



ABAC Adjudication Panel Determination No 185/23

Product: Hard Solo
Company: Carlton & United Breweries
Media: Instagram
Date of decision: 2 January 2024
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 27 November 2023 in relation to the Solo Soft Drink Instagram page run by Carlton & United Breweries (“the Company”), also the producers of Hard Solo (“the product”).
2. Alcohol marketing in Australia is subject to an amalgam of laws and codes of practice that regulate and guide the content and, to some extent, the placement of marketing. Given the mix of government and industry influences and requirements in place, it is accurate to describe the regime applying to alcohol marketing as quasi-regulation. The most important provisions applying to alcohol marketing are found in:
 - (a) Commonwealth and State laws:
 - Australian Consumer Law – which applies to the marketing of all products or services, and lays down baseline requirements, such as that marketing must not be deceptive or misleading;
 - legislation administered by the Australian Communications and Media Authority – which goes to the endorsement of industry codes that place restrictions on alcohol advertising on free to air television;
 - State liquor licensing laws – which regulate the retail and wholesale sale of alcohol, and contain some provisions dealing with alcohol marketing;

(b) Industry codes of practice:

- AANA Code of Ethics – which provides a generic code of good marketing practice for most products and services, including alcohol;
 - ABAC Responsible Alcohol Marketing Code (“ABAC Code”) – which is an alcohol-specific code of good marketing practice;
 - certain broadcast codes, notably the Commercial Television Industry Code of Practice – which restricts when advertisements for alcohol beverages may be broadcast;
 - Outdoor Media Association Code of Ethics and Policies – which place restrictions on the location of alcohol advertisements on outdoor sites such as billboards.
3. The codes go either to the issue of the placement of alcohol marketing, the content of alcohol marketing or deal with both matters. The ABAC deals with both the placement of marketing i.e. where the marketing was located or the medium by which it was accessed and the content of the marketing irrespective of where the marketing was placed. The ABAC scheme requires alcohol beverage marketers to comply with placement requirements in other codes as well as meet the standards contained in the ABAC.
4. For ease of public access, Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the Ad Standards, a copy of the complaint is supplied to the Chief Adjudicator of the ABAC.
5. The complaint is independently assessed by the Chief Adjudicator and Ad Standards and streamed into the complaint process that matches the nature of the issues raised in the complaint. On some occasions, a single complaint may lead to decisions by both the Ad Standards Community Panel under the AANA Code of Ethics and the ABAC Panel under the ABAC if issues under both Codes are raised.
6. The complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaint was received on 27 November 2023.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of

materials and advice and the availability of Panel members to convene and decide the issue. The complaint was completed in this timeframe.

Pre-vetting Clearance

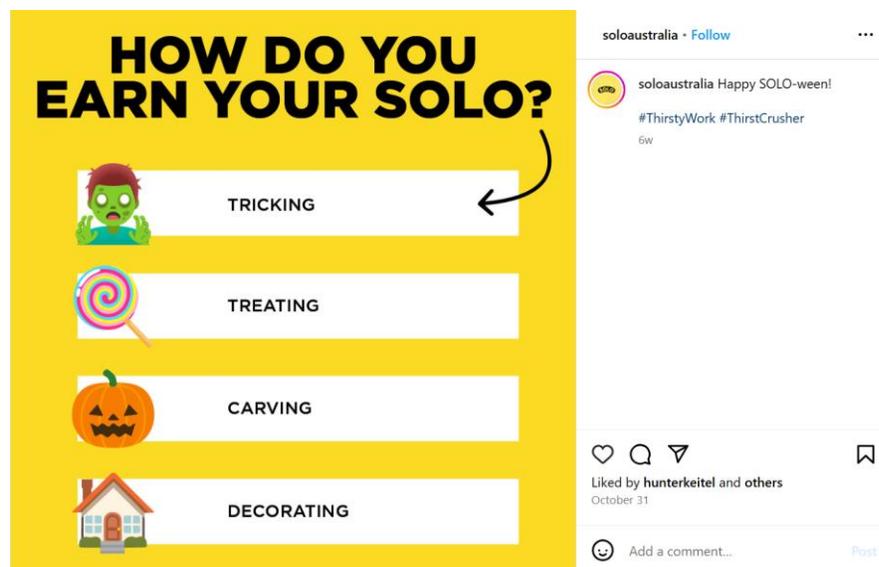
9. The quasi-regulatory system for alcohol beverage marketing features an independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for the content of the marketing.

The Marketing

10. The complaint relates to the Solo Soft Drink Instagram page overall, and specifically to a Halloween post featured on it.

