



Case Report

1	Case Number	0454/11
2	Advertiser	Unilever Australasia
3	Product	Food and Beverages
4	Type of Advertisement / media	TV
5	Date of Determination	07/12/2011
6	DETERMINATION	Upheld - Modified or Discontinued
7	Date of Reviewed Determination	
8	Determination on Review	Recommend as Confirmed

ISSUES RAISED

Product Placement AFGC - Product Placement
Advertising Message AFGC - Advertising Message

DESCRIPTION OF THE ADVERTISEMENT

Animated advertisement for the Bubble Gum Berry Lava Paddle Pop and the Hero or Villain Choc Orange Paddle Pop. The advertisement is set in a jungle and the voice over describes the products.

THE COMPLAINT

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

We believe the advertisement breaches the core principles of the RCMI because:

1. It was shown during 'Media' (Junior Masterchef – Disneyland Home Alone and Home Alone II); and

2. Streets Paddle Pop ice-creams do not represent healthy dietary choices consistent with established scientific or Australian government standards.

'Media' is defined in the RCMI as '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 RCMI Guidelines state that advertising or marketing communication activities are captured if:

1. The audience of the communication activity is predominantly children; and/or

2. The media in which the communication activity appears is clearly directed primarily to children.

3. *The communication activities are regardless of the audience clearly directed primarily to children.*

This advertisement is clearly a communication activity directed primarily to children within the meaning of the Guidelines and the RCMI. It features fun children's themes animation and a voice over that targets children and the products themselves are directed primarily to children.

The advertisement was also broadcast in media clearly directed primarily to children. It was broadcast during:

- Junior Masterchef (Disneyland) on Sunday 13 November 2011 between 7.30 and 8.30pm in Melbourne Perth Sydney and Brisbane on Network 10.*
- Junior Masterchef (Disneyland) on Sunday 7 November 2011 at 8.24pm in Sydney on Network 10.*
- Home Alone on 15 October 2011 between 6.30 and 8.30pm in Melbourne Perth Sydney Brisbane and Adelaide on Network 10.*
- Home Alone II on 12 November 2011 between 7.00 and 9.00pm in Melbourne Perth Sydney and Brisbane on Network 10.*

Junior Masterchef is a cooking competition that features children and is extremely popular among children. We recognise that the Board has previously taken the view that Junior Masterchef is not a program that is directed primarily to children within the meaning of the RCMI. However the episodes of Junior Masterchef broadcast on 7 and 14 November 2011 were broadcast from Disneyland in LA. In our view these particular episodes were clearly directed primarily to children. They featured children's themes and popular Disneyland characters such as Mickey Mouse Minnie Mouse and Donald Duck. The children were involved in a variety of fun cooking challenges involving these and other popular Disneyland characters. For example on the episode broadcast 13 November after selecting ingredients from the Mad Hatters ride at Disneyland the children cooked cupcakes for the Mad Hatter's Tea Party with the Mad Hatter and Alice present throughout the challenge. In the episode broadcast on 7 November the children searched for ingredients in 'Uncle Walt's kingdom' and were then involved in a challenge to create two Disney-inspired dishes. These episodes also featured footage of the children on the program playing at Disneyland and riding on the various rides. These media activities were clearly directed primarily to children within the meaning of the RCMI and RCMI Guidelines.

The Home Alone and Home Alone 2 movies are well known comedies that feature a child accidentally left at home when his parents go on holidays. These movies feature children and children's themes and are clearly directed primarily to children.

Nutritional content of Streets Paddle Pop ice-creams

According to the Dietary Guidelines for Children and Adolescents in Australia care should be taken in relation to children's diets to consume only moderate amounts of sugars and foods containing added sugars.

Bubble Gum Berry Lava and Choc-Orange Hero or Villain Paddle Pops are a very high 21.5% and 19.4% sugar respectively. These Paddle Pop ice creams are not a healthy snack choice for children and do not represent healthy dietary choices consistent with the Dietary Guidelines for Children and Adolescents in Australia. Under the Guide to Healthy Eating ice-creams are an 'extra food' meaning that they should only be consumed sometimes or in small amounts.

Consumption of foods high in sugar such as Paddle Pop ice creams may contribute to weight gain and obesity in children. The OPC believes it is highly irresponsible for companies to advertise such foods directly to children particularly at a time when a quarter of Australian children are overweight or obese.

Action requested by the ASB

We ask the Advertising Standards Board to request Streets to cease broadcasting this advertisement (and other advertisements for unhealthy products) during programs that are directed to children or are watched by large numbers of children.

THE ADVERTISER'S RESPONSE

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

The complaint

The complaint claims that the relevant television advertisement is in breach of the core principles of the AFGC's Responsible Children's Marketing Initiative (RCMI) to which Unilever is a signatory, on the basis that:

- 1. The product allegedly does not satisfy relevant nutritional criteria to make the claim; and*
- 2. The advertisement was shown during programs primarily directed at children.*

We comment as follows:

The RCMI requirements

The basic requirement under the RCMI Core Principles is that

Participants will not advertise food and beverage products to children under 12 in media unless:

- 1. those products represent healthy dietary choices, consistent with established scientific or Australian government standards*

And

- 2. the advertising and/or marketing communication activities reference, or are in the context of, a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages:*

- good dietary habits, consistent with established scientific or government criteria*
- physical activity.*

Media is defined under the RCMI 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. In regards to television, this includes all P and C programs; all programs where more than 50% of the audience is children under 12 years; plus those G rated programs that meet the criteria above as being designed for children.

