



## ABAC Adjudication Panel Final Determination Nos 132 & 137/21

**Product:** Ben & Jerry's Chocolate Chip Cookie Dough Inspired Nitro Beer  
**Company:** 4 Pines Brewing Co  
**Media:** Packaging  
**Date of decision:** 6 September 2021  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Ms Debra Richards  
Professor Louisa Jorm

### Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) concerns the packaging of Ben & Jerry's Chocolate Chip Cookie Dough Inspired Nitro Beer (“the Product”) by 4 Pines Brewing Co (“the Company”). It arises from two complaints received on 20 and 21 May 2021.
2. Alcohol marketing in Australia is subject to an amalgam of laws and codes of practice, that regulate and guide the content and, to some extent, the placement of marketing. Given the mix of government and industry influences and requirements in place, it is accurate to describe the regime applying to alcohol marketing as quasi-regulation. The most important provisions applying to alcohol marketing are found in:
  - (a) Commonwealth and State laws:
    - Australian Consumer Law – which applies to the marketing of all products or services, and lays down baseline requirements, such as that marketing must not be deceptive or misleading;
    - legislation administered by the Australian Communications and Media Authority – which goes to the endorsement of industry codes that place restrictions on alcohol advertising on free to air television;
    - State liquor licensing laws – which regulate retail and wholesale sale of alcohol, and contain some provisions dealing with alcohol marketing;

(b) Industry codes of practice:

- AANA Code of Ethics – which provides a generic code of good marketing practice for most products and services, including alcohol;
  - ABAC Responsible Alcohol Marketing Code (“ABAC 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 meeting 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 complaints raise concerns under the ABAC Code and accordingly are within the Panel’s jurisdiction.

## The Complaint Timeline

7. The complaints were received on 20 and 21 May 2021.
8. Generally, the Panel endeavours to make a decision within 30 business days of the receipt of a complaint but this timeline is not applicable due to the two-part process involved in determinations concerning product names and packaging.

## Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was obtained for the packaging (Approval Number 19226).

## The Marketing

10. This determination relates to the packaging of the Product.



## The Complaint

11. The complainants have the following concerns about the marketing:

### Complainant 1

*The new 4 Pines Ben & Jerry's Nitro Beer uses the very distinct Ben & Jerry's ice-cream branding. I believe the product packaging would have strong appeal*

*to minors, as the Ben & Jerry's branding is highly recognisable, and children would be attracted to a beer that looks just like an ice-cream product and includes the text 'Chocolate Chip Cookie Dough'.*

*The product packaging uses bright colours and cartoon-style imagery that would appeal to children. Of note, the colours of the scenery and the font style are very similar to those that were featured on the packaging of Little Fat Lamb, another product that has been the subject of a complaint to the ABAC Scheme. The ABAC Panel reviewed the Little Fat Lamb packaging in 2015 and found that the colours used for the scenery would be particularly appealing to children, and the font was childish: <http://www.abac.org.au/wp-content/uploads/2015/04/31-15-Final-determination-Little-Fat-Lamb-Cider-22-April-2015.pdf>*

## **Complainant 2**

*This beer is highly likely to appeal to minors. The direct collaboration with an ice cream producer would be recognized by minors as a familiar brand. The style of beer would create a connotation of the beer being an approachable flavour for minors. The beer would provide a entry point for minors by being so child-friendly.*

## **The ABAC Code**

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
  - (b)(i) have Strong or Evident Appeal to Minors.
13. 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 confectionary or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

## The Company's Response

14. The Company responded to the complaint by letter emailed on 2 June 2021. The principal points made by the Company were:

### Alcohol Advertising Pre-vetting Service Approval

- Prevetting approval was granted for the can, wrap and carton by ABAC under application number 679/20 on 19 November 2020, with approval number 19226.

### Responsibility toward Minors

- ABAC asked whether the packaging breaches Part 3 (b)(i) of the Code by having Strong or Evident Appeal to Minors by strongly resembling a container of Ben & Jerry's ice cream, a product commonly consumed by and highly recognisable by Minors.
- This statement contains two assertions, (a) that the can packaging bears a strong resemblance to a container of Ben & Jerry's ice cream, and (b) that Ben & Jerry's ice cream is commonly consumed by and highly recognisable to minors. We reject both these assertions.

### Can resemblance to Ben & Jerry's ice cream container

- During the pre-vetting process, 4 Pines received advice that the can design would need to be clearly distinguishable both from a Ben & Jerry's ice cream container, and as an alcoholic beverage.
- 4 Pines have followed this advice, which is consistent with prior ABAC adjudication decisions. I note that prior upheld ABAC decisions with respect to beers that reference 'milkshake', 'thickshake', 'chocolate', 'toasted coconut' and 'cornflakes' as flavour descriptions have faulted the packaging on the grounds that the overall impression given by the product is not that of an alcoholic beverage. Specifically, I refer to:
  - ABAC Determination 84/20 (Bounty Hunter Toasted Coconut Milk Choc Stout): "the can depicts an action scene which would have appeal across age groups; the colour palette is bright and eye catching; the description 'toasted coconut milk choc stout' particularly 'milk choc' would be far more associated with a non-alcoholic drink than a beer; the term 'stout' would be recognised by beer drinkers and the abbreviation; 'ABV' is used in small font on the front of the can, however the overall impression created by the most impactful features of the can is not of an alcohol beverage".

