



Case Report

1	Case Number	0281/11
2	Advertiser	Nestle Australia Ltd
3	Product	Food and Beverages
4	Type of Advertisement / media	Internet
5	Date of Determination	27/07/2011
6	DETERMINATION	Dismissed

ISSUES RAISED

2.8 - Food and Beverage Code	undermines healthy lifestyle
2.8 - Food and Beverage Code	untruthful/dishonest

DESCRIPTION OF THE ADVERTISEMENT

The MILKYBAR website at www.milkybar.com.au relates to a Competition to find a person to feature in Nestle Australia Ltd's new MILKYBAR television commercial as the Australian MILKYBAR KID. The Competition was open to persons who were residents of Australia and were a parent or guardian of a child aged between 7 and 10 years old.

THE COMPLAINT

A sample of comments which the complainant/s made regarding this advertisement included the following:

We believe the Milky Bar website breaches clause 2.2 and 2.1 of the AANA Food & Beverages Advertising & Marketing Communications Code (Food Code). We also ask the ASB to consider whether the website is contrary to the Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry (RCMI).

Food Code

Breach of clause 2.2:

Clause 2.2 of the Food Code states:

Advertising or Marketing Communications for Food or Beverage Products shall not undermine the importance of healthy or active lifestyles nor the promotion of healthy balanced diets or encourage what would reasonably be considered as excess consumption through the representation of product/s or portion sizes disproportionate to the setting/s portrayed or by means otherwise regarded as contrary to Prevailing Community Standards.

We believe the website is an Advertising or Marketing Communication to Children and undermines the importance of healthy lifestyles and the promotion of healthy balanced diets as it promotes Milky Bars to children.

Clause 1.1 of the Food Code defines “Advertising or Marketing Communications to Children” as:

(a) matter which is published or broadcast using any Medium in all of Australia or in a substantial section of Australia for payment or other valuable consideration and which draws the attention of the public or a segment of it to a product service person organisation or line of conduct in a manner calculated to promote or oppose directly or indirectly the product service person organisation or line of conduct; or

(b) any activity which is undertaken by or on behalf of an advertiser or marketer for payment or other valuable consideration and which draws the attention of the public or a segment of it to a product service person organisation or line of conduct in a manner calculated to promote or oppose directly or indirectly the product service person organisation or line of conduct

but does not include Excluded Advertising or Marketing Communications.

The Advertising Standards Board has previously determined that the AANA Food Code applies to company-owned websites because they fall within this definition of Advertising and Marketing Communications (McDonald’s Australia Ltd (Shrek – internet) case number 256/07 14 August 2007). The Board noted in its determination that a McDonald’s website was ‘considered to be within the definition of advertising and/or marketing communications within the scope of the Food Code as it is material that is published that the company has incurred cost in publishing the material and that it is material that draws the attention of the public or a segment of it to a particular product in a manner calculated to promote that product.’

It follows from the Board’s previous determination that the Milky Bar website is an Advertising and Marketing Communication within the meaning of the Food Code.

The website features fun themes activities and the Milky Bar Kid competition aimed at promoting Milky Bars to children. Only children aged between 7 and 10 were eligible to enter the Milky Bar Kid competition via this website. At a time when nearly one quarter of Australian children are overweight or obese we believe it is irresponsible of Nestle to promote Milky Bars to children and undermine healthy food messages that they may be receiving from their family school and/or community.

Breach of clause 2.1 of the Food Code:

Clause 2.1 of the Food Code states:

Advertising or Marketing Communications for Food or Beverage Products shall be truthful and honest shall not be or be designed to be misleading or deceptive or otherwise contravene Prevailing Community Standards and shall be communicated in a manner appropriate to the level of understanding of the target audience of the Advertising or Marketing Communication with an accurate presentation of all information including any references to nutritional values or health benefits.

We believe that the website contravenes Prevailing Community Standards about unhealthy food advertising to children via the internet. In a 2010 national survey by Cancer Council Victoria just under 9 in every 10 consumers surveyed responded that the government should regulate the featuring of unhealthy food products in games and competitions on websites aimed at kids with 42% in favour of stopping it completely.

For all of the above reasons we ask that the ASB request Nestle to withdraw the Milky Bar website.