In addition to the RCMI Core Principles, each participant to the RCMI develops its own action plan clearly setting out the way in which it will comply with the requirements of the RCMI. These company action plans are approved by the AFGC in order to comply with the Core Principles.

Unilever's company action plan specifically refers to a commitment not to market food to children aged under 6 years, and to only market food to children aged between 6 and 11 if the products follow the strict nutrient criteria as set out in both:

- Fresh Tastes @ School NSW Health School Canteen Criteria; and*
- Unilever's global internal nutrient criteria as published in the peer-reviewed European Journal of Clinical Nutrition (Nijman CAJ et al 2006 EJC. 1-11) and updated regularly.*

Unilever is committed to high standards of responsible marketing across its food and beverage range and all of our advertising is carefully considered and assessed against our core principles as defined in the “Unilever Global Principles for Responsible Food and Beverage Marketing”.

Nutritional values of Paddle Pops

Unilever is committed to helping people make healthy food choices and we continually work to improve the taste and nutritional quality of all our products.

Through our Paddle Pop range we offer families a treat option that is more nutritionally sound than many snack alternatives. Our core Paddle Pop range and the advertised Paddle Pop products meet strict canteen guidelines in every state across Australia, contains less than 110 calories per serve, is 70% milk, is a source of calcium with each serve providing 10% RDI, is reduced fat, and contains no artificial colours.

Additionally Unilever has strict internal guidelines around marketing to children.

The advertised Paddle Pop products (Bubblegum Berry Lava and Hero or Villain Choc Orange) along with the core Paddle Pop range of Chocolate, Banana and Rainbow are all approved for sale in school canteens in every State and Territory in Australia as Amber products based on strict nutritional standards (Qld Smart Choices, NSW Fresh Tastes, Vic Go For Your Life, WA Star Choice, SA Right Bite). The products also meet the recently released National Healthy School Canteen Guidelines.

The products also meet the following accredited school canteen criteria for the sale of ice cream, milk-based ice confection products in Australian schools:

- Healthy Kids (NSW)*
- FOCiS (QLD)*

According to the Fresh Tastes @ School NSW Guidelines, Amber rated products are products which have some nutritional value and have moderate levels of saturated fat and/or added sugar and/or salt. Amber products can be included on school canteen menus subject to avoiding large serving sizes.

Paddle Pop products are sold in portion controlled single serve sizes of approximately 67g per serve for the Bubblegum Berry Lava product and 53g per serve for the Hero or Villain Choc Orange product.

We further confirm that the products meet Unilever’s global internal nutrient criteria as a product suitable for children.

Paddle Pop advertisements on television and internet were previously considered by the Advertising Standards Board in cases 75/10 and 76/10. We note that issues were raised in relation to compliance with the Responsible Children’s Marketing Initiative in those cases, and the Board did not have any concerns in relation to the products’ compliance with the relevant standards. We confirm that the Paddle Pop products in this current television advertisement meet the same requirements and standards as the Paddle Pop products in cases 75/10 and 76/10.

We note the complainant’s concern in relation to the sugar content of the two products. While we confirm that the percentage sugar content by weight is 21.5% and 19.4% for the Bubblegum Berry Lava (BBL) product and the Hero or Villain (HV) product respectively, we do not agree that percentage by weight accurately reflects the nutritional profile of the products.

Firstly, as mentioned above, the nature of Paddle Pop products as portion controlled single serve products makes it highly unlikely for consumers to consume more than one single serve of the products. For this reason, we believe that the products ought to be profiled based on the nutrient content per serve. This is consistent with all school canteen criteria in Australia and consistent with the requirement that Amber products are to be portion controlled in order to be sold in schools.

The advertised products contain 14.3g sugar per serve (BBL) and 10.3g sugar per serve (HV). Secondly, approximately 25% of the total sugar content in these products are derived from sugars such as lactose which are naturally present as a result of the product being made from 70% milk. The added sugar contents of these products are in fact 10.7g (BBL) and 7.4g (HV) per serve.

Thirdly, as one of the few ice cream or ice confection products in Australia that are approved for sale in school canteens, Paddle Pops are in fact lower in sugar per serve than some other milk-based snack products. For example we note the following:

- A 200g tub of reduced fat flavoured yoghurt with fruit contains 34g of sugar per serve (according to Food Works Professional Xyris Software)*
- A 250ml bottle of orange juice contains 14g of sugar (according to NUTTAB 2010 – orange juice, no added Vitamin C)*

We also note that the products also contain 81mg of calcium or 10% of adult RDI per serve (BBL) and 112 mg of calcium or 14% of adult RDI per serve (HV). Calcium is considered a positive nutrient for the purposes of the school canteen criteria.

Unilever is dedicated to developing nutritionally balanced products and employs a number of in-house accredited dietitians and nutritionists to oversee the development of new products. The Paddle Pop product ensure that parents and children who want to have an ice cream / ice confection product will have a nutritionally approved option.

The relevant television programs

Notwithstanding that the product meets nutrition requirements, we have taken steps to ensure that the advertisement is not shown during programming on free to air television that is primarily directed at children.

The complaint refers to the appearance of the advertisement during the following TV programs:

- 1. Junior Masterchef – Disneyland episodes on 7 November and 13 November.*
- 2. Home Alone and Home Alone 2 on 15 October and 12 November.*

Junior Masterchef

We note that the Advertising Standards Board has on several occasions determined that Junior Masterchef is not a program that is directed at children under 12 years of age. In particular, we note the Board's determination in case number 0439/10 in relation to a Mars Confectionery advertisement involving Snickers in which it was determined that with an under-12 viewing audience of 16%, Junior Masterchef is not a program which has an audience of predominantly children.

