



## **ABAC Adjudication Panel Final Determination Nos 161 & 166/23**

**Products:** Tangle Vodka, Twister Vodka, Cake Vodka and Lamington Vodka  
**Company:** Billson's  
**Media:** Product Packaging and Social Media  
**Date of decision:** 28 November 2023  
**Panelists:** Professor The Hon Michael Lavarch (Chief Adjudicator)  
Professor Richard Mattick  
Ms Debra Richards

### **Introduction**

1. This final determination by the ABAC Adjudication Panel (“the Panel”) arises from two complaints received on 4 and 11 October 2023 in relation to Cake Vodka, Lamington Vodka, Tangle Vodka and Twister Vodka (“the products”) by Billson’s Brewery (“the Company”). It follows a provisional determination made on 23 November 2023.
2. Alcohol marketing in Australia is subject to an amalgam of laws and codes of practice that regulate and guide the content and, to some extent, the placement of marketing. Given the mix of government and industry influences and requirements in place, it is accurate to describe the regime applying to alcohol marketing as quasi-regulation. The most important provisions applying to alcohol marketing are found in:
  - Commonwealth and State laws:
    - Australian Consumer Law – which applies to the marketing of all products or services, and lays down baseline requirements, such as that marketing must not be deceptive or misleading;
    - legislation administered by the Australian Communications and Media Authority – which goes to the endorsement of industry codes that place restrictions on alcohol advertising on free to air television;

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

### **The Complaint Timeline**

7. The complaints were received on 4 and 11 October 2023.

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 an independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was obtained for Cake Vodka (Approval Number 5639). Product Certification was obtained for Tangle Vodka (Approval Number 5150). Pre-vetting approval was obtained for Lamington Vodka and Twister Vodka designs however the Company took to market packaging which varied from that given approval.

### The Marketing

10. The complaints relate to the packaging of Tangle, Twister, Cake and Lamington Vodkas, as well as social media posts promoting the products:

### Packaging



**10C REFUND**  
AT COLLECTION DEPOTS/POINTS IN  
PARTICIPATING STATE/TERRITORY  
OF PURCHASE

**BEST BEFORE:**  
SEE BASE OF THE CAN.  
STORE IN A COOL, DRY PLACE.  
BILLSON'S BEVERAGES PTY LTD,  
29 LAST STREET, BEECHWORTH,  
VICTORIA 3747.

BILLSON'S IS A REGISTERED  
TRADEMARK OF BILLSON'S  
BEVERAGES PTY LTD.  
CONSUMER INFORMATION:  
03 5728 1304



Get the facts  
**Drink  
Wise.**  
org.au



*Perfectly Sparkling*  
355ml 3.5% ALC/VOL

**BILLSON'S**  
ESTD. 1865  
*Perfectly Sparkling*  
**MIXED SPIRIT DRINK**

IN 1865, BILLSON'S  
BECAME FAMOUS FOR  
FULL FLAVOURED,  
EXCITING BEVERAGES  
OF ALL DESCRIPTIONS.  
OVER 150 YEARS LATER,  
WE CONTINUE TO  
SOURCE THE FINEST  
LOCAL INGREDIENTS &  
STRIVE EVERY DAY TO  
DELIGHT YOUR TASTEBUDS.

WE STILL BELIEVE OUR  
BEST EVER FLAVOUR  
CREATION IS YET  
TO COME, SO WHILE  
WE'RE WORKING ON IT,  
ENJOY THIS ONE!



**Russ  
Eats**

[www.billsons.com.au](http://www.billsons.com.au)

@Billsons1865

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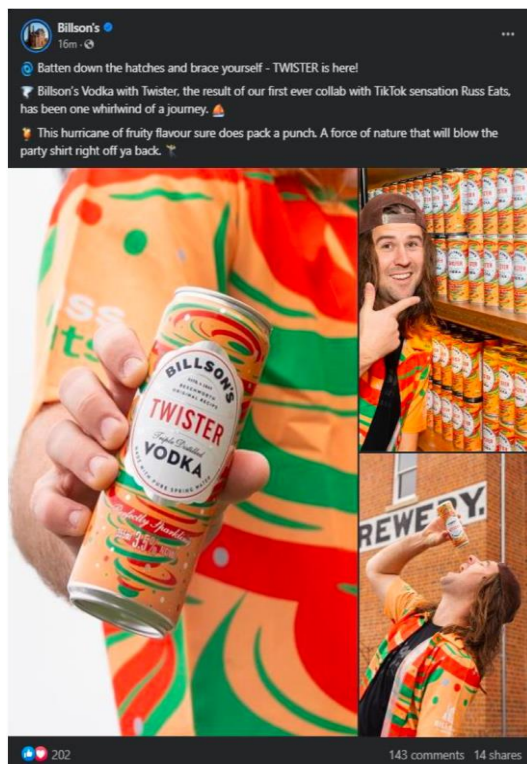
[www.billsons.com.au](http://www.billsons.com.au)