<https://www.instagram.com/soloaustralia/>

[Happy SOLO-ween! #ThirstyWork #ThirstCrusher | Instagram](#)



Complaint

11. The complainant objects to the marketing as follows:
 - *I believe that the current presentation of the Solo Australia Instagram page lacks appropriate age-gating measures, creating a situation where consumers, especially under-age consumers, could easily be confused and misled into thinking that the content is related to the alcoholic version of Solo.*

- *The Solo Australia Instagram page is not adequately separated or age-gated from other Asahi product pages. Unlike other alcoholic beverages, Solo does not have a dedicated Instagram page for its alcoholic version, which increases the risk of under-age consumers stumbling upon content that is not suitable for their age group. This lack of segregation poses a serious concern, particularly considering the appeal of the Solo brand to a younger audience.*

- *One specific issue that caught my attention is the content shared on the Solo Australia Instagram page during Halloween. The posts, particularly those claiming Solo as a "thirst crusher," seem to have a strong appeal to minors. This type of messaging, combined with the absence of clear separation between alcoholic and non-alcoholic products, raises the potential for confusion among consumers, especially those who are underage. Alcoholic beverages should not whether directly or indirectly have a consumer thinking that the alcoholic version is a thirst crusher.*

- *I would like to request that ABAC investigates this matter thoroughly and takes appropriate action to ensure that the Solo Australia Instagram page is compliant with responsible advertising practices. It is crucial to implement age-gating measures, clearly differentiate between alcoholic and non-alcoholic versions of Solo, and refrain from using messaging that may have a strong appeal to minors.*

The ABAC Code

12. Part 3 (b) of the Code provides that a marketing communication must NOT:
- (a) have Strong or Evident Appeal to Minors, in particular;
 - (A) specifically target Minors;
 - (B) have a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
 - (C) use imagery, designs, motifs, language, activities, interactive games, animations or cartoon characters that are likely to appeal strongly to Minors;
 - (D) create confusion with confectionery, soft drinks or other similar products, such that the marketing communication is likely to appeal strongly to Minors; or
 - (E) use brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

13. Part 4 of the Code provides that:

...

- Available Age Restriction Controls must be applied to exclude Minors from viewing an Alcohol Marketing Communication and an Alcohol Alternative Marketing Communication.

...

14. Part 8 of the Code provides that:

Alcohol means a beverage or related consumable product (ice block, vapour etc) containing more than 0.5% alcohol by volume.

Alcohol Alternative means a beverage that is at or less than 0.5% alcohol by volume that:

- has an appearance and style commonly associated with Alcohol; and
- uses a brand or descriptors commonly associated with Alcohol, such as, beer, wine, spirit or other; and
- is not a beverage commonly understood as non-alcoholic, such as fruit juice, soft drink, flavoured milk or other which fall outside the Code remit.

Alcohol Alternative Marketing Communication means a marketing communication for an Alcohol Alternative, in any media, generated by, for, or within the reasonable control of an Alcohol Alternative producer, distributor or retailer, that has a discernible and direct link to Australia, apart from the exceptions listed in Part 2(b).

Alcohol Marketing Communication means a marketing communication for Alcohol, in any media, generated by, for, or within the reasonable control of an Alcohol producer, distributor or retailer, that has a discernible and direct link to Australia, apart from the exceptions listed in Part 2(b).

The Company Response

15. The Company responded to the complaint by letter emailed on 18 December 2023. The principal comments made by the Company were:

- Thank you for your recent correspondence in relation to a complaint with reference number 185/23, and for the opportunity to respond. This

response outlines some background and context, and addresses the questions raised in your letter.

Assertions made by the complainant:

- *“The current presentation of the Solo Australia Instagram page lacks appropriate age-gating measures, creating a situation where consumers, especially underage consumers, could easily be confused and misled into thinking that the content is related to the alcoholic version of Solo. The Solo Australia Instagram page is not adequately separated or age-gated from other Asahi product pages.*

“Unlike other alcoholic beverages, Solo does not have a dedicated Instagram page for its alcoholic version, which increases the risk of under-age consumers stumbling upon content that is not suitable for their age group. This lack of segregation poses a serious concern, particularly considering the appeal of the Solo brand to a younger audience.

“One specific issue that caught my attention is the content shared on the Solo Australia Instagram page during Halloween. The posts, particularly those claiming Solo as a “thirst crusher,” seem to have a strong appeal to minors. This type of messaging, combined with the absence of clear separation between alcoholic and non-alcoholic products, raises the potential for confusion among consumers, especially those who are underage.

“Alcoholic beverages should not whether directly or indirectly have a consumer thinking that the alcoholic version is a thirst crusher.”