- ABAC Determination 70/20 (Howler Choc Milk Stout): “the product packaging is clearly modelled on the packaging of the non-alcoholic product of Milo ... the overall impression created by the packaging is not of an alcohol beverage and may create confusion with a soft drink”.
- ABAC Determination 103/19 (Pirate Life Iced Coffee Milkshake): “a milkshake is a drink consumed across age groups but is popular with under 18 year olds and statistical information suggests the consumption of milkshakes by minors occurs more regularly than with adults; that the highlighting of the term milkshake through a different font style compared to the balance of the branding gives emphasis to this feature of the beverage; and taken as a whole it is considered to have evident appeal to minors through a potential confusion with a soft drink”.
- ABAC Determination 75, 80-81/19 (Kelloggs Cornflakes Nitro Milkshake IPA): “It is not reasonable to believe that an average consumer is going to pick up an individual beer can and examine it in fine detail while turning the can around the full 360 degrees. Accordingly, the Panel does not accept that the probable understanding of the packaging will be drawn from the small print mentions of 'beer' and similar alcohol references identified by the Company in its response”.
- In contrast to these upheld complaints, significant care has been taken ensure there is (a) substantial difference between the Ben & Jerry’s ice cream product and the beer, and (b) the product is very clearly identifiable as an alcoholic beverage.
- In the images below, please note the following differences:
  - The 4 Pines Brewing logo is the dominant image, and additionally is significantly larger than the Ben & Jerry’s logo.
  - The largest legible text on the can are the words ‘NITRO BEER’, and the use of drop shadow on this text draws the eye. This is a very clear descriptor; the Panel has previously stated that terms such as ‘stout’ and ‘IPA’ are well-understood by beer drinkers but not necessarily by minors, however the term ‘beer’ is universally understood.
  - The ‘chocolate chip cookie dough’ descriptor is much smaller than the beer descriptor. It is a dark brown that does not stand out in the broader context of the can. The descriptor also contains the word

'inspired' to make extremely clear that the product is not confectionary, and to this end the word 'ice cream' does not appear on the packaging.

- Key aspects of the ice cream packaging have been removed, including the Ben & Jerry's cow, the images of ice cream, and the images of cookie dough.
- The can nods towards the Ben & Jerry's packaging with the use of clouds, grass and blue sky, but these have been redrawn in the 4 Pines illustrative style. Additionally, the can contains images of solar panels, highlights both companies' environmental credentials, and notes that sales of the beer fund community solar projects. These are topics with appeal to adult audiences.



Ben & Jerry's ice cream is commonly consumed by and highly recognisable to minors

- In previous decisions, the Panel has noted that items such as milkshakes, thickshakes, cereals and chocolate are more commonly consumed by children. We do not accept that this is true of Ben & Jerry's ice cream. In support of this, I invite the panel to consider the distinctly adult offerings currently available on the Ben & Jerry's Australian website, including:
  - An ice cream flavour commemorating Tonight Show host Jimmy Fallon
  - An ice cream flavour commemorating Vermont-based rock band Phish (formed in 1983)
  - An ice cream flavoured with bourbon

- An ice cream that is a pun on the common reference to casual sex, 'Netflix & Chill'.



**The Tonight Dough®**

Caramel & Chocolate Ice Creams with Chocolate Cookie Swirls & Gobs of Chocolate Chip Cookie Dough & Peanut Butter Cookie Dough.

Caramel and chocolate ice creams with crunchy chocolate cookie swirls and gobs of chocolate chip cookie dough and peanut butter cookie dough. Its indulgence is simply over the top, but there's more to this story than chunks and swirls. One of our most popular flavors since launching in 2015, The Tonight Dough was created with Jimmy Fallon to celebrate his takeover of The Tonight Show – the longest running talk show in US TV history. As big and bold as Fallon himself, the flavor stands out as



**Phish Food®**

Chocolate Ice Cream with Swirls of Marshmallow and Caramel and Chocolatey Fish Shaped Chunks

We suggested to the band Phish that we celebrate our Vermont roots with a Phish flavour. It's swirled chewy marshmallow and gooey caramel in chocolate ice cream made with pure dairy cream from family farms. We poured a whole school of fish-shaped chocolatey chunks into every carton and named it Phish Food®. We think it rocks! Enjoy!



**Punch Line™**

A Comedic Duo of Brown Butter Bourbon & Almond Ice Creams with Roasted Almonds & Chuckles of Cherries

Netflix takes comedy as seriously as we take making ice cream. But neither of us takes ourselves too seriously, and here's a punchy flavour to prove it! We recommend pairing this lickable libation with any Netflix stand-up special, sitcom, or funny movie. Netflix is a Joke, but this limited-batch flavour isn't!



**Netflix & Chill'd™**

Peanut Butter Non-Dairy Frozen Dessert with Sweet & Salty Pretzel Swirls & Fudge Brownies

There's something for everyone to watch on Netflix & flavors for everyone to enjoy from Ben & Jerry's, so we've teamed up to bring you a chillaxing new creation that's certain to satisfy any sweet or salty snack craving. It's a flavorful world, and everyone is invited to grab a spoon.

- Additionally, Ben & Jerry's has a history of global collaboration with craft alcohol brands, including a 'salted caramel brownie brown ale' with US brewer New Belgium, and an ice cream that includes craft bourbon distillery WhistlePig's product in the ice cream formulation. Previous Ben & Jerry's flavours have also used mainstream bourbon brand Jack Daniels.



- The products above demonstrate, together with Ben & Jerry's broader marketing approach, that Ben & Jerry's is a brand that seeks to appeal predominantly to adults; this interpretation is reinforced by the Ben & Jerry's Australia website. The current landing page of the Ben & Jerry's website is devoted to a campaign in favour of renewables, inviting adults to sign a petition to send a message to their local MP.



- Further, in examining the 'Ice Cream Catering' section of the Ben & Jerry's website, I note that the sample catering occasions detailed by the company are distinctly adult in nature, including:
  - Corporate Celebration
  - Employee Appreciation
  - Office Birthday
  - Tenant Appreciation
  - Retirement Party
  - Weddings
  - Ice Cream Social
  - Ice Cream Truck / Cart Rental.

