circumstances of Hard Solo are not exactly the same as those two products, the principles outlined in these precedents must be applied consistently in order to assess whether or not the requirements of the Code have been met.

The Bundaberg case (11/22) raises many of the same issues relevant to an application of Part 3(b)(i) of the Code and the Panel found that *"any appeal of the ads to minors is incidental and not strong or evident"*. This was on the basis that the ads established that the product was marketed as an alcoholic beverage. As explained above, the Panel agrees that the Hard Solo packaging clearly indicates that it is an alcoholic beverage. Accordingly, there is no reasonable basis on which to distinguish the Bundaberg example as Bundaberg is also a well-established non alcohol brand.

Further, given that this decision highlighted the importance of the alcohol cues in meeting the requirements of the Code, CUB increased the number, placement and visual weight of alcohol cues on the front of its packaging to ensure that these are even more prominent on the Hard Solo product than those considered in the Bundaberg case (where no breach was found). This included the double alcohol indicators in the name, 'Hard Solo – Alcoholic Lemon', and clear identification of the 18+ logo and ABV percentage in a strongly contrasting colour in order to ensure that any appeal to minors would be "incidental and not strong or evident", consistent with the reasoning in the Bundaberg case.

The Billson's Vodka Zesty Lemon case (24/23) (**Vodka Zesty Lemon**) also raises many of the same issues relevant to an application of Part 3(b)(i) of the Code and again, in this case, specifically in relation to Vodka Zesty Lemon, the Panel stated that it did *"not believe*

*the...product packaging would have strong appeal to minors". This was on the basis that "the labelling does use the clear alcohol descriptor of vodka and other alcohol cues and would most likely not be confused with a soft drink".*

The Panel looks to differentiate this case on the basis that Billson's is a "small producer" with less brand recognition or mass market reach and that there is no "Billson's Man". CUB acknowledges that, because of Solo's established position in the market, it should take extra steps to ensure that any appeal to minors would be "incidental and not strong or evident", and as outlined, it took these steps. Respectfully, CUB submits the Code should be consistently applied and the additional brand recognition enjoyed by the Solo brand should not act as a bar to prevent CUB from being part of an increasingly popular market, being lemon flavoured RTD products. Informed by and following the precedent set by the Vodka Zesty Lemon decision, CUB took additional steps to increase the weighting of the alcohol signifiers on the front of the mature, black packaging of Hard Solo to clearly differentiate it from the soft drink and ensure compliance with Part 3(i)(b) of the Code.

The Panel has also referred to Determination 132 & 137/21- 4 Pines Ben & Jerry's Chocolate Chip Cookie Dough Inspired Nitro Beer (**4 Pines**) on the basis that this determination dealt with issues of relevance to Hard Solo. The 4 Pines packaging was found to be in breach of Part 3(i)(b) of the Code; however, CUB submits that the crucial differentiating factor here is "*the use of bright and contrasting colours [which] would likely be eye-catching for minors*" on the packaging that created confusion with confectionary or soft drinks. CUB has taken significant care to ensure its packaging is not "eye-catching for minors". In fact, the Panel has found this to be the case (as demonstrated in Section 4 above).

We also refer to Determination No. 46/20 in which it was found that the packaging for Boston Brewing Co's Peach Lemonade (**Peach Lemonade**) was in breach of Part 3(i)(b) of the Code. In this case, the Panel found that "*the reference to lemonade would be far more associated with a non-alcoholic drink and lemonade is a common and popular drink for minors*", and further that "*the packaging does not overtly identify the product as alcoholic with references to its alcoholic nature found in smaller print and on the back and side of the can, compared to the more prominent references to lemonade on the front of the can*". This is in stark contrast to the Hard Solo packaging, which clearly indicates that the product is alcoholic (as set out in Section 4 above). Further, in this case the Panel indicates that they view lemonade as a "*popular drink for minors*". As explained above, Solo is an adult drink and the Peach Lemonade case should be differentiated on this basis. We would, however, make the point that there are a considerable number of established alcoholic products in the market that use a lemonade (or similar) flavour as part of their marketing which, we submit, have been accepted by the community as not having a strong or evident appeal to minors. This is on the basis that they use clear and prominent alcohol cues and the packaging uses darker and bland colours and/or is otherwise unexceptional. Therefore, despite the Panel indicating that they view lemonade as a "popular drink for minors", appropriate packaging and design has meant that those established alcoholic lemonade products do not have a strong or evident appeal to minors. CUB respectfully submits the same reasoning applies in the case of Hard Solo.