- The sole focus of the Solo Australia Instagram page is the promotion of non-alcoholic beverages, making it categorically distinct from alcohol marketing. This distinction is crucial as it firmly establishes content on the page is not an advertisement for an alcohol product. The page avoids any reference to Hard Solo and no reference has been or will be made to Hard Solo in the future. There are no alcoholic products featured or promoted on the Solo Australia Instagram page.
- Additionally, with the phasing out of Hard Solo in accordance with ABAC’s determination, the Solo brand’s connection to alcoholic beverages is severed. In addition to this, at no time did Carlton & United Breweries (CUB) have brand led advertising for Hard Solo. Before turning to the questions raised, it is our strong submission that the complaint should be struck out in its entirety because the complaint relates to marketing and communications that do not meet the definition of an “Alcohol Marketing Communication”.

- For completeness, per the ABAC Code, an “Alcohol Marketing Communication means a marketing communication for Alcohol, in any media, generated by, for, or within the reasonable control of an Alcohol producer, distributor or retailer, that has a discernible and direct link to Australia, apart from the exceptions listed in Part 2(b).”
- Notwithstanding a product called Hard Solo was developed, it is not reasonable to conclude that Solo, which has 50 years of history as a soft drink, is well understood by Australians to be a soft drink, and in the absence of any reference to Hard Solo on Solo’s Instagram (or other social media pages) could constitute a “marketing communication for Alcohol”.

Alcohol Advertising Pre-vetting Service Approval

- The alcohol marketing communication referred to in the complaint did not receive Alcohol Advertising Pre-vetting Service Approval because the Solo Australia Instagram page is solely focused on marketing a non-alcoholic beverage range. There never has been reference to an alcoholic product, nor will there ever be.
- The alcohol advertising pre-vetting service is relevant for marketing communications related to alcoholic beverages, which does not apply in this case.
- Posts made to the Solo soft drink Instagram page cannot be considered alcohol marketing communications within the scope of the code. The content on this page is exclusively for the non-alcoholic range of Solo products and does not fall under the purview of regulations governing alcohol marketing. By avoiding any reference to alcoholic products, particularly Hard Solo, the page ensures there is no confusion or misinterpretation about the nature of the beverages being promoted.

Halloween post

- Referencing Halloween: The post referencing Halloween does not breach Part 3 (b)(i) of the Code as the content is tailored for a general audience, including adults, and is promoting a non-alcoholic beverage.
- Including cartoon pictures: The use of cartoon pictures does not inherently appeal solely to minors, especially when used in the context of marketing a non-alcoholic product. The imagery aligns with the brand's identity and is not specifically targeting children.

Age restriction controls

- There is no Hard Solo social media account because CUB has not ever had brand led marketing of Hard Solo. Solo maintains an Instagram account that exclusively promotes the non-alcoholic beverage range and is separate from any alcoholic beverage marketing.
- The absence of a Hard Solo social media account eliminates the possibility of minors navigating from the Solo soft drink Instagram page to an alcoholic product page. Since the Solo soft drink Instagram account does not feature or promote alcoholic beverages, the requirement for age restriction controls as per Part 4(b) of the code specifically pertaining to alcohol marketing communication is irrelevant in this context.
- As there is no social media account for Hard Solo, the question of age restriction controls for such an account is not applicable.

The Panel's View

Background

16. The Company is within the Asahi global group of beverage producers and is a major Australian provider of alcohol beverages as well as the iconic Solo lemon soft drink. In July 2023 the Company introduced Hard Solo, an alcoholic Ready to Drink (RTD) product onto the market. By its decision dated 8 November 2023, the Panel found that the packaging of Hard Solo breached the ABAC standard that provides alcohol marketing including packaging must not have strong or evident appeal to minors.
17. The Hard Solo determination is detailed and the reasons for the finding of strong or evident appeal to minors will not be repeated here. Of importance however was a number of shared branding features between the long established Solo soft drink packaging and the packaging design adopted for the Hard Solo product. Of note was the use on Hard Solo packaging of the 'Solo' brand name displayed in the same font and yellow on black colour scheme used on the Solo soft drink packaging.
18. The Panel observed in the Hard Solo decision that the Solo soft drink brand was a household staple which had been established through an extensive national multi-media marketing effort over many decades. Further the soft drink marketing had not been subject to the obligations and restrictions contained in the ABAC and other regulatory regimes which apply to the marketing of alcohol beverages. The ubiquitous nature of Solo soft drink meant it was entirely familiar and recognisable to minors and this was an element in the strong appeal of the Hard Solo packaging to minors.