Responsible Children’s Marketing Initiative

Nestle is a signatory to the Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry (RCMI)

We understand that the RCMI applies only to advertising to children under 12 in media and our understanding is that company owned websites are not currently included in the definition of media under the RCMI. If this is the case we ask the ASB to urge the AFGC to extend the RCMI to company owned websites.

Given the RCMI is aimed at reducing unhealthy food advertising directed primarily to children we believe that it is inappropriate for signatories to host websites such as these which are clearly directed to children and aimed at encouraging them to consume unhealthy foods. If the website is not covered by the RCMI we would ask that the ASB nevertheless encourage Nestle to cease promoting Milky Bars directly to children and to withdraw the Milky Bar website.

THE ADVERTISER'S RESPONSE

Comments which the advertiser made in response to the complainant/s regarding this advertisement include the following:

I thank you for the opportunity to comment on the issues raised in the Complaint.

Background

The Competition ran from 29 May 2011 to 30 June 2011 and related to the search for a person to feature in the new MILKYBAR television commercial as the Australian MILKYBAR KID. The Competition was open to persons who were residents of Australia and were a parent or guardian of a child aged between 7 and 10 years old. The Website went live on 29 May 2011. Although the Competition has closed, Nestlé intends to keep the Website live for another couple of weeks to enable participants to find out who the winner is.

Complaint

The Complainant alleges that the Website breaches sections 2.2 and 2.1 of the Food Code. The Complainant further requests that the Board press for extension of the Australian Food and Grocery Council's Responsible Children's Marketing Initiative (RCMI) to the Website, although no breach of the RCMI is alleged.

Submission

In making its submission, Nestlé has considered the AANA Advertiser Code of Ethics, the AANA Code for Advertising and Marketing Communications to Children and the AANA Food and Beverages Marketing and Communications Code (Food Code) (Codes). Nestlé submits the Website, and in particular, the Competition, is not directed at children and further submits that they both comply in all respects with the letter and spirit of these Codes.

1. Breach of Section 2.2 of the Food Code

The Complainant alleges that the Website breaches Section 2.2 of the Food Code because:

- (i) it is an Advertising or Marketing Communication to Children;*
- (ii) it undermines the importance of healthy lifestyles and the promotion of healthy balanced diets, as it promotes MILKYBARs to children; and*
- (iii) only children aged between 7 and 10 were eligible to enter the MILKYBAR KID competition.*

The definition of “Advertising or Marketing Communications to Children” in the Food Code is:

“Advertising or Marketing Communications to Children means Advertising or Marketing Communication which, having regard to the theme, visuals and language used, are directed primarily to Children and are for a Children’s Food or Beverage Product.”

In its Practice Note to the Food Code, the Board states that, in considering whether an advertising or marketing communication is directed towards children, the Board will consider the advertiser’s stated intent but will also make an evaluation based on its own review of the material and the product being promoted.

Whilst Nestlé agrees that MILKYBAR is a product that has an appeal to children, it does not agree that the Website constitutes “Advertising to Children”. The audience intended for the Website by Nestlé is adults, evidenced by the fact that both the Competition and Website were promoted in media which was directly targeted at adults. I summarise below the manner in which the Website and Competition was promoted by Nestlé:

(i) The Competition and Website were promoted on the Today Show on Channel 9 during the week commencing 3 April 2011. Based on the last 20 weeks of viewing figures, the demographical composition of the audience of the Today Show is:

- 82% aged 18 years and over; and*
- 85% aged 13 years or over.*

Nestlé considers it likely that any children watching this program would only be doing so as “background viewing” of the show as the viewing choice of their parent or guardian.

(ii) The Competition and Website were also promoted on banners on Ninemsn pages during the periods 3 April 2011 - 24 April 2011 and 29 May 2011 - 30 June 2011. The Ninemsn pages selected targeted adults, particularly mums and other caregivers, and were as follows:

- Australian Women’s Weekly: <http://www.aww.ninemsn.com.au/>*
- Celebrity Fix: <http://celebrities.ninemsn.com.au/>*
- Messenger: <http://windowslive.ninemsn.com.au/messenger.aspx>*
- NW: <http://www.nw.ninemsn.com.au/>*
- Recipe Finder: <http://recipefinder.ninemsn.com.au/>*
- Ticketek: <http://ninemsn.ticketek.com.au/>*
- Today: <http://today.ninemsn.com.au/>*
- Woman’s Day: <http://www.womansday.ninemsn.com.au/>*

The Website in its language reflects that the Website is directed at parents and other caregivers. We draw your attention to the following text which is prominently displayed on the Website:

• The Homepage of the website features an air bubble with the words: “Remember what the old MILKYBAR KID looked like?” This links through to advertisements featuring previous MILKYBAR KIDS which aired between 1980 and 2001. These advertisements are positioned to trigger nostalgic reminiscences of their childhood for parents and caregivers and would have no relevance to their children.