To further illustrate this point, we refer to Determination No 47/22 in which the Panel found that MSC Fruit Tingle Cocktail Boxtails were not in breach of Part 3(i)(b) of the Code (**Fruit Tingle**). In this case the Panel noted that "*care is needed in marketing alcohol products employing a name associated with confectionery as there will be an inherent potential for the marketing material to be relatable to minors. While there is no prohibition on the use of a name such as 'fruit tingle', the context of its use will be vital to ensure that the marketing, as a whole, does not*



*strongly appeal to minors.*" The Panel found that the Fruit Tingle packaging did not have a strong or evident appeal to minors on the basis that "a combination of the cask style packaging type and the clear descriptors 'cocktail on tap' and the reasonably prominent alc/vol information means it is unlikely the product would be confused with a soft drink". Therefore, despite the association of the fruit tingle name with the popular Australian lolly (and therefore inherent potential for the marketing material to be relatable to minors), the packaging and the clear alcohol cues allowed the Panel to find that Fruit Tingle did not hold a strong or evident appeal to minors and was not in breach of Part 3(i)(b) of the Code. It is CUB's position that, even if there is an inherent potential for the Hard Solo packaging to be relatable to minors (although we note all the points we make in Section 3.1 above that that Solo consumers are adults), the context – being the clear alcohol indicators and the black and "unexceptional" Hard Solo packaging – means that the marketing, as a whole, does not have a strong or evident appeal to minors.

Against that background, it remains CUB's firm view that the findings in the Pre-vetting Approval remain the better view and that the packaging of Hard Solo is in fact in compliance with Part 3(i)(b) of the Code. The seemingly "novel" circumstances surrounding the Hard Solo packaging should not mean that the Panel can, without cogent reasoning, deviate from precedent and change its view.

**6 Strong and Evident Appeal to Minors – General Considerations and does the Hard Solo branding and packaging breach the ABAC standard**

It is CUB's position that the conclusion in the Provisional Determination that the packaging of Hard Solo is in breach of Part 3(b)(i) of the Code is improper and unfounded. We set out here the requirements under ABAC Standard 3(b)(i):

*An Alcohol Marketing Communication must NOT:*

- (i) *Have Strong or Evident Appeal to Minors, in particular:*
  - *likely to appeal strongly to Minors;*
  - *specifically targeted at Minors;*
  - *having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;*
  - *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*
  - *using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.*

The Panel has not properly applied the Code and has not explained the basis on for the conclusion reached in paragraph 93 that "The Panel has provisionally found that the branding and packaging design does breach the Code standard on strong or evident appeal to minors". The Panel's assessment is set out in paragraph 86 of the Provisional Determination and references nine statements. These statements are unsupported and do not explain the conclusion.

**7 The conclusions in paragraph 86 are not supported by the evidence**

In our view, the Panel has not applied the provisions of Part 3(b)(i) of the Code and as such has erred in its assessment. We address the nine statements in paragraph 86 of the Provisional Determination below.

***Assertion 1: Solo is a soft drink of long standing that enjoys very high recognition across the community***

- This is correct for the adult community, not the whole community. As explained in paragraph 3.1 above, and as evidenced by the consumption data (see **Annex A**) Solo is an adult drink.

***Assertion 2: The recognition of the Solo brand has been built both by the marketing activities of the various owners of the brand over many decades and the exposure of the product as a staple of the soft drink products stocked by supermarkets, convenience stores and other retailers***

- This proposition is supported by the evidence that Solo is marketed to and consumed by adults (with around 85% of Solo consumers aged 18 years and older) with most of these consumers in the 20-49 year old category. In this context, CUB designed the packaging of Hard Solo to target this intended market, being the 20-49 year old consumers. The commercial success of Solo is completely based on its appeal and consumption by adults. This is acknowledged by the Panel in paragraph 82: "*Certainly the grounding of the brand via the Solo Man television advertisements could be fairly described as being directed towards men and the theme and tone of these ads were akin to beer ads*". Even if Solo is recognised "across the community", adults are the actual demographic for both Solo and Hard Solo and this is evidenced by the consumption data (see **Annex A and B**).

***Assertion 3: as a beverage, carbonated soft drinks are consumed across the community including significantly by minors;***

- This assertion is fundamentally flawed. All carbonated soft drinks cannot be treated the same. The positioning and market will be very different for different categories with certain carbonated soft drinks specifically targeted to (and consumed by) adults. Dry ginger ale is a clear example of this. This is to be contrasted with carbonated soft drinks specifically appealing to and consumed by children – for example raspberry lemonade.
- Further, even if carbonated soft drinks in general may be and are consumed by minors, CUB repeats the points made in Section 3 above that, specifically in relation to Solo, the intended (and actual) demographic is adult and this is integral to its commercial success. Solo is not (and has never been) a soft drink advertised in a way that would appeal to minors and on this basis should be differentiated from other carbonated soft drinks.