- Ben & Jerry's parent company Unilever stated in 2020 that it will cease above the line marketing of all products to children under 12.
- Finally, the price point of Ben & Jerry's in Australia also suggests that it is intended for a more adult consumer. Taking the non-special price, Ben & Jerry's is currently the most expensive tub-style ice cream stocked by Woolworths on a per 100 ml basis; over three times the price of the more explicitly Minor-focused Streets brands. I note as well that 'cookie dough' or 'cookies and cream' is a common flavour at the more premium end of the ice cream market, which is indicative of its broad appeal across a range of age groups and implies that the flavour does not have specific attractiveness for minors above and beyond its appeal to a general audience.

<b>Brand</b>	<b>Woolworths \$/100ml</b>	<b>Has a 'Cookie Dough'-style flavour</b>
Ben & Jerry's	\$2.62 (\$1.97 on special)	Y
Häagen-Dazs	\$2.52	
Pana Organic	\$2.32	
FroPro Keto	\$2.11	
Magnum	\$2.05	Y
Halo Top	\$1.90	Y
Reese's	\$1.80	
Tilly's Guilt Free	\$1.68	Y
Nestle Milo	\$1.49	
Connoisseur	\$1.10	Y
Hinterland	\$1.05 (\$0.53 on special)	Y
Skinny Cow	\$0.88	
Woolworths Plantitude	\$0.80	Y
Weis Dairy Free	\$0.80	
Streets (inc. Paddle Pop, Bubble O'Bill)	\$0.80	
Oreo	\$0.75 (\$0.50 on special)	Y
Sara Lee	\$0.70	
Sanitarium So Good	\$0.66	
Cadbury	\$0.50	
Bulla Creamy	\$0.43 (\$0.21 on special)	
Peters	\$0.28	

Streets Blue Ribbon	\$0.25	Y
Peters	\$0.24	
Woolworths	\$0.23	
Bulla	\$0.20	
Woolworths Essentials	\$0.14	

- Further, a small tub of Ben & Jerry's ice cream (458ml) is \$15 on the Ben & Jerry's website. A price point beyond many minors, and further pointing to a premium adult-focused brand.
- ABAC asked whether, notwithstanding the resemblance to Ben & Jerry's ice cream packaging, the packaging breaches Part 3 (b)(i) of the Code by having Strong or Evident Appeal to Minors by using:
  - Bright, contrasting colours which would be eye catching to children;
  - Fonts that would appeal to Minors, as they are playful and/or rounded and easy to read; and
  - The words "Chocolate Chip Cookie Dough", which describe treats consumed by and likely to appeal strongly to Minors.
- As per previous ABAC determinations, I will address these issues together as we are concerned with the overall impression created by the can. For context, I repost the flat art below:



- The can is undeniably bright, but as demonstrated by ABAC Determinations 146/20 (Brookvale Union Boozy Seltzer), 97/20 (Pirate Life Apple & Guava), and 84/19 (Pirate Life Acai & Passionfruit), bright colours cannot be said to constitute a per se appeal to children. Although bright, the colours are used in the context of depicting a sunny field with solar panels, a scene that does not hold appeal to minors. The illustrated solar panels and the white box titled 'good beer that gives back' explain the fact

that 4 Pines, in partnership with Ben & Jerry's and Enova energy, will be donating proceeds from the sale of the beer to fund community solar projects. This solar focus, including the explanatory box and the solar panels, constitutes about half the total can area – clearly indicating the intended adult focus of the product.

- Similarly, with respect to the fonts, although the Ben & Jerry's font is 'playful and easy to read', it is used sparingly in three discrete instances: in the Ben & Jerry's logo and description of the inspirational flavour, which is to be expected given the product is a collaboration, and in the text that reads 'Flip it & pour it hard to activate Nitro' – a serving direction for the beer that would make little sense to a minor, or indeed a non-beer enthusiast. The text is also upside-down, making it quite difficult to read. As I have previously noted, the most prominent textual elements of the can are the 4 Pines Brewing logo and the drop-shadowed text that reads 'NITRO BEER', clearly indicating the product's alcoholic nature.
- The words 'Chocolate Chip Cookie Dough Inspired' describe the flavour profile of the beer, indicating that it has been brewed in a manner that will produce both chocolately and biscuity barley notes, with the addition of lactose (in the form of milk) and using a nitrogenation process (as opposed to carbonation) in order to produce a creamy, rounded mouthfeel. As I have discussed earlier, 'chocolate chip cookie dough' and similar flavours are well represented at the premium, adult-focused end of the market.
- ABAC asked whether the packaging provides the illusion of a smooth transition from non-alcohol to alcohol beverages.
- The product is a beer, inspired by an iconic Ben & Jerry's flavour. There is no suggestion on the can that drinking it is in any way a comparable experience to eating a Ben & Jerry's ice cream. Brewers have been experimenting with creamy, biscuity, and chocolately taste profiles for some time, but the overall impression from both this can, and the liquid itself, is that this product is an alcoholic beverage, specifically a nitro beer.
- I note as well that the product has deliberately only been advertised through 4 Pines' age-gated social media and website platforms. The post was boosted to target audiences with a total reach of 27,567 people – all aged 18-65. The beer is not listed on the Ben & Jerry's website or promoted on Ben & Jerry's social media; the intention is to maintain the clear distinction that this product is definitively a beer, not an ice cream, and to reduce even further the very small risk that minors will mistake it for confectionary.