The complaint alleges that the particular setting of the two relevant episodes at Disneyland increases the appeal of the program to children.

We firstly point out that the advertiser at the time of booking the advertising spot does not have any means of determining the content of the particular episode of Junior Masterchef during which the advertisement is to be shown.

Secondly, viewership data we have obtained in relation to the episode screened on 13 November 2011 demonstrates a steady under-12 audience at 16% of the total viewership.

We therefore do not believe that there is any reasonable basis for considering these particular episodes of Junior Masterchef any differently to previous episodes.

Home Alone and Home Alone 2

Whilst the Home Alone series of movies were generally considered to be of appeal to children, we note that both of these movies have been classified by the Office of Film and Literature Classification (Australia) as PG, parental guidance recommended for persons aged under 15 years.

Both of these movies contain violent themes which are not suitable for children under 12 years to watch whilst unsupervised.

Within this context, we do not believe it is reasonable to impose the rules of the RCMI on advertisements shown during a movie for which parental guidance is recommended and which in fact depicts violent scenes and overconsumption of ice cream by a child.

The wording of the television advertisement

In addition to ensuring that product meets school canteen criteria and ensuring that the advertisement is only shown during appropriate programming, particular attention was paid to the wording of the advertisement to ensure that no inadvertent suggestion of overconsumption was made.

We note that there are two references to “one” in the wording of the advertisement to emphasise that consumers do not consume more than one serve in each occasion. As mentioned above, the nutrient content per serve of these products is better than the nutrient content of a serve of some other substitutable snack or dairy dessert items.

Compliance with other relevant standards

Unilever is confident that the advertisement satisfies all requirements under all relevant standards relating to advertising to children. We note that no other issues were raised in the complaint. Should the Board consider that there are other serious issues to be considered, we request the opportunity to formally respond to those concerns.

Approvals

Unilever is a responsible advertiser and has numerous internal review processes, including review by Unilever’s Legal, Nutrition and Corporate Relations Departments to critique all advertisements to ensure compliance with legal and ethical considerations.

Conclusion

We submit that we are not in breach of the terms of the Responsible Children Marketing Initiative.

Please contact me should you require any further information.

THE DETERMINATION

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

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

The Board noted the complainant's concern that the advertisement breaches the RCMI because it appeared in media directed primarily to children, is an advertisement directed primarily to children and because Unilever Paddle Pops do not represent a healthy dietary choice.

The Board considered whether the advertisement met the requirements of the RCMI.

The Board noted that under the RCMI the relevant requirement is that the company not advertise food and beverage products to children under 12 in “media” unless those products represent healthy dietary choices.

The Board first considered whether the product is a healthy dietary choice.

The Board noted the advertiser's response that the advertised products, Unilever Paddle Pops, do meet the requirements for a healthier dietary choice. The Board also noted the independent arbiter's confirmation that the advertised product, Unilever Paddle Pops, does meet the requirements for a healthier dietary choice:

"...in terms of the nutrition criteria of the advertised products, they do comply with the nutrition criteria set out in the Fresh Tastes @ School NSW Healthy School Canteen Strategy and Unilever's own global internal nutrient criteria as published in Nijman et al (2007). The advertised products are therefore consistent with the nutrient criteria detailed in Unilever's Company Action Plan under the Australian Food and Grocery Council's Responsible Children's Marketing Initiative."

Finding that the product does represent a healthy dietary choice the Board then considered whether the advertisement is broadcast in media directed primarily to children.

The Board noted the RCMI Initiative and also the information provided on the AFGC website which describes the Scope of the RCMI 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. In regards to television, this includes all P and C programs; all programs where more than 50% of the audience is children under 12 years; plus those G rated programs that meet the criteria above as being designed for children.

Based on these definitions, the scope covers three aspects:

1. Where the audience of the communication activity is predominately children (e.g. greater than 50% of the audience of a television program is comprised of children less than 12 years)
2. Where the media in which the communication activity appears is directed primarily to children
3. Where the communication activities are directed primarily to children

The Board noted the complainant's concern that the advertisement had been shown during children's movies, including 'Home Alone' and 'Home Alone 2' as well as during the television programs 'Junior Masterchef' and 'Home and Away'. The Board noted that Appendix II to the AFGC RCMI lists programs not covered by the RCMI and that Home and Away and Masterchef are included on this list.

The Board noted the advertiser's response which stated 'we have taken steps to ensure that the advertisement is not shown during programming on free to air television that is primarily directed to children.' The Board noted the programming information provided by the advertiser which indicated that approximately 16% of the audience for Junior Masterchef is children under 12.

The Board considered that whilst Junior Masterchef would be of appeal to children and will have a relatively significant under 12 audience it is not a program which has a predominantly child audience. The Board also determined that although attractive to children the program Junior Masterchef is not a program which is 'directed primarily' to children.

The Board noted that 'Home Alone' and 'Home Alone 2' are rated PG (parental guidance) and are intended for a mixed audience of children and parents. The Board considered that these movies do not have a predominantly child audience and also considered that these movies are not 'directed primarily' to children although they would be attractive to children.

The Board noted the advertiser's commitment not to broadcast this advertisement in broadcasting with predominant child audiences and that such advertisements would not be available in C or P programming.

The Board therefore determined that the advertisement was not broadcast in programs:

- With a predominantly child audience; or
- In programs which are 'directed primarily' to children.

The Board then considered whether the advertisement itself, in accordance with the Scope of the RCMI (as set out above) is itself directed primarily to children.