@Billsons1865



### Social Media Post 1 (31 August 2023)

<https://www.facebook.com/Billsons1865/posts/pfbid02JtQKthN7U6LAXJVUNU2rJFvPMPPhYfRoacNWAxRtqRc4tvpM7MwV7uzEBDMYql>



**Social Media Post 2 (29 August 2023)**

<https://www.facebook.com/Billsons1865/posts/pfbid02d7ZE1HZQFDxoyzn7ZdrCHBCZ9e24Gnrnp9FrYi8rbxriWDqNXCgUExdzTqVURXml>

Social Media Post 2 consists of three images:

The image shows a Facebook post from Billson's, dated 2 days ago. The post text reads: "Billson's bake sale now on! 🍰 Our Flavour Cave Crew have been baking up a storm, their creations – Billson's Vodka with Cake and Billson's Vodka with Lamington. 🍰 Now you can have your cake and drink it too. 🍰". Below the text are three images: a large image of two cans of Billson's Triple Distilled Vodka (Lamington and Cake) and two glasses of drinks, and two smaller images showing the cans and glasses in different settings. The engagement metrics at the bottom are 5.1K likes and 8.2K comments and 828 shares.

**Billson's** 2 days ago

🍰 Billson's bake sale now on! 🍰

👤 Our Flavour Cave Crew have been baking up a storm, their creations – Billson's Vodka with Cake and Billson's Vodka with Lamington. 🍰

🍰 Now you can have your cake and drink it too. 🍰

**BILLSON'S**  
ESTD. 1865  
BEECHWORTH  
ORIGINAL RECIPE  
**LAMINGTON**  
Triple Distilled  
**VODKA**  
MADE WITH PURE SPRING WATER  
Perfectly Sparkling  
355ml 3.5% ALC/VOL

**BILLSON'S**  
ESTD. 1865  
BEECHWORTH  
ORIGINAL RECIPE  
**CAKE**  
Triple Distilled  
**VODKA**  
MADE WITH PURE SPRING WATER  
Perfectly Sparkling  
355ml 3.5% ALC/VOL

**BILLSON'S**  
ESTD. 1865  
BEECHWORTH  
ORIGINAL RECIPE  
**LAMINGTON**  
Triple Distilled  
**VODKA**  
MADE WITH PURE SPRING WATER  
Perfectly Sparkling  
355ml 3.5% ALC/VOL

**BILLSON'S**  
ESTD. 1865  
BEECHWORTH  
ORIGINAL RECIPE  
**CAKE**  
Triple Distilled  
**VODKA**  
MADE WITH PURE SPRING WATER  
Perfectly Sparkling  
355ml 3.5% ALC/VOL

👍❤️👎 5.1K

8.2K comments 828 shares

## Complaint

11. The complainants object to the marketing as follows:

Complaint #	Media	Concerns
161/23	Packaging	<ul style="list-style-type: none"> <li>● <i>Two of the products promoted “Vodka with Tangle” and “Vodka with Twister” breach section 3 (b) of the ABAC Responsible Alcohol Marketing Code.</i></li> <li>● <i>Their packages have similar design elements to Billson's products ABAC has previously found breach the code – including names similar to confectionary or dessert/ice blocks and use of bright colours.</i></li> <li>● <i>The products are clearly appealing to children and young people through their colourful design.</i></li> <li>● <i>Tangle is a similar name to popular children’s confectionery “Fruit Tingle” and uses bright colours.</i></li> <li>● <i>Twister shares a name with Paddle Pops dessert/ ice block “Twister” and is also reminiscent of another Paddle Pop product “Cyclone”. It also has colourful packaging. Further, other TikTok advertising demonstrates the similarity with the “Twister” and “Cyclone” Dessert / ice block.</i></li> </ul>
166/23	Packaging and Social Media	<ul style="list-style-type: none"> <li>● <i>The photo used for the Facebook post depicts the new products alongside real versions of the baked goods. This creates a real-life association between the popular baked goods well known to young children and links it to an alcohol product</i></li> <li>● <i>The packaging and the photograph advertisements would both have significant appeal to minors. The naming of the products after popular baked goods 'lamington' and 'cake', the bright and cartoon style packaging as well as the photographs showcasing the baked goods alongside the alcoholic products would have strong appeal to minors.</i></li> <li>● <i>Additionally, Billsons have advertised another new product known as 'Twister'. The advertisement includes popular Tik-Tok star RUSS.EATS to showcase the new product packaging.</i></li> </ul>