- ABAC asked whether the packaging overall resembles a product for the consumption of children.
- The determination to be made in this instance is whether the can meets the test of Strong or Evident Appeal to Minors, defined in the ABAC as:
  - (i) likely to appeal strongly to Minors;
  - (ii) specifically targeted at Minors;
  - (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
  - (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; or
  - (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.
- In previous determinations, and specifically in ABAC Determination 84/19 (Pirate Life Acai & Passionfruit), the Panel has very clearly outlined its position with respect to this standard. To quote from this determination, the test is:
  - Would someone under the age of 18 be attracted or drawn to the product packaging through it:
    - Being apparently targeted at minors; or
    - Having a particular attractiveness for a minor beyond its general attractiveness it has for an adult; or
    - Using imagery or designs that are likely to appeal strongly to minors or that create confusion with soft drink.
- I have outlined that the product is not apparently targeted at minors. It is advertised on age-gated platforms to an 18+ audience, sold in small quantities through licensed off-premise venues, and deliberately not advertised on the non-age gated Ben & Jerry's website or social media.
- I have also outlined that the product does not have a particular attractiveness for a minor beyond its general appeal to adults. Ice cream is a product enjoyed by a very wide variety of age groups, and 'chocolate chip cookie dough' is a common, premium flavour that is not specifically marketed towards minors. Further, Ben & Jerry's is best known as a brand

focused on the adult end of the ice cream market, as evidenced by its current and prior product range, including craft and mainstream alcohol collaborations, and its high price point.

- This brings us to the question of whether the 4 Pines beer product uses imagery or designs that create confusion with confectionary or a soft drink. In Determination 84/19 the Panel outlined the following considerations:
  - Considerations as to whether a product packaging could be confused with a soft drink include:
    - Does the packaging clearly identify the product as an alcohol beverage through the use of alcohol descriptions like beer, ale, vodka style of wine etc;
    - The presence of visual design features that would be commonly found on soft drinks such as fruit images, bright block colours and the use of a font style 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.
- We agree there are design features in the form of bright colours on the can that are similar to the Ben & Jerry's ice cream container, but key visual elements have been removed, including the cow, the ice cream representation, the minimisation of the 'Chocolate Chip Cookie Dough Inspired' text through both its small size and brown colour, and the addition of solar panels and a lengthy explanatory box detailing the community solar partnership between 4 Pines, Ben & Jerry's, and Enova. 'Chocolate Chip Cookie Dough' is self-evidently a term associated with confectionary, but we have been careful to note that the product is simply inspired by this iconic flavour.
- Conversely, as I have demonstrated throughout this response, the product is clearly identifiable as a 'NITRO BEER' – this text is large, given additional visual weight by the drop shadow device, and supported by the large and prominent 4 Pines Brewing logo. The physical package is a can

– to the best of my knowledge, an ice cream product has never been sold in can format.

- On this basis, it is my strong belief that an average, reasonable consumer would see this product in the way 4 Pines intends: as a beer, intended for adults, inspired by a classic Ben & Jerry’s flavour in a collaboration that supports a worthy environmental cause.
- 4 Pines is committed to ensuring our products and marketing material do not promote or encourage the irresponsible consumption of alcohol, especially with respect to underage consumption. It is never our intent for our products to appeal to minors. To this end, the 4 Pines marketing team worked very closely with ABAC’s pre-vetter to ensure the product packaging met ABAC standards.
- I note, as the Panel did ABAC Determination 70/20 (Howler Choc Milk Stout) that “while pre-vetting approval does not guarantee that a subsequent public complaint won’t be made or the outcome of the independent complaint process, statistically very few marketing communications which have been pre-vetted against the Code standards are found to be in breach of the Code.” We are cognisant of the fact that alcoholic products that seek to occupy the creamy, biscuity and chocolatey end of the flavour spectrum need to take additional care given the wide variety of confectionary products available both for minors and adults, and we agreed with the Panel’s statement in Determination 70/20 that “it might have been both good practice and prudent risk management to have taken this simple measure [of pre-vetting]”. Having done so, we are confident that this packaging meets both the ABAC standard and community expectations with respect to ensuring it does not appeal to minors.

15. On 11 August 2021 the Company requested a rehearing of the provisional determination asserting:

- We request a rehearing of the determination as we believe the Panel has erred in its assessment that the 4 Pines x Ben & Jerry’s product packaging is in breach of Part 3(b)(i) of the Code. The Panel’s assessment is captured in paragraph 41 of the Provisional Determination and is supported by nine contentions, which we will address individually.

***Assertion 1: Ben & Jerry’s is a premium quality ice-cream product popular across all age groups***

- We do not disagree, although we reassert that the Ben & Jerry’s brand in Australia is an adult-oriented brand. Earlier in the Provisional Determination, the Panel attempts to dismiss the causal aspect of the packaging, stating in

paragraph 22 that “4 Pines contends that the social issues thematic featured in Ben & Jerry's marketing is an example of how the market appeal of the ice cream brand will be adults, but this does not necessarily follow”.

- The Panel gives the example of Greta Thunberg and the ‘School Strikes for Climate’ movement to show that climate change is an also an issue that motivates younger Australians, however this is irrelevant to the specific depiction of solar panels and especially to the details of the community solar projects funded by the product. We do not disagree that climate change is a motivating issue for many Australians of all ages, including minors, but we do contend that the specific, practical initiative detailed on the product packaging is an example that shows it is clearly intended for an adult audience.

***Assertion 2: There are strong similarities between the 4 Pines product packaging and the well-known Ben & Jerry's Chocolate Chip Cookie Dough tub, in particular:***

- ***Very similar green grass, blue sky and white cloud colours and design***
  - ***Identical Ben & Jerry's name and logo on the front and centre of the can***
  - ***The same font and outline bubble for the ‘Chocolate Chip Cookie Dough’ flavour in a brown rather than red font on the front and centre of the can below the ‘Ben & Jerry's’ logo***
- The product draws on both Ben & Jerry's brand elements and 4 Pines brand elements. The green grass, blue sky and white cloud design is the work of the 4 Pines illustrator, and the visual style is similar to other 4 Pines limited release products, for example the four (pre-vetted) Keller Beer styles below:



- The Ben & Jerry's name, logo and similar font and outline bubble for the flavour description are present on the front of the can as would be expected for any product that is the outcome of a brand collaboration. The Ben & Jerry's elements are dwarfed by the 4 Pines logo and the ‘nitro beer’ description.