The Board noted the features of the advertisement in particular, the cartoon style, the 'adventure' references, the references to a 'hero' or 'villain', and the product advertised - variously flavoured 'paddle pops'. In the Board's view the overall theme and content of the advertisement creates an advertisement which is clearly directed primarily to children.

The Board determined that the advertisement is primarily directed to children and that therefore the RCMI does apply.

As the advertised product is a healthy dietary choice, the RCMI permits such products to be advertised to children provided the advertisement meets specific requirements. The Board noted that the RCMI allows healthy dietary choices to be advertised to children provided that:

“..the advertising and/or marketing communication activities reference, or are in the context of, a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages:

- Good dietary habits, consistent with established scientific or government criteria
- Physical activity.

The Board noted the two requirements of this provision: encouraging good dietary habits AND physical activity.

The Board considered that the advertisement did not depict any unhealthy eating choices or practices but noted that the RCMI obligation is a positive obligation for the advertisement to

‘reference or be in the context of a healthy lifestyle...through messaging that encourages good dietary habits.’

The Board concluded that the advertisement did not reference good dietary habits and was not in the context of a healthy lifestyle that would encourage good dietary habits.

The Board then considered whether the advertisement referenced or was in the context of encouraging physical activity. In the Board’s view the fact that the advertisement depicted a jungle scene and described an ‘adventure’ did not amount to an implication or encouragement of physical activity. The Board noted that the advertisement does not feature any characters participating in physical activity and that there are no verbal or visual references to taking part in physical activity.

The Board determined that the advertisement did not meet the ‘Advertising Messaging’ requirements of the RCMI.

The Board also considered the provision of the RCMI relating to ‘Use of Popular Personalities and Characters’. The Board noted the images of the Paddle Pop lion in the closing frame of the advertisement. Although part of the label of the product, and shown in the context of a label, the Board considered that the use of the licensed character in an advertisement which did not meet the ‘Advertising Messaging’ requirement of the RCMI was a breach of the RCMI.

The Board determined that the advertisement breached the ‘Advertising Messaging’ and ‘Use of Popular Personalities and Characters’ provisions of the RCMI. Finding that the advertisement breached the AFGC RCMI, the Board upheld the complaint.

The Board then considered whether the advertisement complied with the AANA Code for Advertising and Marketing to Children (Children’s Code).

The Board determined that the advertisement is primarily directed to children (for the reasons stated above) and also determined that Paddle Pops are a product targeted towards and of principal appeal to children. On this basis the Board determined that the Children’s Code did apply to the advertisement.

The Board first considered whether the advertisement complied with section 2.1 of the Children’s Code which requires that ‘Advertising or marketing communications to children must not contravene Prevailing Community Standards.’ The Board noted that the advertisement is for a healthier choice product and that development of such products is positive. The Board considered that, while there is some concern among sectors of the community about whether or not such products should be advertised directly to children, in the Board’s view the advertisement presents a healthier product and does so in a responsible manner. The Board considered that advertising such products is not contrary to current prevailing community standards.

The Board also considered whether the advertisement complied with section 2.7 of the Children’s Code which requires that:

‘Advertising or marketing communications to children:

(a) must not undermine the authority, responsibility or judgment of parents or carers

(b) Must not contain an appeal to children to urge their parents or carers to buy a product for them.’

The Board considered that the advertisement is designed to encourage people to purchase the product but that it does not contain any explicit or inappropriate wording or context that would amount to a direct appeal to children to urge their parents to buy the product for them. The Board determined that the advertisement did not breach section 2.7 of the Children’s Code.

The Board considered whether the advertisement complied with section 2.15 of the Children’s Code. Section 2.15 requires that:

‘Advertising or marketing communications to children for food or beverages must neither encourage nor promote an inactive lifestyle or unhealthy eating or drinking habits.’

The Board considered that, although the advertisement does not make any positive encouragement of a healthy diet or physical activity (as required by the RCMI), the advertisement does not promote an inactive lifestyle or unhealthy eating habits. The Board determined that the advertisement does not breach section 2.15 of the Children’s Code.

Having considered the other provisions of the Children’s Code, the Board determined that the advertisement complied with the provisions of the AANA Children’s Code.

The Board noted that the advertisement must also comply with the AANA Food and Beverages Advertising and Marketing Communications Code.

The Board determined that the advertisement did not contravene prevailing community standards (for the reasons above) and did not breach section 2.1 of the Food Code.

The Board also considered the requirements of section 2.2 of the Food Code which includes the requirement that ‘advertising or marketing communications shall not...encourage what would reasonably be considered as excess consumption ...by means otherwise regarded as contrary to community standards.’

The Board noted the advertiser’s comments that the advertisement was particularly worded to ensure that there was no suggestion of excess consumption. In particular the advertiser noted that there are two separate references to ‘one’ in the advertisement which is intended to “emphasise that consumers do not consume more than one serve in each occasion: “Hero or villain, which one will you get?” and “Try one from your local convenience store today”. The Board considered that the reference to hero or villain implies which version of the ice cream you will get when you purchase one ice cream, and that that the second statement does encourage a single serving of the advertised product. The Board considered that the advertisement did not suggest excess consumption and did not breach section 2.2 of the Food Code.

Having considered the other provisions of the Food Code, the Board determined that the advertisement complied with the provisions of the AANA Food Code.

Finding that the advertisement breached the AFGC RCMI, the Board upheld the complaint.

ADVERTISER RESPONSE TO DETERMINATION

I refer to the determination by the Advertising Standards Board (“the Board”) in relation to the above complaint against our Streets Paddle Pop Bubblegum Berry Lava and Hero or Villain Choc Orange television advertisement.