Complaint #	Media	Concerns
		<ul style="list-style-type: none"> <li>• <i>The bright colours and naming of the product to be similar to the popular ice-cream 'Twister' will have strong appeal to minors.</i></li> <li>• <i>A colour scheme and design aimed to appeal to children and similar to the colour design of both the packaging and product of the Twister ice block, and an influencer known as RUSS.EATS who does not have age restrictions on his social media accounts. The broad appeal of his accounts will mean that it is likely that many minors will see the product advertised across his social media accounts.</i></li> </ul>

## The ABAC Code

12. A [new ABAC Responsible Alcohol Marketing Code](#) was launched on 1 August 2023. Given the products were launched after 1 August 2023 and the social media posts are dated after 1 August 2023, the complaint will be considered against the revised Code in line with the transitional arrangements set out on our [website](#).
13. Part 3 of the new ABAC Code provides that a Marketing Communication must NOT:
- (b)(i) 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.
14. Part 4 of the new ABAC Code deals with Placement Standards and provide that:

...



- (b) Available Age Restriction Controls must be applied to exclude Minors from viewing an Alcohol Marketing Communication and an Alcohol Alternative Marketing Communication.
- (c) If a digital, television, radio, cinema or broadcast print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, an Alcohol Marketing Communication and an Alcohol Alternative Marketing Communication may only be placed where the audience is reasonably expected to comprise at least (75%) Adults (based on reliable, up-to-date Australian audience composition or social media follower data, if such data is available).

15. Part 8 of the new Code provides that:

**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

16. The Company responded to the complaint by email on 16 October 2023 and 1 November 2023. The principal comments made by the Company were:
- All received pre-vetting approval.
  - We don't believe Twister has a strong appeal to minors. The predominant colour is a muted peach colour. Both Vodka and 3.5% Alc are called out clearly.
  - The 'Twister' ice cream referenced is a UK variety that entered the local market after our launch. This does not share the same predominant colours or flavours.
  - In relation to Cake and Lamington Vodka packaging:
    - Neither of the designs include any bright colours.
    - We believe the main design elements on the pack (white roundel, typography etc) all cue premium & alcohol. We don't believe these colours are bright.
  - In relation to the Facebook post to the Billson's account dated 31 August 2023 (Social Media Post 1):

- We believe the colours, flavours and design are significantly different to Street Twister, which unfortunately entered the Australian market after our launch.
    - The post does feature Russel Stuart (Russ.Eats) and was age restricted on our platforms.
  - In relation to social media posts by Russ.Eats we engaged Russel to develop a new flavour for us as his background is in FMCG research and development. We did not have any control over his social media content.
  - All marketing on Billson's platforms applies age restrictions.
  - In relation to the Facebook post to the Billson's account dated 29 August 2023 (Social Media Post 2):
    - We don't believe the posts breach Part 3 (b)(i) of the Code by having Strong or Evident Appeal to Minors. All packaging colours are muted and premium / adult in nature.
    - We didn't view the straws or the baked goods as appealing to minors, simply supporting usage / taste expectation.
    - We don't believe the copy creates appeal to minors, it was intended to support the flavour profile.
  - Both Cake and Lamington were small batch limited edition releases, and whilst they were both pre-vetted, we don't plan on continuing these flavours.
  - The products entered the market post the 1st of August, however all the packaging was manufactured prior to the 1st of August.
  - Our agreement was for Russel to help develop a new flavour for us given his background in R&D. We didn't have any requirement that he would review it on his social media however given that he previously reviewed many of our products (and many other alcohol products) we assumed it was likely.
  - His age analytics on Instagram show that 3.4% are below the age of 18. TikTok doesn't appear to show analytics for people under the age of 18, so it currently shows as 0% in the analytics, however we suspect in reality it would be closer to Instagram.
17. The Company responded to the provisional determination by email on 27 November 2023. The additional comments made by the Company were:
- We accept the determinations of the panel.

- Lamington was made as a one-off batch. We have no forward production orders and are committed to exhausting the remaining stock (circa 40k units) within the next 3 months.
  - We have removed the Lamington & Cake launch post which is now no longer visible.
18. As the Company has not sought a re-hearing of the provisional determination, under the rules and procedures applying to the Panel the determination now becomes final.