***Assertion 3: The association with this popular ice-cream brand would be immediately apparent to a reasonable person in the community***

- It also immediately apparent to the reasonable person that the product is a 4 Pines beer.

***Assertion 4: Ice cream is a product consumed across age groups with minors proportionately consuming more ice cream than adults***

- The Panel has noted it is not a research body but asserts that ice cream is more commonly consumed by minors by citing a number of statistics showing that minors derive a greater proportion of their energy intake from ‘frozen milk products’.
- Regardless of whether minors or adults consume more ice cream, there are three tests the Panel needs to apply, as per the definition of Strong or Evident Appeal to Minors in the ABAC:
  - Is this product likely to appeal strongly to Minors?
  - Is it specifically targeted at Minors?
  - Does this product have a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult?
- It is worth noting that the Panel is asking these questions of the 4 Pines x Ben & Jerry’s Nitro Beer product packaging. It is not assessing the general appeal of Ben & Jerry’s ice cream to adults *vis a vis* children.
- We contend that the clear identification of the product as a beer means it is self-evidently not targeted at minors, and nor is it likely to hold strong appeal for minors. We do not believe the product’s association with Ben & Jerry’s or use of Ben & Jerry’s logo devices is enough to give it a particular attractiveness for a minor beyond the attractiveness it has for an adult.

***Assertion 5: While Ben & Jerry’s marketing does have a focus towards adult consumers, this does not mean the product is not recognised nor consumed by minors***

- Again, with respect, ‘recognition or consumption’ of Ben & Jerry’s ice cream by minors is not the test that the Panel is adjudicating on. Recognition or consumption of Ben & Jerry’s ice cream by adults does not overwhelm the clear impression created by the product that it is a beer for adults.

***Assertion 6: The reference to ‘Chocolate Chip Cookie Dough inspired’ flavouring, references a relatable and popular flavour that a minor would find appealing***

- The Panel has provided no evidence for this assertion. Chocolate Chip Cookie Dough may well be appealing to minors but there is no evidence that it has appeal to minors over and above the general appeal it would have for an adult.

***Assertion 7: While it is unlikely that the product would be confused with confectionary 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***

- We thank the panel for their agreement that the product cannot be confused with confectionary, in this case ice cream. We do not think that the assertion of “suggesting a smooth transition from a non-alcoholic to an alcoholic

beverage” is sufficiently articulated. In particular, there is no mechanism suggested for how this might be accomplished, other than a vague assertion that the colours and flavours of the product may be eye catching for or appealing to minors.

- It is worth noting that this is not a cream-based beverage (having personally consumed it I can assure the panel it looks, tastes and pours very much like a regular beer), but cream-based beverages, both alcoholic and non-alcoholic, are commonly consumed by adults, as the enduring appeal of drinks like Baileys or cocktails such as the pina colada shows.
- In paragraph 31 of the Provisional Determination the Panel notes the complainants’ assertion that “the style of beer would create a connotation of the beer being an approachable flavour for minors.” We maintain that the style of the beer, i.e. a nitro beer, is meaningless to minors and has no parallel with any product marketed towards minors. The description ‘chocolate chip cooking dough inspired’ is meant to highlight subtle notes in the overall palate of the beer and should not be read literally. In the same way, a wine would not create “the illusion of a smooth transition from a non-alcoholic to an alcoholic beverage” from a tasting note like “red apple skins, raspberry and spice, Redskin lollies; a generous mouthfeel of plush spice-laden fruit.”<sup>1</sup>

***Assertion 8: The use of bright and contrasting colours would likely be eye-catching for minors***

- The Panel has asserted on numerous occasions that bright and contrasting colours are not a sole point of appeal to minors, specifically in Determination 84/19 [Pirate Life Acai and Passionfruit](#), and recently Determination 95/21 [Vodka Cruiser Spritz](#).
- In ABAC Determination 31/15 concerning [Little Fat Lamb](#), cited by one of the original complainants as a point of comparison although it relates a decision that is over six years old, we note there are several factors that have given rise to the Part 3(b)(i) breach. The brightness of the colours and the farmyard setting of the design are mentioned, and to this is added:
  - The colours used for the lamb
  - The childish fonts that resemble children’s colouring in books
  - The plastic bottle and insufficient alcohol cues creating confusion with a soft drink
- I note that although the 4 Pines x Ben & Jerry’s product packaging is bright, the settings are not similar – the Little Fat Lamb packaging is clearly a farmyard

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<sup>1</sup> Alpha Box & Dice Tarot Grenache 2020

complete with animal, while the 4 Pines product is a grass background with several solar panels.

***Assertion 9: Taken as whole, a reasonable person would understand the packaging as likely to appeal strongly to minors***

- In paragraph 34 the Panel states that there are “some characteristics within marketing material which may make it strongly appealing to minors”. I note as well paragraph 35, which states that the list is not a full criteria, but also that “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.”
- Appreciating that the Panel is guided by overall impressions, I have nevertheless compared the list of factors in paragraph 34 against the packaging:

<b>Characteristics that may connote appeal to minors</b>	<b>4 Pines x Ben &amp; Jerry's product packaging</b>
The use of bright, playful, and contrasting colours	Present
Aspirational themes that appeal to minors wishing to feel older or fit into an older group	Not present
Illusion of a smooth transition from non-alcoholic to alcoholic beverages	Argued by the panel on the basis of a flavour note
Creation of a relatable environment by use of images and surroundings commonly frequented by minors	Not present
Depiction of activities or products typically undertaken or used by minors	Not present
Language and methods of expression used more by minors than adults	Not present
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)	Not present
Style of humour relating to the stage of life of a minor (as opposed to humour more probably appealing to adults)	Not present
Use of a music genre and artists featuring in youth culture	Not present

- We appreciate that Part 3(b)(i) is one of the most subjective sections of the ABAC and as such is one of the most difficult to adjudicate on. We recognise that there will be differences of opinion as to precisely what constitutes appeal to minors, and that everyone is capable of taking a different view of the same piece of work – in this case for example there is an evident disagreement between the prevetter and the ABAC Panel. We believe that in this case 4 Pines has met the standard of Part 3(b)(i), and kindly ask the Panel to reconsider their Provisional Determination in light of our further submission.