We are disappointed at the determination and note that this appears to be the first determination that has found a breach of the RCMI despite the advertised product in fact satisfying all nutritional and dietary standards and requirements consistent with the intentions of the RCMI.

We maintain our view that we comply with the RCMI Core Principles and we intend to appeal the decision.

In any event we confirm that the advertisement is no longer shown on television. The last broadcast occurred on 19 November 2011 for free-to-air television and the last payTV broadcast was on 10 December 2011.

We note that the bases of the initial complaint were that the Paddle Pop products did not satisfy the nutritional requirements for the RCMI, and that the advertisements were shown during Junior Masterchef, Home Alone and Home Alone 2.

The Board dismissed these claims put forward by the complainant.

Despite the Board dismissing the bases of the initial complaint, the Board’s determination raised the following new issues on which the complaint was ultimately “upheld”:

1. the advertising and/or marketing communication activities failed to comply with the requirement that such activities “reference, or are in the context of a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages:
 - good dietary habits, consistent with established scientific or government criteria
 - physical activity.
2. As a result of a finding of the breach set out in point 1, the reference to the Paddle Pop lion on pack in the advertisement further breaches the RCMI.

We note that we have not been offered the opportunity to address these issues.

Unilever takes its compliance obligations and social responsibilities very seriously. Unilever ensures that products which are particularly attractive to children are thoroughly reviewed internally to ensure they meet the strictest nutritional and quality standards. For this reason, we feel it is necessary to address the new concerns raised by the Board in the appropriate forum of a formal appeal.

We now provide our further comments as follows:

Dietary Guidelines and Good Dietary Habits

The Board and an independent arbiter of nutritional standards have confirmed that the Paddle Pop products are a “healthy dietary choice”. The advertised products therefore meet the nutritional guidelines for advertising under the RCMI which are consistent with established scientific and government criteria in the form of Unilever’s internal and peer reviewed nutritional guidelines as well as all of the school canteen criteria around Australia.

We further note that the Board agreed that statements contained in the advertisement did in fact encourage the consumption of only a single serving of the product.

Despite communicating limited single serve consumption of a product that has been confirmed as a “healthy dietary choice”, the Board concluded that the advertisement failed to reference good dietary habits and was not in the context of a healthy lifestyle that would encourage good dietary habits.

We disagree with the Board’s view.

We note that the RCMI does not require explicit reference to good dietary habits. It in fact requires that the messaging “supports” or “encourages” good dietary habits. On the basis that the advertised product is a “healthy dietary choice” and the messaging in the advertisement encourages the consumption of a single serve only, it is our position that the messaging in the advertisement is consistent with recommendations under national dietary guidelines and therefore consistent with the encouragement and support of good dietary habits.

We do not agree that on any reasonable view would the promotion of a “healthy dietary choice” fail to “encourage” or “support” good dietary habits.

Sense of Adventure

We note that the Board recognised that the advertisement depicted a jungle scene and imparted a sense of adventure.

We note the Board’s view that the jungle scene and adventure failed to amount to an implication or encouragement of physical exercise.

We do not agree with this conclusion and we feel that it could only be reached in circumstances where relevant facts have not been considered.

We believe that the encouragement of adventure and the use of jungle themes necessarily encourages children to engage in physical activity by undertaking their own adventure whether in the backyard or in “adventure playgrounds” in parks and schools.

Further, we submit that the advertisement, particularly a 15 second advertisement, should not be viewed in isolation, but ought to be viewed in light of associated materials as well as the rich heritage of the brand with which viewers will no doubt associate the advertisement.

The Paddle Pop lion, which is closely associated with the Paddle Pop brand, is an iconic character which has been part of Australian culture for over 50 years. He is an aspirational character that has always been fit, strong and physically active in his various roles including as an adventurer and a surfer. The purpose of a jungle scene is to draw upon the known association with the active lion character.

Associated materials including the Paddle Pop website clearly depict the Paddle Pop lion’s physical activeness and abilities as aspirational and heroic features.

The obligation under the RCMI core principles and Unilever’s action plan do not require that physical activity be “depicted” in the advertisement, only that messaging “encourages” or “supports” physical activity. The visual, spoken and contextual cues of adventure, heroism and physical prowess clearly “encourage” and “support” physical exercise for children.

This is particularly true when compared with other less active forms of popular entertainment and activities that children currently engage in.

Paddle Pop support for sporting and physical activities

Unilever, through its Streets and Paddle Pop brands have been strong supporters of sport and physical activity for children. Events and promotions such as the Paddle Pop Nickelodeon Sports Challenge demonstrate Unilever’s active efforts to encourage a culture of physical exercise and activity amongst children.

We believe this contributes to the context in which the advertisement is to be viewed.

Availability of the Product

Apart from the advertisement and various other brand attributes synonymous with the Paddle Pop brand, it is important to note that the advertised products are sold only in “out of home” channels, meaning that these advertised products cannot be purchased in multipacks from supermarkets for consumption at home. The advertised products are only available in milk

bars, convenience stores, petrol stations, school canteens and various other locations where single serve Streets ice cream freezers are located.

The advertisement highlights this by stating “try one from your local convenience store today”.

We believe it is material to the consideration of this advertisement that the availability of the advertised product is limited to individual portions at convenience stores and purchased for immediate consumption when the consumer is out and about rather than at home in front of the television.