## **The Panel's View**

### **Introduction and framing observations**

19. Billson's are a Victorian based craft beverage producer of both alcohol and non-alcoholic products. This determination arises from two complaints received, which combined, raise concerns about the social media promotion of Billson's Ready to Drink (RTD) vodka products, as well as the packaging of 4 different products (Tangle, Cake, Lamington and Twister Vodkas). In summary, the complainants are concerned that both forms of marketing are targeted towards minors.
20. The packaging of Billson's RTD vodka products has been considered by the Panel in three previous determinations, specifically Determination 118/22, Determination 24/23 and Determination 71/23. In total some 27 packaging designs have been assessed with the Panel finding nine designs in breach of the Code by having strong or evident appeal to minors.
21. The RTD range of the Company adopt flavour profiles which often draw their inspiration from:
- fruits - eg lemon, lime and berries etc
  - soft drinks - eg sarsaparilla, pink lemonade
  - desserts/ice blocks- eg pine lime, banoffee
  - confectionery- eg turkish delight.
22. As noted by the Panel in its previous determinations, the ABAC scheme does not regulate physical alcohol beverages. This means the physical properties of the beverage such as its colour or taste are not within the remit of the Panel. The regulation of this aspect of alcohol rests directly with government.
23. The impact of colour or taste of a product interacts with the ABAC standards in as much as the colour of the product features in the marketing e.g. through the use of a glass bottle or descriptors of taste are included in marketing material. Accordingly it is no defence to use marketing material which strongly appeals to minors to

assert that the physical taste of the product will not appeal to minors. Equally a product which is argued will appeal to minors due to its taste will not be in breach of the ABAC standard if its marketing material is fairly assessed as not having strong appeal to minors.

24. Because of the flavour type of the Company's products and the use of product names or descriptions sometimes associated with non-alcoholic foods or beverages, the question of the appeal of the Company's marketing to minors continues to be raised. When popular non-alcoholic product descriptions are used, then there will often be an elevated potential for the product's marketing including its packaging to have familiarity and relatability to minors. Whether this amounts to 'strong or evident appeal' is always a case by case assessment of the individual marketing material. And sometimes the assessment can be finely balanced and reasonable minds might disagree.
25. Since the first Panel determination concerning Billson's product packaging in February 2023, the Company has engaged with the ABAC pre-vetting service. This service provides advice to alcohol marketers as to whether proposed marketing communications including packaging designs are consistent with Code standards. While the pre-vetting service falls under the umbrella of the ABAC Scheme, it should be noted:
  - the pre-vetting advice service and the public complaints process that triggers the making of a Panel determination are completely separate and independent of each other, and as result;
  - the Panel is not bound by the advice given by the pre-vetting service about a marketing communication, although statistically there is a high correlation between pre-vetting advice and the findings about a marketing communication in subsequent Panel determinations.
26. Critically the pre-vetting advice is about marketing copy provided to the service to be assessed. If a company gets advice on one version of a marketing communication but then uses a different or modified version of the marketing communication, it cannot claim to have pre-vetting approval.
27. The Company in relation to the Twister and Lamington packaging designs stated it had obtained pre-vetting approval. It did obtain approval for two designs but the packaging actually taken to market for both products varies to the material submitted and assessed at pre-vetting. In particular the Lamington product packaging assessed at pre-vetting is notably different from the final design used by the Company in the images of individual lamingtons shown on the can.

#### **'Certification' and the 'Tangle' Packaging**

28. The ABAC Rules and Procedures create a differential process between branding and packaging on one hand and all other forms of alcohol marketing

communications on the other. Specifically, to find a breach concerning brand names and packaging of a product involves a two step process involving firstly a provisional determination followed by an opportunity for a company to seek a re-hearing of the provisional decision. A final determination of a breach only occurs after the re-hearing during which the company can make further submissions in response to the provisional determination.

29. The reason a two stage process is used for brand names and packaging and not other marketing items is because of the very significant consequences of finding a breach of branding and packaging. In essence, to comply with a breach finding in relation to branding and packaging requires a company to remove from the market the product under its current branding/packaging. This often involves a loss of all the value built up in a brand as well as the cost of redesign and recommissioning the physical beverage if the product is to be returned to the market. This has a much greater impact than the removal of a marketing communication such as a social media post or even an expensive item such as a television ad.
30. If a final determination of a breach is made regarding branding/packaging, the ABAC Rules permit the affected alcohol company to seek 'certification' of its new brand name and/or packaging through the ABAC pre-vetting service. This step aims to address the issue leading to the breach and gives the company surety that its certified packaging design will not then be subject to a further adverse Panel determination.
31. The reason for providing this background is that in Determination 118/22 the Panel found the packaging of the 'Fruit Tangle' vodka RTD in breach of the strong appeal to minors standard. The Company accepted the outcome and obtained a certification of the packaging redesign of the product now renamed as 'Tangle' from the pre-vetting service. This means that the complaint about the packaging of the Tangle product cannot now be further considered by the Panel.
32. This does not mean that all marketing featuring the Tangle product is unable to be reviewed by the Panel. It is only the packaging itself which falls within the scope of the certification. So social media posts showing images of the product, or use of the image on say a billboard or references to the product in a radio ad etc are all subject to the ABAC standards and a complaint about these marketing communications will be considered by the Panel and a finding made.