## The Panel's View

### Introduction

16. This final determination concerns a branding collaboration between the Sydney based brewer 4 Pines and the international ice cream producer Ben & Jerry's which resulted in elements of the Ben & Jerry's ice cream container design being used in the can labelling design of a 4 Pines beer - 'Ben & Jerry's Chocolate Chip Cookie Dough Inspired Nitro Beer'. The product packaging of the beer has attracted two complaints, both of which argue that the packaging has strong appeal to minors. The Company provided a very detailed argument in rebuttal of the complaints and maintains the packaging does not breach the ABAC standards.
17. The Rules and Procedures applying to the ABAC Scheme permit alcohol marketers an opportunity to seek a re-hearing of a finding that product packaging is in breach of an ABAC standard. This has occurred in this case, with the Company seeking a re-hearing of a provisional determination made on 28 July 2021.
18. A re-hearing of a provisional determination is a fresh consideration of the complaints. The Panel is to consider the materials at hand at the time of the provisional determination as well as the additional submissions made by the Company in response to the provisional determination. The Company's original response to the complaints is detailed at paragraph 14, while its additional submissions in response to the provisional determination are detailed at paragraph 15.
19. Marketing and branding collaborations are common across many goods and services and are frequently used by alcohol marketers. In some instances, the collaboration results in established alcohol beverage branding being used on non-alcohol products e.g., Determination 185/20 where the VB beer logo was placed on Volley sandshoes (this is captured under the ABAC as a 'brand extension' of an alcohol product). In other cases, elements of the non-alcohol product branding are used directly in the marketing of the alcohol product including in the packaging of an alcohol product e.g., Determination 65/19 where the brand name of the snowboard manufacturer Burton was incorporated into the can design of a Pirate Life beer.
20. At the outset it is important to note that the ambit of the ABAC Scheme is good practice standards in alcohol beverage marketing communications. The ABAC has no jurisdiction over the commercial relationships between alcohol producers or retailers and third parties. This means ABAC does not assess if the very concept of a marketing/branding collaboration between an alcohol company and a company in another sector is appropriate or not. Nor does the ABAC purport to regulate physical alcohol beverages i.e. should an alcohol beverage have a particular flavour profile, or be a specific colour etc.

21. In this case, this means the Panel is not assessing if a 'Chocolate Chip Cookie Dough' inspired beer is or is not a socially responsible product. The Panel is not assessing if the taste of the beverage would appeal to consumers of a particular age. The ABAC does not go to the price point of the product and whether a typical young consumer would have the resources to purchase the product. It's not that these questions are irrelevant as to who might be inclined to consume the product, but that within the shared regulatory and policy regime applying to alcohol, these issues fall to other agencies such as Commonwealth and State governments.
22. The Panel under the ABAC has a specific mandate and that is to assess if the packaging (can design) of the product has strong or evident appeal to minors. When the alcohol beverage packaging incorporates branding elements from a recognisable non-alcohol beverage product, then inevitably the Panel's assessment needs to be cognisant of the background of the non-alcohol product and what its market profile might contribute to the overall impression a reasonable person would have of the packaging.

### **Ben & Jerry's**

23. Ben & Jerry's is by any objective measure a highly successful international brand. Commencing from the first 'scoop' store in the US State of Vermont in 1978, the ice cream manufacturer now has a direct presence in 38 countries with its franchise model seeing 590 scoop shops worldwide. The company was started by Ben Cohen and Jerry Greenfield who were early pioneers of corporate activism as an integral part of a company's business model. Ben & Jerry's have over time supported in various ways social and legal reforms including marriage equity, the Black Lives Matter movement, and climate action.
24. In 2000 Ben & Jerry's was acquired by the Anglo-Dutch multinational corporation Unilever. The 'activist' and 'disruptor' characteristic of the Ben & Jerry's brand has continued and within Australia the company has focussed upon climate action. This activist position is more than a philanthropic sideline and features heavily in Ben and Jerry's marketing. For instance, the company's Australian Instagram account carries the descriptor 'Peace, Love and Fairtrade Ice Cream' and contains posts which depict various company Ice Cream flavours with messaging about the company's Fairtrade actions and practices. Other posts call upon followers to send a message to Australian MP's seeking renewable energy and not gas. Some posts are a straight up and down promotion of a Ben & Jerry's Ice Cream flavour, but at least half of the posts are political/social/economic issue messaging.
25. 4 Pines contends that the social issues thematic featured in Ben & Jerry's marketing is an example of how the market appeal of the ice cream brand will be adults, but this does not necessarily follow. For instance, action to respond to climate change which Ben & Jerry's promotes in Australia, is very much an issue in which younger Australians have championed. Following the lead of Greta

Thunberg, tens of thousands of Australian high school students have participated in 'School Strikes for Climate' since 2019.