Proprietary Character

We note the Board’s view that the depiction of the Paddle Pop Lion in the pack-shot at the end of the advertisement is in breach of the RCMI. We note that the inclusion of the Paddle Pop Lion is only a breach of the RCMI if the product and the advertising message do not otherwise meet the RCMI criteria.

As discussed above, it is our position that the product and the advertising message all comply with the requirements of the RCMI. We therefore do not believe that the inclusion of the Paddle Pop Lion as depicted in a pack shot of the product constitutes a breach of the RCMI.

Conclusion

We therefore believe that the advertisement does encourage good dietary habits while the broader context of the advertisement strongly encourages and supports physical activity by children, considering the context of the product, brand heritage and associated promotions and materials of the brand.

Unilever is confident that the advertised products comply with the strictest nutritional standards and are suitable for consumption by children. We take our social responsibilities very seriously and for this reason we will be appealing the Board’s decision.

This is an application for review of the decision of the Advertising Standards Board (the Board) relating to an advertisement by the Advertiser, Unilever Australasia. The 15 second advertisement is described and set out in Case Report 0454/11 as follows:

Animated advertisement for the Bubble Gum Berry Lava Paddle Pop and the Hero or Villain Choc Orange Paddle Pop. The advertisement is set in a jungle and the voice over describes the products.

The grounds on which a decision of the Board may be reviewed are:

1. Where new or additional relevant evidence which could have a significant bearing on the determination becomes available. An explanation of why this information was not submitted previously must be provided.
2. Where there was a substantial flaw in the Board’s determination (determination clearly in error having regard to the provisions of the Code, or clearly made against the weight of evidence).
3. Where there was a substantial flaw in the process by which the determination was made.

The complainant claimed that the advertisement breached the Responsible Children’s Marketing Initiative (RCMI) of the Australian Food and Beverage Industry because:

(1) it appeared in media directed primarily to children (Junior Masterchef and “Home Alone” #1 and #2)

- (2) the advertisement itself was directed primarily to children
- (3) Unilever Paddle Pops do not represent a healthy dietary choice

The Advertising Standards Board Case Report (0454/11) states that the Board considered whether the advertisement breached Section 2 of the AANA Advertiser Code of Ethics (the Code), the RCMI, the AANA Food and Beverages Advertising and Marketing Communications Code (Food Code) and the AANA Code for Advertising and Marketing Communications to Children (Children's Code).

Unilever Australasia is a signatory to the RCMI and such signatories must also abide by the other three Codes noted above. In its response to the complaint, Unilever advised that it has also created a Company Action Plan under the RCMI, setting out the way in which it will comply with the requirements of the RCMI. These plans are approved by the Australian Food and Grocery Council (AFGC).

The Determination

In considering the complaint, the Board firstly considered whether the advertisement breached the RCMI.

The relevant provisions of the RCMI state:

Advertising Messaging

Participants will not advertise food and beverage products to children under 12 in media unless:

1. those products represent healthy dietary choices, consistent with established scientific or Australian government standards

AND

2. the advertising and/or marketing communication activities reference, or are in the context of, a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages:

- good dietary habits, consistent with established scientific or government criteria
- physical activity

Use of Popular Personalities and Characters

Participants will not use popular personalities, program characters or licensed characters in advertising primarily directed to children under 12 unless such advertising complies with the messaging options set out above. This is in addition to requirements under the Children's Television Standards 2009 covering C and P periods (CTS section 35).

In determining whether the advertisement breached the Advertising Messaging provision of the RCMI, the Board considered a range of evidence regarding nutrition and concluded that Unilever Paddle Pops do represent a healthy dietary choice. Thus, ground 3 of the complaint was dismissed.

The Board next considered whether the advertisement was broadcast in media "directed primarily to children". The Board noted that "Masterchef" is listed as a program not covered by the RCMI. Having considered evidence regarding the programs "Junior Masterchef" and the films "Home Alone" and "Home Alone 2", the Board concluded that neither "Junior Masterchef" nor the two "Home Alone" films were 'directed primarily' to children although they would be attractive to children. The Board therefore determined that the advertisement was not broadcast in programs:

With a predominantly child audience; or

In programs which are ‘directed primarily’ to children.
Thus ground two of the complaint was dismissed.

The Board then considered whether the advertisement itself is ‘directed primarily to children’. Having considered the various elements of the advertisement, the Board concluded that “the overall theme and content of the advertisement creates an advertisement which is clearly direct [sic] primarily to children”. Accordingly, the Board noted, the RCMI applied to this advertisement. The implication of this is that the RCMI allows products which are healthy dietary choices (as the Board had found in this case) to be advertised to children provided the advertisement meets the following requirements:

“ the advertising and /or marketing communication activities reference, or are in the context of, a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages:

- Good dietary habits, consistent with established scientific or government criteria
- Physical activity”

The Board noted that the RCMI obligation is a positive (my emphasis) obligation for the advertisement to ‘reference or be in the context of a healthy lifestyle ...through messaging that encourages good dietary habits’. The Board concluded that although the advertisement did not depict any unhealthy eating choices or practices, it did not reference good dietary habits and was not in the context of a healthy lifestyle that would encourage good dietary habits.

The Board then considered whether the advertisement referenced or was in the context of encouraging physical activity. The Board concluded that the fact that a jungle scene was depicted and the advertisement “described an ‘adventure’ “did not amount to an implication or encouragement of physical activity.

The Board therefore determined that the advertisement did not meet the “Advertising Messaging” requirements of the RCMI.

As a consequence of the determination above in respect of the advertisement, the Board then considered the related provision of the RCMI entitled “Use of Popular Personalities and Characters” quoted above.