### **The Packaging - General Consideration**

33. The complainants' concerns regarding the packaging raise Part 3 (b) of the ABAC. This standard provides that an alcohol marketing communication must not have strong or evident appeal to minors. The standard might be breached if the marketing:
  - specifically targets minors;

- has a particular attractiveness for a minor beyond the general attractiveness it has for an Adult;
- uses imagery, designs, motifs, language, activities, interactive games, animations or cartoon characters that are likely to appeal strongly to minors; and
- creates confusion with confectionery, soft drinks or other similar products, such that the marketing communication is likely to appeal strongly to minors.

34. 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.

35. 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.

36. 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 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 similar to that used by soft drinks or fruit juices e.g. prima style juice box.
37. 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.
38. It should also 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.

### **The specific packaging**

39. The packaging for each of the three products feature the standard Billson's vodka range white roundel with the following features:
- the specific product name is shown across the middle of the roundel;
  - at the top of the roundel, the Billson's name is shown in relatively large black capital letters. It follows the curvature of the roundel;
  - following are the words "ESTD 1865" (with a small red star in the middle) and "Beechworth Original Recipe", both in smaller black capital letters;
  - beneath the product name the words "Triple Distilled" are shown in relatively small cursive font, followed by the word "Vodka" in relatively large black capital letters;
  - the words "Made with pure Springwater" follow the curvature of the bottom of the roundel, in relatively small black capital letters.

## **Twister Vodka Packaging**

40. For the Twister product, the brand name “Twister” is shown in the middle of the roundel, in relatively large red capital letters. The roundel is shown against a background which is predominantly a peach colour and also features a red and green swirling illustration reminiscent of a tornado. The words “Perfectly Sparkling” are shown beneath the roundel, along with information that the product is 355ml and 3.5% Alc/Vol.
41. Both complaints express concern that the Twister packaging has strong or evident appeal to minors by:
  - sharing a name with the ‘twister’ ice block;
  - being reminiscent of another ice block product called ‘Cyclone’;
  - the colour scheme and design being similar to the colour design of both the packaging and product of the twister ice block; and
  - using a bright colourful design that is appealing to children.
42. In response to the complaint, the Company advised that:
  - we don’t believe Twister has a strong appeal to minors. The predominant colour is a muted peach colour. Both Vodka and 3.5% Alc are called out clearly; and
  - the ‘Twister’ ice cream referenced is a UK variety that entered the local market after our launch. This does not share the same predominant colours or flavours.
43. The flavour for the Twister product flows from a collaboration between the Company and Mr Richard Russell who under the name ‘Russ Eats’ has built a following on social media reviewing junk food and beverages including alcohol. It is evident from videos posted by Russ Eats that the flavour inspiration for the product was the ‘Cyclone’ - an ice block produced by the manufacturer Streets. The Russ Eats connection is acknowledged on the side of the can through inclusion of the logo used by Mr Russell.
44. As mentioned earlier, the Company engaged with the pre-vetting service over the packaging design of the Twister product. The Company did not provide information about the Russ Eats collaboration. Further it did not submit for approval the design inclusive of the Russ Eats logo.
45. The physical Cyclone ice block has a spiral appearance which combines different fruit flavours. The outside packaging of an individual Cyclone ice block is predominantly green with a depiction of the ice block and a spiral pattern. The



packaging of the ice block doesn't mirror the Billson's can design, although the point made in the complaints of the actual ice block and the spiral pattern on the ice block packaging having some similarity to 'swirl' pattern on the can is acknowledged.

46. That said, the dominant branding of the can is the Billson's name, the product name and the swirl pattern on the peach background. The Panel does not believe the Billson's product's brand identity and packaging would be immediately associated with the Cyclone ice block. And in this respect the circumstances are different from Determination 132 & 137/21 dealing with 4 Pines Ben & Jerry's Chocolate Chip Cookie Dough Inspired Nitro Beer or Determination 119 (and others)/23 dealing with Hard Solo. In both those cases the core branding of the alcohol products was self-evidently taken from the very well known non-alcohol brands.
47. Russ Eats has established a strong following on Tik Tok with almost 168,000 followers as at 19 November 2023. While this clearly makes Mr Russell a social media influencer, his profile is not such as to conclude that his involvement with the Company means most or even a significant minority of the community will readily understand the connection between the Twister product and the Cyclone ice block.
48. Further, the term 'twister' is used in a variety of contexts and it would be an extrapolation to believe the reasonable person would automatically associate the twister name with a ice block brand. For instance, a brief internet search suggests the 'twister' name is used in contexts including:
  - a name used particularly in the USA for a tornado;
  - an enduring 1960's party game;
  - a 1996 disaster movie; and
  - a variety of Colgate toothbrush.
49. Quite recently a second ice block called a Twister came onto the Australian market and this was referenced by the complainants. A Twister is similar in appearance to the Cyclone ice block and is apparently popular in the UK. Given its recent addition to the Australian market it is unlikely to have established significant brand recognition at this point.
50. Drawing this together, the Panel does not believe the Twister packaging has strong or evident appeal to minors. In reaching this conclusion the Panel noted:
  - a regular follower of the Russ Eats videos might understand the flavour inspiration for the Twister product is the Cyclone ice block and this antecedence is reinforced by the Russ Eats logo on the can but this understanding is unlikely to be commonly held in the wider community;