26. Given the profile of Ben and Jerry's and its brand positioning, there are numerous public articles which provide an analysis of the company's marketing strategies, and the consumers to whom the company is seeking to market its products. The primary consumer focus for Ben & Jerry's is socially aware, middle class and affluent adult consumers. It is priced as a premium product. Publicly available data does not readily identify the Australian target market for the ice cream, however the following sources are informative:
- the largest consumer segment of Ben & Jerry's in the USA is under 24 year olds followed by 25 to 34 year olds (Numerator Brand Snapshot);
  - American consumers of the ice cream brand have higher incomes and hold college and advanced degrees compared to the general population (Numerator Brand Snapshot);
  - a 2019 radio campaign for Ben & Jerry's in Australia over the Nova stations had target demographic groups of 10 to 17, 18 to 24 and 25 to 39 (Commerical Radio Australia - advertising case studies); and
  - information for potential Australian franchisees describes scoop shops as welcoming places for families (Ben & Jerry's website).
27. Ben & Jerry's have a long history of engaging in brand and other collaborations. The first example was in 1987 with 'Cherry Garcia' a flavour referencing the front man of the rock band Grateful Dead- Jerry Garcia. Over the years, flavours and Ben & Jerry's packaging designs have referenced entertainers and media personalities with one range named after Vermont Senator and Presidential Candidate, Bernie Sanders - 'Bernie's Yearnings'. Co-branding has also occurred with the shoe and sportswear manufacturer Nike and the streaming service Netflix.
28. As noted by 4 Pines in its response to the complaints, there has been previous Ben & Jerry's branding collaborations with alcohol companies. In 2015 Ben & Jerry's branding featured on the name and packaging from a Colorado based craft brewer - New Belgium Brewing - on a product 'Salted Caramel Brownie Brown Ale'. The following year the brewer produced a 'Chocolate Chip Cookie Dough Ale'. These beers are no longer produced.

#### **4 Pines and Ben & Jerry's**

29. 4 Pines Brewing was founded in 2008 and is now located at Brookvale on Sydney's north shore. While not enjoying the same longevity or profile, there are some similarities between 4 Pines and Ben & Jerry's. The website of 4 Pines provides the background to the founding of the craft brewery and explains the centrality of

community good to the Company's mission. On occasions the marketing and packaging of 4 Pines products capture this sentiment with use of the strapline- 'good beer that gives back'. Also, like Ben & Jerry's, 4 Pines started as a small independent enterprise but has subsequently been acquired by an international company- firstly AB InBev and it is now owned by Asahi Breweries.

30. The collaboration is also stated to involve a grant program for community groups seeking to move to solar energy. This program is referenced on the product packaging in a panel on the side of the can and the images of solar panels on the front of the can. This program is open for application until October 2021.

### **Consumption of Ice Cream**

31. Ice cream is a popular dessert and snack food which is consumed across age groups. That said, available public information from Australian sources suggests that proportionately, minors consume more ice cream than adults. For instance, Australian Bureau of Statistics (ABS) data:
  - shows that minors in the age groups 4-8 and 9-13 are the most likely age groups to have consumed frozen milk products in a two-week period followed by adults aged above 71 with the next highest cohort being minors aged 14 to 18; and
  - reveals when comparing the food energy sources derived by different age cohorts shows minors aged 2 to 18 gain 2.2% of energy from frozen milk products compared to frozen milk products supplying 1.4% of the energy intake of adults aged over 19.
32. A 2018 report from the Australian Institute of Health and Welfare on 'Nutrition across the life stages' shows that about one-third of Australians energy comes from discretionary food with teenagers 14-18 obtaining their discretionary energy intake from sweet biscuits, cakes and muffins, potato chips, pastries, ice cream and fried potato products. In contrast, ice cream is not identified as a leading discretionary energy contributor for adults (alcohol is for adults).
33. It should be stressed that the Panel is not a research body, and it is not claimed that the information above is a thorough review of the question as to which age groups are most attracted to ice cream as a product. Equally, it is evident that some ice cream products are marketed directly towards children e.g., paddle pop with the well-known Paddle Pop Lion while other ice cream products are directed towards adult consumers.

### **Strong and evident appeal to minors – General considerations**

34. The complaints raise concerns that the product packaging has strong appeal to minors, as:

- the Ben & Jerry's branding is highly recognisable;
  - children would be attracted to a beer that looks just like an ice-cream product and includes the text 'Chocolate Chip Cookie Dough';
  - the product packaging uses bright colours and cartoon-style imagery that would appeal to children; and
  - the style of beer would create a connotation of the beer being an approachable flavour for minors.
35. These concerns bring into play Part 3 (b) (i) of the ABAC which provides that an alcohol marketing communication (which includes product labels and packaging) must not have strong or evident appeal to minors. This standard might be breached if the branding:
- 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; or
  - uses imagery, designs, motifs, animations, or cartoon characters that are likely to appeal strongly to minors or create confusion with confectionery or soft drink.
36. Assessment of the consistency of a marketing communication with an ABAC standard is from the probable understanding of a reasonable person. This means that the life experiences, values, and opinions held by a majority of the community is to be the benchmark. A person who interprets a marketing message in a different way is not 'unreasonable' but possibly their understanding would not be shared by most people.
37. 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;
  - 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.
38. 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 which shapes how a reasonable person will understand the item.
39. Product packaging can give rise to strong appeal to minors if it creates confusion with confectionary 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 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 e.g., 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 like that used by soft drinks or fruit juices e.g., prima style juice box.

### **The Company's Arguments**

40. The Company presents a very detailed argument as to why the branding and packaging of the product does not breach the ABAC standard. It is submitted:

- significant care has been taken in consultation with an ABAC pre-vetter to ensure there is substantial difference between the Ben & Jerry's ice cream product and the beer, and the product is very clearly identifiable as an alcoholic beverage;
  - the 4 Pines Brewing logo is the dominant image, and significantly larger than the Ben & Jerry's logo;
  - the largest legible text on the can are the words 'NITRO BEER', and the use of drop shadow on this text draws the eye;
  - the 'chocolate chip cookie dough' descriptor is much smaller than the beer descriptor and is a dark brown that does not stand out in the broader context of the can (the descriptor also contains the word 'inspired' to make it extremely clear that the product is not confectionary), and the word 'ice cream' does not appear on the packaging;
  - there are design features in the form of bright colours on the can that are similar to the Ben & Jerry's ice cream container, but key visual elements have been removed, including the cow, the ice cream representation, the minimisation of the 'Chocolate Chip Cookie Dough Inspired' text through both its small size and brown colour, and the addition of solar panels and a lengthy explanatory box detailing the community solar partnership between 4 Pines, Ben & Jerry's, and Enova;
  - Ben & Jerry's font is used sparingly;
  - text that reads 'Flip it & pour it hard to activate Nitro' – a serving direction for the beer that would make little sense to a minor, or indeed a non-beer enthusiast, is also upside-down, making it quite difficult to read; and
  - the physical package is a can – and ice cream is not sold in cans.
- The product is not targeted at minors:
  - has deliberately only been advertised through 4 Pines' age-gated social media and website platforms: and
  - is not listed on the Ben & Jerry's website or promoted on Ben & Jerry's social media; the intention is to maintain the clear distinction that this product is definitively a beer, not an ice cream, and to reduce even further the very small risk that minors will mistake it for confectionary.

- The product does not have a particular attractiveness for a minor beyond its general appeal to adults:
  - ice cream is a product enjoyed by a very wide variety of age groups, 'chocolate chip cookie dough' is a common, premium flavour that is not specifically marketed towards minors; and
  - Ben & Jerry's is best known as a brand focused on the adult end of the ice cream market, as evidenced by its current and prior product range, including craft and mainstream alcohol collaborations, and its high price point.

41. Put succinctly, the Company's arguments might be stated as follows:

- the packaging and branding were adjusted with the benefit of pre-vetting advice and clearly establish the product is an alcoholic beverage that would not be confused with a confectionery;
- while there are similarities with the Ben & Jerry's branding, the Nitro beer packaging is quite distinctive and would not appeal to minors;
- to the extent the product does invoke Ben & Jerry's, the adult focus of Ben & Jerry's means that the product packaging is not relatable to minors; and
- careful marketing will restrict minors from engaging with the product.

42. It is acknowledged that the Company utilised the ABAC pre-vetting process, and this represents best practice by the Company. While statistically few marketing items which obtain pre-vetting approval are subsequently found in breach of an ABAC standard, the public complaints process is independent of the pre-vetting process and the Panel makes its own decision on a de novo basis. Invariably some assessments are closely balanced, and the Panel may, and on occasion does, reach a different conclusion from that arrived at during pre-vetting.

43. It can also be recognised that employing marketing channels that limit the potential exposure of minors with the product is good practice and is consistent with the policy intent of the ABAC Placement Rules. This, however, does not mitigate from the requirement that the content of the alcohol marketing communication on its own terms must not have strong or evident appeal to minors.

### **The Provisional Determination**

44. The Panel made a provisional determination that the product packaging does breach the Part 3 (b) (i) standard. In reaching this conclusion the Panel noted:

- Ben & Jerry's is a premium quality ice-cream product popular across all age groups;

- there are strong similarities between the 4 Pines product packaging and the well-known Ben & Jerry's Chocolate Chip Cookie Dough tub, in particular:
  - very similar green grass, blue sky and white cloud colours and design;
  - identical Ben & Jerry's name and logo on the front and centre of the can; and
  - the same font and outline bubble for the 'Chocolate Chip Cookie Dough' flavour in a brown rather than red font on the front and centre of the can below the 'Ben & Jerry's' logo;
- the association with this popular ice-cream brand would be immediately apparent to a reasonable person in the community;
- ice cream is a product consumed across age groups with minors proportionately consuming more ice cream than adults;
- while Ben & Jerry's marketing does have a focus towards adult consumers, this does 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 confectionary 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.

### **Further submissions**

45. The Company has provided further submissions in seeking a rehearing of the provisional determination. In these submissions the Company addresses each of the points noted by the Panel in paragraph 44 and argues that the Panel is mistaken in its conclusions. In summary it is submitted:

- The Panel is mistaken that Ben & Jerry's appeal is such that references to the brand as used on the product packaging would have strong appeal to minors.

- That too much weight was given to the features on the packaging which draw on Ben & Jerry's designs and the consistency of the packaging with styles used by the Company on its range was not acknowledged.
- In any event the Ben & Jerry's references are 'dwarfed' by the 4 Pines logo and nitro beer description, and this makes it immediately apparent the product is a beer.
- The Panel seemed to be assessing the appeal of Ben & Jerry's as a product and not the actual 4 Pines packaging. The product is self-evidently a beer, and this means it will not likely have appeal to minors.
- There is no evidence that 'Chocolate Chip Cookie Dough' would have appeal to minors beyond the general appeal it has for adults. It is a description of a tasting note and more generally cream based beverages- alcoholic and non-alcoholic are commonly consumed by adults.
- Even accepting the bright and contrasting colours employed on the can, this one factor alone would not be sufficient to base a decision of strong appeal to minors. In fact, very few indicators of strong appeal to minors cited by the Panel as a guide are present on the packaging.

46. The Panel has given serious consideration to the further arguments submitted by the Company. It is a fair point that the task at hand is not the assessment of a Ben & Jerry's ice-cream product, but rather the Company beer packaging, and the Panel needs to be careful when making its decision it is not applying the incorrect test. That said, the decision is not being made on the 'beyond reasonable doubt' standard but the standard of the probable understanding of the product packaging of a reasonable person i.e., the balance of probabilities.

47. Ultimately, the Panel must draw its own conclusion and the Panel believes the provisional determination finding of a breach of the Part 3 (b) standard should stand. The Panel believes that the packaging adopts unmistakable characteristics of a Ben & Jerry's ice cream product and then these characteristics invoke an overall understanding of the packaging which a reasonable person would believe is strongly appealing to minors. The points listed in paragraph 44, notwithstanding the rebuttal points submitted by the Company, remain the Panel's view.

48. The complaints are upheld.