• The Just for Fun page of the Website features the words: “Phew. After all that fun show-business stuff, we thought your child might like to have some more. So here are a few MILKYBAR Kid activities for the both of you to get stuck into. Enjoy and remember, anything can happen with the MILKYBAR Kid, especially a little fun with Mum and Dad.” This selection of craft/artistic activities is clearly directed to parents and other caregivers to provide material to inspire imaginative play with their children as part of a balanced lifestyle. The intention is to provide a resource for parents and other caregivers who access the Website.

So far as the second part of this allegation is concerned, there is nothing on the Website to support the allegation that the Website undermines the importance of healthy lifestyles or the promotion of healthy balanced diets. The product itself is featured only on the dedicated Products page of the Website and text prominently positioned on this page clearly emphasises moderation in consuming the product, consistent with Nestlé's position that confectionery is suitable in moderation as a treat: "Pick up a NESTLÉ FUN PACK and enjoy a bite-sized MILKYBAR piece for a quick treat."

We further draw your attention to the Board's comments in its determination of Complaint Reference number 55/10 that "it is not the role of the ASB Board to determine the healthiness or unhealthiness of foods." Nestlé believes that adult caregivers, who are the target audience of the Website, understand the place that a product such as MILKYBAR plays in their children's overall diet.

In relation to the Complainant's statements regarding the Website undermining healthy food messages, Nestlé submits that this is not a reasonable interpretation of the Website. There is nothing in the Website which undermines healthy food messages or which encourages consumers to over-consume MILKYBARs, and Nestlé can see no basis for this aspect of the Complaint.

With regard to the third part of this allegation, we note that this is factually incorrect. Whilst the talent search is to identify a child aged between 7 and 10 years old, the competition itself is targeted at parents or guardians of such children. All media relating to the Competition and directing traffic to the Website was targeted at adults. Furthermore, the Competition Terms and Conditions (which were set out on the Website and which have been provided to the Board) clearly state that children are ineligible to enter. Only parents or guardians may enter the Competition.

2. Breach of Section 2.1 of the Food Code

The Complainant alleges the Website breaches Section 2.1 of the Food Code because it "contravenes Prevailing Community Standards about unhealthy food advertising to children via the internet".

Nestlé disagrees with this allegation in a number of respects.

- (i) First, as stated above, the Website is directed to adults and the media in which the Website was promoted clearly targeted adults.*
- (ii) Secondly, we would submit that positioning a Website such as this in an adult context is entirely in line with Prevailing Community Standards: that adults (and not young children) are the category of people invited to visit the Website; that the Website contains adult oriented content; and that the Website otherwise envisages adult participation at all stages. This is reinforced by the consumer feedback that Nestlé has received in relation to the Website. Nestlé received a large number of consumer contacts in relation to the Competition and Website throughout April, May and June 2011. Notwithstanding the large number of contacts, Nestlé has not received any feedback in relation to any of the issues raised by the Complainant as being of concern to the community at large. On this basis alone, Nestlé would strongly dispute any allegation that the Website contravened Prevailing Community Standards.*

As to the survey referenced by the Complainant, we make the following comments.

- (i) The details and methodology behind the survey, along with the survey results, have not been provided.*
- (ii) The survey response as reported by the Complainant related to government regulation, refers to websites "aimed at kids", and otherwise lacks the context that would be necessary to properly relate it to the Website.*

(iii) Further, we are concerned that the Board is being requested to determine Prevailing Community Standards on the basis of this survey. Prevailing Community Standards are defined in the Food Code as:

“Prevailing Community Standards means the community standards determined by the Advertising Standards Board as those prevailing at the relevant time, and based on research carried out on behalf of the Advertising Standards Board as it sees fit...”

We submit that the survey referred to falls outside the definition set out in the Food Code, and for this and the other reasons stated above is not a proper basis on which the Board should consider this aspect of the Complaint.