- some members of the community including some minors might associate the product with the Cyclone ice block but again this is not likely to be a widely held community understanding given:
  - the Cyclone name is not referenced on the packaging; and
  - the colour scheme used on the can is not that used on the packaging of the Cyclone ice block;
- the can design establishes the product as being a vodka RTD and it is unlikely the product packaging would be confused with a soft drink;
- the twister name is used in various contexts within the community and the swirl pattern on the can would most probably be taken as referencing a tornado;
- taken as a whole, the packaging would have incidental rather than strong appeal to a minor.

### **Cake Vodka Packaging**

51. The Cake Vodka packaging features the white roundel with the word “Cake” in brown font across the centre. The background colour is a lighter tan colour, and what would appear to be chocolate or chocolate icing is shown dripping from the top of the can. The words “Perfectly Sparkling” are shown beneath the roundel, along with information that the product is 355ml and 3.5% Alc/Vol.
52. The complainants are concerned that the naming of the product to resemble flavour profiles of popular baked goods (e.g. cupcakes) will have strong appeal to minors.
53. In response to the complaint the Company advised that:
  - the Cake Vodka packaging design does not include any bright colours; and
  - the main design elements on the pack (white roundel, typography etc) all cue premium and alcohol.
54. The use of the non-alcoholic descriptor of ‘cake’ does elevate the potential appeal of the packaging to minors. Cake is a generic term for a standard baked item and covers a huge variety of different styles and types of individual cakes. Clearly not all cakes are the same in their potential appeal to minors, but as a generic class ‘cakes’ are consumed and have popularity across the community including minors.
55. That said, the lead branding of the packaging is the Company name and the vodka alcohol reference and in this respect the packaging is not akin to the Hard Solo or 4 Pines Ben & Jerry’s cases where the dominant branding was taken from well known non-alcohol brand names. The ‘Cake’ term is a descriptor of the product flavour but is not a brand name of itself.

56. On balance, the Panel believes that the Cake Vodka packaging is consistent with the Part 3 (b) standard. In reaching this conclusion the Panel considered that:
- the overall design of the can uses muted colours that are not strongly eye catching;
  - the colour palette does not use strong contrasts such red and black;
  - the use of the word 'Vodka' provides a strong alcohol cue such that the product would not likely be confused with a soft drink; and
  - taken as a whole the packaging has incidental appeal rather than strong or evident appeal to minors.

### **Lamington Vodka Packaging**

57. The Lamington Vodka packaging features the white roundel with the word "Lamington" in brown font across the centre. The background colour is a dark brown/black colour, and features illustrations of lamingtons, some of which have had a bite taken out of them to reveal a bright red filling. The lamingtons are depicted with white coconut flecks that provide a contrast to their dark colour. The words "Perfectly Sparkling" are shown beneath the roundel, along with information that the product is 355ml and 3.5% Alc/Vol.
58. The second complainant is concerned that the design of the packaging features cartoon style images of lamingtons, which are a popular baked good, as well as bright colours, which are likely to have strong appeal to minors and young children.
59. In response to the complaint, the Company advised that:
- the Lamington Vodka design does not include any bright colours; and
  - the main design elements on the pack (white roundel, typography etc) all cue premium and alcohol. We don't believe these colours are bright.
60. Like the Cake Vodka product, the use of the lamington name together with the images does elevate the potential appeal of the product packaging to minors. Unlike the generic 'cake' reference, lamingtons are a specific type of baked item and one that holds an iconic status within the Australian community. It is likely that lamingtons are well recognised across age groups including minors.
61. Like the other packaging examples considered in this determination, the lead branding element of the packaging is the Company name and vodka alcohol descriptor. This can be contrasted to the Hard Solo and 4 Pines Ben & Jerry's decisions where the lead branding of the packaging was well established brand name non-alcohol products.

62. On balance, the Panel believes that the packaging does breach the Part 3 (b)(i) standard. In reaching this conclusion the Panel noted:

- the most visually prominent feature of the packaging is the lamington depictions with the lamingtons shown with contrasting white coconut flecks and some with a distinctive red filling;
- lamingtons are highly recognisable across the community including with minors;
- the can design establishes the product as being a vodka RTD and it is unlikely the product would be confused with a soft drink;
- the lamington depictions including the use of contrasting colours would probably be understood as creating a familiar and relatable image; and
- taken as a whole, the reasonable person would conclude that the packaging has tipped over into strong or evident appeal to minors.