***Assertion 4: even accepting the consumer data supplied by the Company that Solo consumers are predominantly adults as opposed to minors, Solo is consumed by minors and more generally the brand is well known by minors;***

- ABAC has no foundation for the assertion that "*Solo is consumed by minors and more generally the brand is well known by minors*". The only evidence put forward by the Panel to support this is one reference to the 2009 A League TVC (referred to below and at paragraph 83 of the Provisional Determination), which is now over 14 years old. That

campaign did not appeal to children but rather to adults and the nostalgia of remembering one's childhood. We note that the ABAC Guidance Notes to the Code (the **Guidance**) states that "unrelatable nostalgia" is a factor which can indicate that a marketing communication is unappealing to minors.

- CUB reiterates that the test to be applied is set out in Part 3(b)(i) of the Code which requires that the Panel assesses (among other factors) if Hard Solo is likely to appeal strongly to minors or have a particular attractiveness for a minor (beyond the general attractiveness it has for an adult). While CUB acknowledges that an application of the Code will involve consideration of the Solo brand, the extent to which "*Solo is consumed by minors and...well known by minors*" is not the test the Panel is adjudicating on and the Panel has not demonstrated how "consumption" or "recognition" of Solo by minors (which in any case it has not evidenced) is relevant to the test required Part 3(b)(i) of the Code.

**Assertion 5: the marketing posture of the Solo brand was initially strongly adult male focussed with this moderating in more recent times with consumer data supplied by the Company showing male to female consumers to be relatively even (52% male- 48% female and more females than males consuming Solo no sugar);**

- CUB submits that the marketing posture of the Solo brand as between males and females is irrelevant to the factors to be considered by the Panel in Part 3(b)(i) of the Code.

**Assertion 6: some marketing of the brand has featured minors such as the 2009 A League TVC**

- The 2009 A League TVC is the only example put forward by ABAC to attempt to evidence that "*the Solo brand marketing has not always been laser focussed on adults*". To render robust determinations the Panel should be focusing on the requirements of Part 3(b)(i) of the Code, and not on anecdotal examples from over 14 years ago. Many advertisements feature minors but are not seeking to appeal to, nor do they appeal to, minors, as is the case with this advertisement, which was aimed at adults (and played on the nostalgia of remembering one's youth via a flashback to the 70's).

**Assertion 7: while the packaging design establishes the product as being alcoholic, the design uses Solo brand elements that will be readily recognised by consumers including minors;**

- The Panel does not provide any evidence for this assertion – nor does it in its conclusion articulate which brand elements that might be "readily recognisable". On the contrary, the Panel clearly acknowledges that the packaging design establishes the product as being alcoholic. We note in particular paragraph 75 of the Provisional Determination where the Panel states that "*a reasonable person looking at the can would most probably understand that they were viewing an alcoholic beverage and not a soft drink*".
- In making these assertions, the Panel has failed to apply Part 3(b)(i) of the Code, which requires an assessment of whether Hard Solo is likely to appeal strongly to minors or have a particular attractiveness for a minor (beyond the general attractiveness it has for an adult) – and not whether the brand elements will "*readily recognisable by consumers – including minors*".

**Assertion 8: the recognition and familiarity of the Solo branding on the packaging creates an illusion of a smooth transition from a non-alcoholic to alcoholic beverage for minors;**

