



Case Report

1	Case Number	0482/10
2	Advertiser	Nestle Australia Ltd
3	Product	Food and Beverages
4	Type of Advertisement / media	TV
5	Date of Determination	08/12/2010
6	DETERMINATION	Upheld - Modified or Discontinued

ISSUES RAISED

Product Placement AFGC - Product Placement

DESCRIPTION OF THE ADVERTISEMENT

The advertisement is a shortened 15 second version of the advertisement produced by Nestle to advertise generally its Drumstick ice cream product. We open on the Kiosk in the same vein as in the brand commercial.

A group of men and women walk towards the Kiosk. Many hands are seen pulling Choc Shocs from a freezer. The ad then moves to the water's edge where a line of bathers sit, each with a Choc Shoc – and in perfectly unison each swing their leg into pool. A group of people on stairs with a multitude of towels laid out beside them. The bathers sit on the towels in time with each other and the music. A male bather beside the pool unwraps his Choc Shoc, then more bathers pulling their Choc Shoc from the wrapper.

Everyone but one up ends their Choc Shoc to bite the base. One girl does the reverse and bites the crown of the Drumstick first.

THE COMPLAINT

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

Drumstick advertisement – breach of the Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry

We write to complain about a television advertisement for Nestle drumstick which we consider to breach the Responsible Children's Marketing Initiative of the Australia Food and Beverage Industry (RCMI).

We believe the advertisement breaches the RCMI because it was shown during programs primarily directed to children and watched by high numbers of children and because Drumstick does not represent a healthy dietary choice consistent with established scientific or Australian government standards.

Responsible Children's Marketing Initiative of the Australia Food and Beverage Industry (RCMI) 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.

This advertisement is being broadcast during programs that are primarily directed to children and that are watched by very high numbers of children.

It was broadcast during the X factor and during the Simpsons a cartoon program. Both of these programs have very large children's audiences. In particular recent ratings data shows that The Simpsons is one of the top three highest rating programs for children younger than 12.

The Simpsons 19/10 NEW10 Perth 6:06pm

The X Factor ATN7 Sydney 17/10 8:57pm

The ad was shown during the afternoon sessions of the Commonwealth games when large numbers of children would have been in the audience.

Times shown included:

Long version:

TEN Sydney 13/10 3:16pm

Shortened version:

11/10 TEN Sydney 3:17pm

We believe the advertisement breaches the Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry as this advertisement does not "represent healthy dietary choices". Also the Drumstick does not meet the standards of the Nestle Nutritional Profiling System Nutritional Foundation criteria for children. See table below:

	<i>Nestle Nutritional Profiling System</i>		
<i>vanilla drumstick</i>	<i>Criteria for children 9-11 years</i>		<i>Criteria for children 4-8 years</i>
<i>Total energy kcal/serve</i>	<i>2226</i>	<i>200</i>	<i>170</i>
<i>Saturated fat g/serve</i>	<i>8.4</i>	<i>4</i>	<i>3.8</i>
<i>Sugars g/serve</i>	<i>19.5</i>	<i>12.5*</i>	<i>10.6*</i>
<i>Total fat g/serve</i>	<i>12.1</i>	<i>9.7</i>	<i>8.5</i>

**Nestle criteria states "added sugars" g/serve*

The saturated fat in the drumstick is more than double the Nestle criteria and exceeds the criteria for energy total fat and most likely added sugar although the consumer cannot work out the amount of added sugar from the nutrition information panel as the panel shows all sugars.*

We request the Advertising Standards Bureau consider whether the Drumstick advertisement breaches clause 4.1 of the Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry.

Drumstick advertisement – breach of the Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry.

We write to complain about a television advertisement for Nestle drumstick which we consider to breach the Responsible Children's Marketing Initiative of the Australia Food and Beverage Industry (RCMI).

We believe the advertisement breaches the RCMI because it was shown during programs primarily directed to children and because Drumstick does not represent a healthy dietary choice consistent with established scientific or Australian government standards.

Responsible Children's Marketing Initiative of the Australia Food and Beverage Industry (RCMI) 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.

The ad was shown during My friends Tigger and Pooh a computer animated television series inspired by Winnie-the-Pooh clearly a children's program. It was also broadcast several times during Junior Masterchef, a show about children primarily aimed at children and during the Simpsons, a cartoon program also aimed primarily at children. According to recent ratings data Junior Masterchef and The Simpsons are both in the top three highest rating programs for children younger than 12.

Examples of when the ad was broadcast:

My friends Tigger and Pooh BTQ Brisbane 24/10 6:04am

Junior Masterchef TEN Sydney 29/10 7:43 pm and 8:05pm

Simpsons TEN Sydney 29/10 6:09 pm and 6:17pm

This advertisement is being broadcast during programs directed primarily to children.