### **Social Media Posts**

63. The second complainant has pointed to two different social media posts made to Billson's Facebook page, as well as made a general observation about the placement of Billson's advertising on Russ.Eats social media accounts. The complainant contends:

- Social Media Post 1:
  - includes packaging, colour schemes and designs reminiscent of a popular children's ice-block known as 'Street's Twister' that would appeal to children; and
  - prominently includes the popular influencer, RUSS.EATS whose social media accounts are not age restricted and are seen by minors.
- Social Media Post 2:
  - depicts the Lamington and Cake Vodkas alongside real versions of the baked goods;
  - the products have cartoon style packaging and are named after baked goods, cake and lamington, that are popular with minors.
  - the placement of the products with real versions of lamingtons and cakes creates a real-life association between the popular baked goods well known to young children and links it to an alcohol product.

- Russ.Eats Social Media:
  - Russ.Eats does not have age restrictions on his social media accounts; and
  - the broad appeal of his accounts will mean that it is likely that many minors will see the product advertised across his social media accounts.

64. The Code requires that the content of an alcohol ad not be strongly appealing to minors (content standard), and that marketing be directed towards adults and to the extent possible away from minors (placement standards).


### **Content Standard - Social Media Post 1**


65. Social Media Post 1 consists of three photos, all of which feature Russ Eats wearing a shirt with the Twister Vodka packaging design on it:

- Photo 1 shows Russ Eats holding a can of Twister Vodka towards the camera. We can see only his arm, hand and a section of his torso.
- Photo 2 shows Russ Eats standing alongside fully stocked shelves of Twister Vodka. He is wearing his cap backwards and pointing at the product.
- Photo 3 shows Russ Eats standing outside the Billson's Brewery building, again wearing a backwards facing cap. He has his head tilted upwards and is holding a can of Vodka Twister above, as if he is drinking the last remaining drops of product.

66. The text accompanying the post reads:

 Batten down the hatches and brace yourself - TWISTER is here! 🥳

 Billson's Vodka with Twister, the result of our first ever collab with TikTok sensation Russ Eats, has been one whirlwind of a journey. 🚤

 This hurricane of fruity flavour sure does pack a punch. A force of nature that will blow the party shirt right off ya back. 🧑🏻







67. The complainant's concerns raise the question as to whether the Billson's Facebook post has strong or evident appeal to minors by including packaging, colour schemes and designs that have strong or evident appeal to minors, and also by featuring a popular personality of evident appeal to minors at the time of the marketing (being Russ Eats).

68. These concerns raise Part 3 (b)(i) of the Code. The application of this Code standard has been explained in paragraphs 31 to 33 above.

69. As noted, Russ Eats has a substantial following on social media particularly Tik Tok. Mr Russell adopts an Aussie larrikin persona for his videos as he reviews fast food and confectionery amongst other products. Some but by no means all of his reviews are of alcohol products including several releases in the Billson's range.
70. In response to the complaint, the Company advised that:
- Russ Eats' age analytics on Instagram show that 3.4% are below the age of 18.
  - TikTok doesn't appear to show analytics for people under the age of 18, so it currently shows as 0% in the analytics, however we suspect in reality it would be closer to Instagram.
71. The Panel does not believe the content of Post 1 breaches the Code standard. It shows Mr Russell with the Twister vodka product and there is nothing particular about the images or the accompanying text that would appeal strongly to minors.

### **Content Standard- Social Media Post 2**

72. Social Media Post 2 includes three images:
- Photo 1 is a picture of two cans, one of Lamington Vodka and the other of Cake Vodka, surrounded by glasses with black striped drinking straws, a cupcake with chocolate icing and coloured sprinkles and lamingtons.
  - Photo 2 is of a can of Cake Vodka, with a cupcake sitting on top. A number of cupcakes are shown surrounding the can, some with white icing and the others with chocolate icing. Both have coloured sprinkles. Berries are also shown, and in the background would appear to be lamingtons, as well as a larger cake decorated similarly to the Cake Vodka packaging. There is a full Billson's Beechworth glass standing next to the can, containing two black striped straws.
  - Photo 3 is of a can of Lamington Vodka. There is a full Billson's Beechworth glass standing next to the can, containing two black striped straws. Lamingtons are also positioned near the can.
73. The text accompanying the social media post reads as follows:

 Billson's bake sale now on!   
 Our Flavour Cave Crew have been baking up a storm, their creations – Billson's Vodka with Cake and Billson's Vodka with Lamington.   
 Now you can have your cake and drink it too. 