The messaging options referred to in this section of the RCMI are the options addressed above (products must represent healthy dietary choices, advertising/marketing communications reference, or are in context of, a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages good dietary habits and physical activity).

The Board considered the images of the Paddle Pop lion appearing in the closing frame of the advertisement and concluded that the use of a licensed character in an advertisement which did not meet the ‘Advertising Messaging’ requirements of the RCMI, was itself a breach of the RCMI. Accordingly, the Board found that the advertisement breached both the ‘Advertising Messaging’ and the ‘Use of Popular Personalities and Characters’ provisions of the RCMI. The Board therefore upheld ground 2 of the complaint.

The Board then considered whether the advertisement complied with the AANA Children’s Code and the AANA Food Code. Having considered a number of sections in the Codes, the Board determined that the advertisement complied with both Codes.

The Board upheld the complaint on the basis that the advertisement breached the RCMI as noted above.

Review Application

The Advertiser, Unilever Australasia sought review of the Board's decision. Though the grounds for review were not clearly indicated by Unilever in its Request for Appeal, it appears to have been making the request on the basis that:

1. The Board had dismissed "the bases of the initial complaint" but the Board's determination had raised "new issues on which the complaint was ultimately "upheld" "
2. The Board had not followed correct procedure in not considering relevant facts in making its decision and had not followed correct procedure in considering the advertisement "in isolation" rather than within a wider context.

The Complainant submitted a response to Unilever's application for review supporting the ASB determination.

Grounds (1) and (2) of the grounds for review are not made out.

Ground (1)

The Advertiser claimed that the Board had, in its determination, raised "new issues on which the complaint was ultimately 'upheld'". (This claim might also be interpreted as relating to Review Ground (3)). In consequence of that claim, the Advertiser has submitted additional material which it says 'address the new concerns raised by the Board'. However, this claim that the Board raised 'new issues' cannot be maintained in the face of the clear documentary evidence set out below.

1. It is apparent from a perusal of both the original complaint and the determination of the Board that the Advertiser (Unilever) has not accurately ascertained the grounds for the original complaint. That complaint was sent to Unilever by the ASB (as per its normal practice) for comment on November 21, 2011. The complaint clearly sets out three separate grounds on which it claims the advertisement breached the RCMI. Those grounds are reiterated in the early part of the Board's determination.

The complainant's three grounds are that the advertisement:

- Appeared in media directed primarily to children
- The communication activities are directed primarily to children
- Streets Paddle Pops do not represent healthy dietary choices.

It is clear from Unilever's response to the complaint that it has not properly comprehended the original complaint, as Unilever lists the grounds of complaint as:

- I. The product does not satisfy relevant nutritional criteria to make the claim and
- II. The advertisement was shown during programs primarily directed at children.

It is evident from this that Unilever failed to observe that there was a third ground, i.e. that the communication activities (the advertisement itself) are directed primarily to children. Having failed to observe the third ground, Unilever did not address that issue in its response. It also appears that Unilever failed to carefully read the Board's determination when it was provided to them, as the Board, as noted above, also clearly indicates that there were three grounds in the original complaint. Thus, it is clear that the Board did not introduce 'new issues' into its consideration of the complaint and did not uphold the complaint on the basis of such 'new issues'. It is not the case, as claimed by Unilever, that they "have not been offered the opportunity to address these issues". All grounds of the complaint considered by the Board were set out in the original complaint and Unilever was not denied the opportunity to address the issues.

2. More generally, in several other respects, Unilever had clear and unambiguous notice of the scope of the Board's deliberations on the complaint as follows:

- The 'notification of complaint' letter sent to Unilever by the ASB on 21/11/11 included the following instructions about what the advertiser should include in their response:

- “Your comprehensive comments in relation to the complaint (taking into account the need to address all aspects of the advertising codes);

- The notification letter clearly indicates under the heading “Issues Raised to Date”
Product Placement AFGC - Product Placement
Advertising Message AFGC - Advertising Message
- This notification letter also refers advertisers to the ASB website for further information regarding all these matters. On that website, on the Advertiser Know-How page, under ‘Information we need’, the second sentence states “advertisers should provide a detailed response that addresses not just the issues raised by the complaint but all elements of the relevant Codes and initiatives.”
- This issue is also mentioned specifically on the ASB website, in the Complaint Process Steps – under 4. Board Meetings, which states:
“The Board considers complaints in light of all of the Codes and accordingly may apply any part of those Codes in reaching a determination. The Board is not limited, in its considerations, to issues raised by the complaint.”

These examples make it abundantly clear that all advertisers are comprehensively made aware that the Board will consider all Codes and initiatives when deliberating on a complaint and that the Board is not limited to issues raised by the complaint.

There were no ‘new issues’ raised by the Board in its determination and thus the material submitted by Unilever to address such ‘new issues’, does not satisfy ground (1) of the review grounds.

Ground (2)

There is no evidence submitted by the Advertiser which would indicate that there was a substantial flaw in the Board’s determination given the matters addressed under Ground (1) above. While Unilever states that it ‘disagrees’ with the Board’s views on a number of issues, it did not adduce any evidence that there was a substantial flaw in the Board’s determination indicating that the determination was clearly in error having regard to the provisions of the Code, or clearly made against the weight of evidence. Thus, Ground (2) is not satisfied.

Ground (3)

The Advertiser, Unilever, has claimed that the process whereby the Board made its determination was flawed and thus Ground (3) provides the main basis for the request for the review.