We believe the advertisement breaches the Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry as this advertisement does not "represent healthy dietary choices". Also the Choc Shock Drumstick does not meet the standards of the Nestle Nutritional Profiling System Nutritional Foundation criteria for children. See table below:

Nestle Nutritional Profiling System

Choc Shock drumstick Criteria for children 9-11 years Criteria for children 4-8 years

Total energy kcal/serve 238 200 170

Saturated fat g/serve 10.3 4 3.8

Sugars g/serve 19.4 12.5 10.6**

Total fat g/serve 12.2 9.7 8.5

**Nestle criteria states "added sugars" g/serve*

The drumstick provides 50% of the daily reference value for 9-11 year old of saturated fat and exceeds the Nestle criteria for energy total fat and most likely added sugar although the consumer cannot work out the amount of added sugar from the nutrition information panel as the panel shows all sugars.*

We request the Advertising Standards Bureau consider whether the Drumstick advertisement breaches clause 4.1 of the Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry.

THE ADVERTISER'S RESPONSE

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

I refer to your letter of 20 November 2010 to Nestlé Australia Ltd (Nestlé) advising of a complaint (Complaint) received in relation to an advertisement (Advertisement) for Nestlé's Choc Shock DRUMSTICK ice cream product (Product). Thank you for the opportunity to comment on the issues raised in the Complaint.

From your letter I understand the Bureau is concerned the Advertisement may not comply with Section 2 of the AANA Advertiser Code of Ethics (Ethics Code), which incorporates the AANA's Food and Beverages Advertising and Marketing Communications Code (Food Specific Code) and the AANA's Code for Advertising Marketing Communications to Children (Children Specific Code) (together the Codes). Whilst the Bureau has only requested Nestlé to address the Codes in its comments on the Complaint, as it specifically makes reference to the Australian Food and Grocery Council's Responsible Children's Marketing Initiative (RCMI), I also address the RCMI below.

On behalf of Nestlé I would like the Board to consider the information below in its consideration of the Complaint. I wish to state at the outset that Nestlé does not consider the Advertisement to be in breach of the Codes or the RCMI.

1. Audience for the Advertisement

Nestlé directed its media agency that the target audience for the Advertisement was adults aged 25 to 29 years. The focus of the planned media schedule for the Advertisement was to screen the Advertisement during day-time talk shows and adult day-time programming generally as well as during programs shown at or later than 7:30pm whose primary audience was the target audience. The planned media schedule for the Advertisement did not include for it to be shown during any children's specific programming or 'C' (children's) classified programs.

Further, the planned media schedule for the Advertisement complied with Nestlé's own policy of not screening the Advertisement during programs where 25% or more of the audience were children aged 14 years and under. The planned media schedule included for the Advertisement to only be shown during programs where 75% or more of the audience were over the age of 14.

I have uploaded the planned media schedule for the information of the Board. Also uploaded is the spot report setting out the when the Advertisement was screened.

2. Advertisement

The Advertisement is a shortened 15 second version of the advertisement produced by Nestlé to advertise generally its DRUMSTICK ice cream product (Original Advertisement). The Advertisement was produced to allow Nestlé to specifically promote the new Choc Shock flavour variant of its DRUMSTICK product.

The premise and theme for the Original Advertisement (upon which the Advertisement is based) was to look fondly upon, and remind the audience of, the classic Australian summer ritual of spending the day at the local suburban swimming pool. The Original Advertisement was a humorous and exaggerated depiction of some of the things that form part of this ritual - finding a spot, spreading a towel, applying sunscreen, jumping into the water, adjusting one's swimming costume and jumping on one leg to get water out of the ears - all things that happen at the beach or the pool on a sunny summer's day in Australia.

The Original Advertisement was created to appeal to its intended adult audience and its theme and content is unlikely to be of any appeal to children. This is also true for the Advertisement. Specifically I note that both the Original Advertisement and the Advertisement only feature adults, consistent with the intention that it be of little or no relevance to children.

3. The Advertisement, the Codes and the RCMI

3.1 Food Specific Code

Nestlé does not consider the Advertisement breaches any of the matters set out in section 2 of the Food Specific Code. The Advertisement could not be construed as infringing prevailing community standards or as containing any statements that are misleading or deceptive. In fact there are no product-specific statements contained in the Advertisement and no statements that could otherwise offend section 2 of the Food Specific Code.

Although not specifically raised in the Complaint, having regard to the key issue of “marketing to children” raised by the complainant, section 3 of the Food Specific Code is relevant to the Complaint. In relation to section 3 Nestlé submits:

(a) As discussed at heading 2 above, the Advertisement is directed to adults and not children (and certainly not primarily directed to children as required under section 3 of the Food Specific Code). As a result section 3 does not apply to the Advertisement in its entirety.

(b) The Product is not a “Children’s Food or Beverage Product” (as defined in the Food Specific Code) and its primary appeal is to adults. In no way could it be said that the Product is targeted towards or has principal appeal to children. As a result section 3.2 does not apply to the Advertisement.