74. The complainant is concerned that the photo used for the Facebook post depicts the Lamington and Cake Vodka products alongside real versions of the baked goods. This creates a real-life association between the popular baked goods well known to young children and links them to an alcohol product.
75. In response to the complaint, the Company advised that:
- we don't believe the posts breach Part 3 (b)(i) of the Code by having strong or evident appeal to minors;
  - all packaging colours are muted and premium/adult in nature;
  - we didn't view the straws or the baked goods as appealing to minors, simply supporting usage/taste expectation; and
  - we don't believe the copy creates appeal to minors, it was intended to support the flavour profile.
76. The Panel believes that Social media Post 2 does breach the Part 3 (b)(i) standard. In reaching this conclusion the Panel noted the content of the post:
- directly links the alcohol beverages to products familiar to and appealing to minors;
  - showcases iced speckled cupcakes, lamingtons and a beverage in a glass with striped straws which are products and imagery well-known, familiar to and appealing to minors; and
  - includes emojis of a birthday cake and a slice of cake in the accompanying text, which would increase the appeal to minors.

### **Placement - Russ.Eats Social Media Posts**

77. The second complaint has raised a concern that the Russ.Eats social media accounts do not utilise age restriction controls. This concern potentially raises the Placement Standards in Part 4 of the Code, depending on whether the posts made by Russ.Eats in relation to Billson's products can be regarded as marketing communications that have been generated by or within the reasonable control of the Company.
78. In response to the complaint, the Company advised that:
- our agreement was for Russell to help develop a new flavour for us given his background in R&D;
  - we didn't have any requirement that he would review it on his social media however given that he previously reviewed many of our products (and many other alcohol products) we assumed it was likely; and

- we did not have any control over his social media content.
79. While the Russ Eats social media accounts and individual posts do contain videos reviewing various alcohol products, this of itself does not bring the account or the posts within the scope of the ABAC standards. Each day there are many thousands of references to alcohol products on social media accounts made by private individuals. Such accounts and posts are not 'alcohol marketing communications' within the reach of the ABAC Scheme.
80. What brings posts within the domain of the ABAC obligations is a relationship between the apparently private social media account holder and an alcohol industry company that means the alcohol company's actions caused the post to be made or gives the company a reasonable control over the post.
81. In the current circumstances it is clear the Company had a relationship (presumably commercial) with Mr Russell that had him collaborate in the development of the flavour of the Twister product. Given that Mr Russell is a social media personality and influencer it is clear that he would relate the nature of the collaboration and post about it.
82. All of the posts from Russ Eats related to the collaboration including the 'review' of the product have been generated by the Company and fall within the scope of the ABAC obligations. It is immaterial that the Company had no direct editorial control over the content of the posts. The Twister posts came about because of the relationship between the Company and Russ Eats.
83. As a consequence the Company has a responsibility to have the Russ Eats posts about the Twister product directed towards adults and away from minors by meeting the requirements of the ABAC Placement standards. The relevant standards require:
- that available age restriction controls be utilised to exclude minors - Standard 4 (b); and
  - if there are no available age restriction controls, then the marketing communication may only be placed where the audience is expected to be at least 75% adult - Standard 4 (c).
84. The Russ Eats Twister posts were accessible over the platforms of TikTok, Instagram and Facebook. Both Instagram and Facebook have age restriction controls that enable individual posts to be age restricted even if the entire account is not age restricted. The failure to apply this restriction to the Russ Eats Twister posts is a breach of Placement Standard 4 (b).
85. Tik Tok does not have age restriction controls. This means Placement Standard 4 (c) is applicable. The Company advised the analytic data from Tik Tok indicates that Russ Eats posts are served predominantly to adults.



86. It is difficult to independently assess the audience of posts on TikTok. The platform employs an elaborate algorithm to determine the posts served to its account holders which combine a range of factors. In simple terms users are served posts that they are likely to engage with based on their preferences for content over time. Further while TikTok was originally a platform with a high proportion of minors as users the platform has been 'aging up' as its initial followers have themselves aged and the appeal and range of content on the platform expanded.
87. The analytic data advice from the Company suggests the TikTok audience of the Twister posts is most likely to be in excess of 75% adults and the Panel cannot find a breach of the standard on the available information.

### **Conclusion**

88. As the Company has not requested a re-hearing, the Panel makes a final determination that the packaging for Lamington Vodka product is in breach of Part 3 (b)(i) of the ABAC Code.
89. The Panel dismisses the complaints regarding the Twister and Cake Vodka products and it is noted the Tangle Vodka product packaging has received certification and cannot be further reviewed by the Panel as a result.
90. In relation to the social media posts the Panel finds:
  - the complaint on the content of Social Media Post 1 is dismissed;
  - the complaint on the content of Social Media Post 2 is upheld; and
  - the complaint on the placement of the Twister posts by Russ Eats on Facebook and Instagram is upheld and is dismissed in relation to TikTok.