In any event, given that the Website is directed at adults, Nestlé can see no basis for this aspect of the Complaint.

3. Extension of the RCMI

The Website is operated by Nestlé and, as the Complainant points out, the RCMI has no application.

Nestlé believes in and is committed to responsible marketing activity and marketing communication to all consumers, especially children, irrespective of whether the RCMI is applicable. As discussed above, Nestlé was careful to ensure that all media relating to the Competition and directing traffic to the Website was targeted at adults. Nestlé was also careful to ensure that the Website was directed to adults and not to children.

There is no basis on which the Website could be characterised as advertising to children and accordingly Nestlé can see no basis for the Board to support the Complainant’s request to press for extension of the RCMI.

Please do not hesitate to contact me should you require any further information or wish to discuss our response.

THE DETERMINATION

The Advertising Standards Board (Board) considered whether this advertisement breaches Section 2 of the AANA Advertiser Code of Ethics (the "Code"), the AANA Food and Beverages Advertising and Marketing Communications Code (the Food Code), the AANA Food and Beverages Advertising and Marketing Communications Code (the Food Code) and the AFGC Responsible Children’s Marketing Initiative of the Australian Food and Grocery Council (AFGC RCMI).

The Board reviewed the advertisement and noted the advertiser’s response.

The Board noted the complainant's concern that the advertisement presents unhealthy food to children and undermines healthy eating messages.

First, the Board considered whether the advertisement met the requirements of the AFGC RCMI. The Board noted that under the AFGC RCMI the relevant requirement is that the company does not advertise food and beverage products to children under 12 in ‘media’ unless those products represent healthy dietary choices.

Media is defined as: ‘Media means television, radio, print, cinema and third-party internet sites where the audience is predominantly children and/or having regard to the theme, visuals, and language used are directed primarily to children.’

The Board noted that the advertisement appears on the advertiser’s home website and thus does not meet the conditions of ‘Media’ as the RCMI applies only to third party websites. The Board determined that the advertisement does not fall under the provisions of the RCMI and therefore the Board cannot consider the advertisement under this Code.

The Board then considered the advertisement under the AANA Code for Advertising and Marketing Communications to Children. The definition of what is advertising and marketing communications to children' in the AANA Children's Code is “Advertising or Marketing Communications which, having regard to the theme, visuals and language used, are directed primarily to Children and are for Product”.

The Board noted that Children means, “children 14 years old or younger” and Product means, “goods, services and/or facilities which are targeted toward and have principle appeal to children.”

The Board noted the advertisement relates to a competition on the Milky Bar website and that it is open to parents or guardians of persons aged between 7 and 10 years old. The Board considered that the competition clearly states that adults/guardians are the target, and although for a kids product the Board considered that it is not directed at children, and does not therefore breach the provisions of the Kids Code.

As the advertisement is not directed primarily to children and is not for product, the Board considered that the Children’s Code and Part 3 of the AANA Food and Beverages Advertising and Marketing Communications Code (the Food and Beverages Code) do not apply to this advertisement.

The Board then considered whether the advertisement complied with all relevant provisions of the Food and Beverages Code.

The Board noted section 2.1 of the Food Code which provides that: advertising or marketing communications for food or beverage product shall not...otherwise contravene Prevailing Community Standards...’

The Board considered that advertising a chocolate bar is not, of itself, something which is contrary to prevailing community standards.

The Board noted section 2.2 which states: “the advertising or marketing communication...shall not undermine the importance of healthy or active lifestyles nor the promotion of healthy balanced diets, or encourage what would reasonably be considered excess consumption through the representation of product/s or portion sizes disproportionate to the setting/s portrayed or by means otherwise regarded as contrary to prevailing community standards.”

The Board considered that the advertising or promotion of chocolate is not, per se, inconsistent with or undermining of a balanced diet or healthy lifestyles. The Board determined that although the website contains images of the product it did not depict or encourage excess consumption and that there was nothing in this advertisement that would amount to undermining of a balanced diet or healthy lifestyle. The Board considered the advertisement does not undermine healthy eating messages.

The Board determined that the advertisement did not breach Section 2.2 of the Food Code.

The Board determined that the advertisement did not breach the AANA Food Code or Children's Code.

Finding that the advertisement did not breach the AANA Code of Ethics, Food Code or AFGC RCMI, the Board dismissed the complaint.