- Firstly, it is important to note that “recognition and familiarity” is not the test the Panel is adjudicating on under Part 3(b)(i) of the Code.
- Second, the packaging of the Hard Solo can is demonstrably different to the Solo packaging in the following ways (and this was accepted in the Pre-vetting Approval). Each of these changes having been made to specifically address the requirements in Part 3(b)(i) of the Code that an alcohol marketing communication must not have “Strong or Evident Appeal to Minors”:
  - The predominant use of primary black and secondary yellow colour palette, which completely differentiates the product from the yellow Solo soft drink can.
  - Reduction in graphic design elements including drop shadow and use of cleaner, sharper fonts.
  - Very prominent use of the clear alcohol signifiers ‘Hard’ and ‘Alcoholic’ in the name of the product and in large, bold lettering throughout the packaging.
  - Removal of the ‘thirst crusher’ tagline and reduction in the size of the lemon device.
  - Inclusion of the 18+ logo, standard drinks and ABV percentage in large and bright font in a place of increased prominence on the front of pack, to clearly demonstrate that the product contains alcohol and is for adults only.
- Third, even if there might be “recognition and familiarity” of the Solo branding on the Hard Solo packaging, the Panel has not articulated what the “illusion” is or how it has been created. In particular, the Panel has not provided any reason for there might be *“the illusion of a smooth transition from a non-alcoholic to alcoholic beverage for minors (emphasis added)”*. In fact, it is CUB’s position that this cannot be the case; as above, Solo is a drink marketed to and consumed by adults.
- We refer to Determination 118/22 in relation to the packaging for certain of Billson’s Beechworth vodka products. In particular, the Panel found that the ‘Toffee Apple’ vodka product was in breach of Part 3(b)(i) of the Code by having strong or evident appeal to minors because the *“name and background images of the toffee apples would contribute to an illusion of a smooth transition to an alcohol product for a minor”*. The Panel came to the same conclusion in respect of the ‘Creamy Soda’ vodka product. In contrast to this, it was found that the packaging of the fruit flavoured vodka cans, including ‘Lime Vodka’, were in compliance with Part 3(b)(i) of the Code on the basis that the overall design of these products were *“mature in nature and not individually eye-catching”* and that *“while the fruit flavour descriptors would be familiar to minors and are also used in the names of confectionery items, non-alcoholic drinks, ice creams and desserts, the packaging design does not make any other specific references to these similarly flavoured items”*. In our view, the reasoning applied to the fruit flavoured vodka cans should be applied to the Hard Solo packaging on the basis that it is also “mature in nature”, being black in colour and (as the Panel has noted) *“unexceptional”*.
- We also refer to the points made in Section 5 above in relation to the Fruit Tingle case, in particular, the fact that the Panel noted that context is *“vital to ensure that the marketing, as a whole, does not strongly appeal to minors”*. It is CUB’s position that, even if there is an inherent potential for the Hard Solo packaging to be relatable to minors (although we note all the points we make in Section 3.1 above that around 85% of Solo consumers are adults), the context – being the clear alcohol indicators and the black and “unexceptional” Hard Solo packaging – means that the marketing, as a whole, does not have a strong or evident appeal to minors.



**Assertion 9: taken as a whole a reasonable person would probably understand the branding and packaging design would have an evident appeal to minors**

- Firstly, Part 3(b)(i) of the Code requires that the marketing communication must not have a “Strong or Evident Appeal to Minors”, and not just an “evident appeal”.
- It is CUB’s position that a reasonable person would not, in fact, understand that the branding and packaging design of Hard Solo would have an evident appeal to minors. This is supported by CUB’s ‘consumer sentiment’ testing which shows that just 4% of survey participants expressed an unprompted concern that the product could be mistakenly consumed by minors, and 85% of consumers clearly understood that the product was alcoholic from its packaging (see **Annex D**). Further, we note that this testing was conducted in 2022, before notable changes were made to the Hard Solo packaging to ensure that it does not appeal to minors. These include the inclusion of the word “Hard”, the prominent “18+ logo”, the removal of the Solo tagline “Thirst Crusher”, the removal of the word, “original” and the removal of the “since 1973” to decouple the product from the Solo product. Therefore, even without these clear alcohol indicators, the consumer sentiment testing concludes that there is very little risk that the product could be mistakenly consumed by minors.
- We further note that the Guidance states that “*it is the level of appeal of the packaging to a minor that is relevant*” when considering to whom the material is likely to be communicated. As acknowledged by the Panel on a number of occasions (see Section 4 above), the Hard Solo packaging is in fact in many respects (not least the black colour) not appealing to minors (i.e. at paragraph 84 the Panel has stated that the “*design is mature with limited features that would be regarded as strongly appealing to minors*”).

**Part 3(b)(i) of the Code**

For completeness, we refer to the requirements under Part 3(b)(i) of the Code set out at above and reassert that the Hard Solo packaging is not in breach of Part 3(b)(i) of the Code. We address each requirement of Part 3(b)(i) of the Code below to demonstrate that the Hard Solo packaging **does not have Strong or Evident Appeal to Minors**.

- It is CUB’s position that it has taken all possible steps to ensure that the Hard Solo packaging **does not appeal strongly to Minors**. To support this, we point to
  - (A) the branding and design changes listed under Assertion 8 above. The only design elements that have been retained from the Solo can are the use of the Solo font for the name “Hard Solo” and the lemon tree device (and further we note that the size of the lemon device has been reduced). All other features have been changed.
  - (B) paragraph 77 of the Provisional Determination, where the Panel agrees that “[c]ertainly, *Hard Solo is not using bright colours generally considered eye-catching to minors, although the black and yellow combination are contrasting colours*”.
  - (C) paragraph 84, where the Panel acknowledges that the packaging is “*unexceptional*” because it “*clearly identifies the product as being an alcohol beverage and the design is mature with limited features that would be regarded as strongly appealing to minors*”.