Unilever claims two procedural errors were made by the Board in making its determination:

- a. That the Board did not consider relevant facts when determining that the advertisement did not reference nor was in the context of a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages good dietary habits and physical activity.
- b. That the advertisement “should not be viewed in isolation, but ought to be viewed in light of associated materials as well as the rich heritage of the brand with which viewers will no doubt associate the advertisement”.

Re (a), it is apparent from the application for review that Unilever confuses criteria in the RCMI applicable to a product with criteria applicable to an advertisement. Unilever seems

not to acknowledge that despite paddle pops being a 'healthy dietary choice' which is a determination about a product, an advertisement for such a product may still be in breach of the provision of the RCMI noted in (a) above. In their application for review Unilever states: "We do not agree that on any reasonable view would the promotion of a "healthy dietary choice" fail to "encourage" or "support" good dietary habits". (NB the RCMI does not mention "support".)

And later:

"...we do not agree that on any reasonable view the promotion of a confirmed 'healthy dietary choice' product could be considered inconsistent with the context of a healthy lifestyle".

The RCMI is quite clear in its differentiation between requirements for products (i.e. that they represent healthy dietary choices) and its requirements for the advertising and /or marketing communication activities (i.e. that they reference, or are in context of, a healthy lifestyle ... through messaging that encourages good dietary habits and physical activity). Satisfying one of the requirements does not mean the other requirements are satisfied. The Board, in its determination, clearly noted that although the advertisement did not depict 'unhealthy eating choices or practices' the RCMI obligation is a positive (my emphasis) obligation for the advertisement to 'reference or be in the context of a healthy lifestyle ...through messaging that encourages (my emphasis) good dietary habits'. This applies equally to the requirement to encourage physical activity. Both are positive obligations. Having considered the advertisement in the context of the positive obligation of the RCMI, the Board found that the advertisement did not reference good dietary habits and was not in the context of a healthy lifestyle that would encourage good dietary habits. The Board was making a judgement about whether the advertisement satisfied the positive obligations referred to above, and was entitled to make that judgement.

The Board then considered whether the advertisement referenced or was in the context of encouraging physical activity. This is also a positive obligation under this provision of the RCMI. The Board took the view that "the fact that the advertisement depicted a jungle scene and described an 'adventure' did not amount to an implication or encouragement of physical activity". The Board further noted that "the advertisement does not feature any characters participating in physical activity and that there are no verbal or visual references to taking part in physical activity".

Unilever, in its application for review, incorrectly states that "the Board recognised that the advertisement depicted a jungle scene and imparted a sense of adventure". The Board, as quoted in the paragraph above, did state that the advertisement depicted a jungle scene but did not state that it 'imparted a sense of adventure'. Rather, the Board states that the advertisement 'described an "adventure" '. There is a significant difference in meaning between describing an adventure and imparting a sense of adventure and the Board was quite clear in its meaning and choice of words.

Unilever in its review application, claiming that the Board has failed to consider relevant facts, states that:

"We believe that the encouragement of adventure and the use of jungle themes necessarily encourage children to engage in physical activity by undertaking their own adventure whether in the backyard or in "adventure playgrounds" in parks and schools. There are no relevant ways in which to operate in a jungle except through physical activity."

This claim represents an opinion by Unilever and does not adduce evidence that the Board failed to consider relevant facts in this regard.

Re (b), Unilever claimed in the review application that the Board failed to consider relevant facts as follows:

“We submit that the advertisement, particularly a 15 second advertisement, should not be viewed in isolation, but ought to be viewed in light of associated materials as well as the rich heritage of the brand with which viewers will no doubt associate the advertisement.”

And

“We therefore believe that the advertisement does encourage good dietary habits while the broader context of the advertisement strongly encourages and supports physical activity by children, considering the context of the product, brand heritage and associated promotions and materials of the brand”.

Unilever submitted that the following facts should have been considered by the Board in making its determination on the advertisement:

- The Paddle Pop lion “is an iconic character which has been part of Australian culture for over 50 years”. The lion is claimed to be ‘an aspirational character that has always been fit, strong and physically active in his various roles including as an adventurer and a surfer’. Unilever states that “The purpose of a jungle scene is to draw upon the known association with the active lion character”. Associated materials including the Paddle Pop website clearly depict the Paddle Pop lion’s physical activeness and abilities as aspirational and heroic features” according to the review application.
- The reputation of the Paddle Pop brand and its values
- Paddle Pop support for sporting and physical activities
- The availability of the product is limited to individual portions at convenience stores and other venues where single serve Streets ice cream freezers are located.

Regarding the last point above, the Board does, in its determination, refer to the individual portion/ single serve issue when addressing the compliance of the advertisement with the Codes. This aspect was thus considered by the Board when making its decision.

The Board is not obliged, when making its determination, to undertake research or to take any particular external information into account. It is obliged to consider whether the advertisement, on its merits, breaches the relevant codes. In doing this, the Board correctly has concentrated on the advertisement itself, its features and content and the media in which it appeared. In my view, the Board has not failed to consider relevant facts in making its determination.

Use of Popular Personalities and Characters

With regard to the use of the proprietary character of the Paddle Pop lion, Unilever states that:

“... it is our position that the product and the advertising message all comply with the requirements of the RCMI .We therefore do not believe that the inclusion of the Paddle Pop lion as depicted in a pack shot of the product constitutes a breach of the RCMI.”

There is no claim that the Board failed to consider relevant facts in respect of the proprietary character.

I find that there was no substantial flaw in the process by which the determination was made. I therefore conclude that the Board’s determination was made correctly having regard to the provisions of the Codes.

I recommend that the original determination of the Board be confirmed.