19. The current complaint makes a somewhat similar point although coming from the opposite perspective. Instead of contending Hard Solo has appeal to minors due to its branding association with Solo soft drink, the complainant in essence submits Solo soft drink could be confused with the Hard Solo RTD product. Because of this, the complainant argues the Solo soft drink Instagram account should be age restricted so it's not accessible to under 18 year olds.
20. At one level the complaint will shortly be academic as the Company is in the process of running down the last stocks of Hard Solo packaging and the RTD product under the Hard Solo brand name will be removed entirely from the market. That said, as at the time of the complaint, Hard Solo is still available and under the rules and procedures governing the ABAC Scheme, the Panel is to make a determination of the complaint.

Is the Solo Soft Drink Instagram account marketing captured by the ABAC Scheme?

21. For the Solo soft-drink Instagram account to be captured by the ABAC obligations including those contained in the Placement Standards (which requires the application of available age restriction controls to exclude minors), the Instagram account would need to be considered:
 - An alcohol marketing communication; or
 - An alcohol alternative marketing communication.
22. The Code defines an 'alcohol marketing communication' to mean a marketing communication for alcohol, in any media, generated by, for, or within the reasonable control of an alcohol producer, distributor or retailer. 'Alcohol' means a beverage or related consumable product (ice block, vapour etc) containing more than 0.5% alcohol by volume.
23. Solo soft drink does not contain alcohol and on the face of it, any marketing material produced to promote Solo soft drink would not be usually expected to be an alcohol marketing communication. The Code however adopts an expansive view of what type and style of activity/material can be regarded as marketing alcohol beverages and this includes 'marketing collateral'.
24. 'Marketing collateral' is defined to mean 'material to promote a brand and support the sales and marketing of alcohol or an alcohol alternative, including but not limited, to point of sale marketing, gifts with purchase, competition prizes and branded merchandise'.
25. The Panel does not believe the Solo soft drink Instagram account can be fairly regarded to be an alcohol marketing communication. In reaching this view the Panel noted:

- Solo soft drink has a 50 year history and the extensive marketing campaigns to promote the soft drink over many decades including its social media accounts cannot be reasonably construed as material to support the sales and marketing of an alcohol product;
 - as found in the Hard Solo determination, the packaging of the Hard Solo RTD and the Solo soft drink are sufficiently distinctive so that a reasonable person would not confuse the two products as such; and
 - while the introduction of Hard Solo did attract a short burst of intense media and public attention, it would be a long bow to believe that the profile of the product is such that a reasonable person including a minor seeing the Solo Instagram account would be confused to think the site related to an alcohol product.
26. For completeness the revised ABAC introduced from 1 August 2023 extended the ABAC Scheme to capture alcohol alternative marketing communications. This term is defined to mean a marketing communication for an alcohol alternative - ie a beverage that is at or less than 0.5% alcohol by volume that:
- has an appearance and style commonly associated with alcohol; and
 - uses a brand or descriptors commonly associated with alcohol, such as, beer, wine, spirit or other; and
 - is not a beverage commonly understood as non-alcoholic, such as fruit juice, soft drink, flavoured milk or other which fall outside the Code remit.
27. In short, the Code now captures the marketing of zero alcohol beers and wines etc. Solo soft drink does not contain alcohol, but it is not styled as an alcohol alternative and the product is commonly understood to be a soft drink.
28. Accordingly, the Panel finds that the Solo Instagram account is not within the remit of the ABAC Scheme, and the age restriction controls required under the ABAC have no application to the Solo social media accounts.
29. While the complaint is not well founded in terms of the scope of the ABAC, it does raise an interesting point about an emerging trend of which Hard Solo is an illustration. In the past there were reasonably clear distinctions between alcohol products and their branding on one hand, and non-alcohol products on the other hand. These distinctions are blurring somewhat as brand owners seek to leverage the equity developed in one product category by expansion into another product category. Hard Solo was an example of seeking to leverage an iconic soft drink into an alcohol variant.

30. Equally there are examples of alcohol product brands having non-alcohol beverage products released and some examples of brands known for non-beverage products being applied to new alcohol beverage products. While there is nothing new in brand names applying across sectors-e.g. 'Virgin' extends from music to credit cards to health centres and an airline - such practices can place a strain on regulatory regimes designed with a single product in mind.
31. Over time the ABAC Scheme has endeavoured to adapt to changes in marketing practices and the most recent extension of the ABAC obligations to alcohol alternatives is a good example of this. But it does foreshadow the need for the Scheme to remain highly attuned to developments so its core purpose of furthering good practice in alcohol marketing is able to be achieved.
32. The complaint is dismissed.