- The clear identification of Hard Solo as alcoholic (accepted by the Panel in Assertion 7 above) means it is self-evidently **not specifically targeted at minors**. As explained in paragraph 4 above, the Panel acknowledges that the Hard Solo packaging clearly indicates that it is an alcoholic beverage numerous times throughout the Provisional Determination. For example:
  - (A) paragraph 71 of the Provisional Determination states that “[t]he Hard Solo design has clear cues on the front of the can that the product is an alcoholic beverage”.
  - (B) paragraph 74 states that “[i]t is accepted that the Hard Solo packaging does establish the product is alcoholic and as such a reasonable person looking at the can would most probably understand that they were viewing an alcoholic beverage and not a soft drink. This is supported by ‘consumer sentiment’ research conducted by the Company which the Company advised showed that just 4% of survey participants expressed an unprompted concern that the product could be mistakenly consumed by minors’.”
- For all the reasons set out above, **the Panel has not shown that Hard Solo has a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult**. In particular:
  - (C) As explained in paragraph 3 above, Hard Solo has been designed to be attractive to the adult consumer. Consumer data (see **Annex A**) confirms that Hard Solo is in fact attractive to the adult consumer. The Panel has put forward no evidence to support its position that Hard Solo is attractive to minors.
  - (D) Even if Hard Solo was found to be attractive to minors (which in our view it is not), the Panel has not sought to apply this particular test, which is that Hard Solo has a particular attractiveness for a Minor **beyond the general attractiveness it has for an Adult**.
- **Hard Solo does not use imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks.**
  - (A) As explained above, the Tribunal has accepted that the Hard Solo packaging is “unexceptional” and with limited features that would be regarded as strongly appealing to minors” (paragraph 84).
  - (B) We refer to our response under Assertion 8 above, where we list out how the Hard Solo packaging is different from the Solo packaging, showing that that there cannot be confusion.
  - (C) We also refer to the points made under Assertion 8 in relation to certain of Billson’s Beechworth vodka products (No 118/22). As explained, Hard Solo is to be distinguished from the Billson’s Beechworth ‘Creamy Soda’ or ‘Toffee Apple’ vodka products on the basis that it does not create confusion with confectionary or soft drinks. Further, as set out in Section 5 above, Hard Solo is also to be distinguished from Ben & Jerry’s Chocolate Chip Cookie Dough Inspired Nitro Beer (4 Pines). As acknowledged by the Panel, Hard Solo does not use “bright and contrasting colours [which] would likely be eye-catching for minors” – being the basis on which the Panel found there was confusion with confectionary in this case.

- Finally, Hard Solo **does not use brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors**. Hard Solo is an adult drink and the packaging is demonstrably different to the Solo packaging (as clearly set out above). In any event, there is no Hard Solo merchandise, and marketing is limited to point of sale in licensed retail outlets and venues.

## 8 Conclusion

As noted above, the ABAC scheme is designed to be consistent with community expectations in relation to the responsible marketing of alcoholic beverages in Australia. To inform the “*probable understanding of the marketing communication*”, CUB has conducted social media and community interest monitoring to observe public reception to and discussion of Hard Solo since its launch. CUB has observed no media or community interest in (or mention of) Hard Solo, including on social media channels likely to be used by minors (see **Annex E**) since the initial public discourse occurred around the time of its launch. It is CUB’s position that if Hard Solo did have a strong or evident appeal to minors, there would be some evident engagement with the product on social media channels (there is not). During the same period, Hard Solo has established itself as a successful, popular product. These two factors together ((i) the lack of prevalent ongoing critique and commentary and the fact that minors are not talking about the product on social media and, at the same time, (ii) the popularity of the Hard Solo product amongst adults) indicate that the packaging for Hard Solo is in line with community expectations in relation to the responsible marketing of alcoholic beverages in Australia.

CUB’s position is that the packaging for Hard Solo is in compliance with both the spirit and the policy intent of Part 3(i)(b) of the Code. For the reasons set out above, it is CUB’s firm view that the correct application of Part 3(i)(b) of the Code leads to the conclusion that the requirements have been met.

Yours faithfully  
Gilbert + Tobin

A handwritten signature in blue ink, appearing to read 'Janet Whiting', written over a light blue background.

**Janet Whiting**  
Partner  
+61 3 8656 3387  
[jwhiting@gtlaw.com.au](mailto:jwhiting@gtlaw.com.au)