If the Bureau does not accept these submissions and considers section 3 of the Food Specific Code applies to the Advertisement, Nestlé submits it does not breach any of the matters set out in section 3 as it does not:

(a) contain any statements that are misleading or deceptive in relation to nutritional or health claims (as per section 3.1 of the Food Specific Code), there being no health or nutritional claims in the Advertisement; or

(b) encourage children to consume what would be considered excessive quantities of the Product (as per section 3.2 of the Food Specific Code).

In relation to section 3.2 Nestlé notes the Advertisement does not focus upon the consumption of the Product, but its humorous take on the classic Australian summer ritual of spending the day at the local suburban swimming pool. The Advertisement features only one consumption moment of the Product, at its conclusion, in a manner that could not be considered excessive.

3.2 Children Specific Code

Nestlé submits that as the Advertisement is directed to adults and is not primarily directed to children (as discussed at headings 1, 2 and 3.1 above), the Children Specific Code does not apply.

If the Bureau does not accept this submission and considers the Children Specific Code does apply, Nestlé does not consider that the Advertisement breaches any of the matters set out in the Children Specific Code. Specifically in relation to section 2.15 of the Children Specific Code, Nestlé submits that the Advertisement does not encourage nor promote an inactive lifestyle or unhealthy eating habits. The Advertisement depicts people, outdoors and active, enjoying a hot summer’s day at the local swimming pool.

3.3 RCMI

(a) Nestlé’s Commitment to the RCMI

As previously indicated to the Bureau, Nestlé is committed to the RCMI and has a Company Action Plan (CAP). A copy of Nestlé’s CAP has been previously provided to the Bureau.

Please let me know if the Bureau would like a further copy.

(b) Steps taken to ensure RCMI Compliance

Nestlé has taken active and positive steps to ensure advertisements for its products that do not represent “healthy dietary choices” are not screened during children’s programming (defined in the RCMI as programming where the audience is predominantly children and/or directed primarily to children) (Children’s Programming).

Specifically Nestlé would like to note to the Board the following steps it has employed to ensure compliance with its obligations under the RCMI.

(i) Notifications have been sent to all networks advising that advertisements for Nestlé products are not to be screened during Children's Programming. Specifically the networks were informed that this directive applied to both paid and unpaid media airtime (capturing bonus spots).

(ii) Nestlé has adopted a more stringent definition than that adopted by the RCMI to determine whether the audience for a program is predominantly children. Rather than use the definition in the RCMI of 50%, Nestlé's policy is to not screen Advertisements during programs where 25% or more of the audience are children aged 14 years and under.

(c) No breach of the RCMI

Under the RCMI Nestlé commits to not direct the advertising of food products to children under 12 unless they represent health dietary choices. As submitted above, Nestlé does not use the Advertisement as a vehicle to advertise the Product to children. Rather the Advertisement was created to advertise the Product, and appeal, to adults.

As a result, even if screened during Children's Programming, the Advertisement does not breach the RCMI as it does not direct the advertising of a food product to children. It is the advertising of a food product directed to adults.

(d) Advertisements the subject of the Complaint

If the Bureau does not accept Nestlé's submission in paragraph (c), taking the view that Nestlé has breached the RCMI if it screens an advertisement for a food product that does not represent a "healthy dietary choice" during Children's Programming, Nestlé would like to submit the following in relation to the Complaint.

The Complaint submits the Advertisement was broadcast during the following examples of Children's Programming:

(i) My Friends Tigger and Pooh (BTQ Brisbane 24/1 6:04am);

(ii) Junior Masterchef (TEN Sydney 29/10 7:43pm and 8:05pm); and

(iii) The Simpsons (TEN Sydney 29/10 6:09pm and 6:17pm).

In relation to Junior Masterchef and The Simpsons, the audiences for these shows are predominantly adult and they are not directed primarily to children. As such they are not Children's Programming.

In relation to My Friends Tigger and Pooh, Nestlé admits this show is Children's Programming. Nestlé would like to note to the Board that it was inadvertent on the part of Nestlé and unplanned that the advertisement appeared during this program. This placement was a bonus spot provided by the network. It was not in the media plan, nor was it booked or approved by Nestlé or its agency. Further, the placement of the Advertisement during this program was contrary to the instruction given by Nestlé to the network (see heading 3.3(b) above).

(e) Further steps taken to ensure RCMI Compliance Nestlé is concerned that, contrary to its instructions to the network and its media schedule, the Advertisement nonetheless appeared during Children's Programming. To ensure there is not a repeat of this inadvertent and unplanned screening of an advertisement for its products during Children's Programming, Nestlé is currently taking further steps to ensure that other Nestlé products do not inadvertently appear during Children's Programming.

These steps include:

(i) Again notifying the networks at senior management level that advertisements for Nestlé products are not to be screened during Children's Programming (for both paid and unpaid media airtime).

(ii) With respect to television movies with "family oriented" content, although such movies have a broad audience and are generally viewed by children in the apparent company of an adult, Nestlé intends to review the placement of advertisements during such programming.

3.4 Ethics Code

Nestlé submits that the Advertisement does not contain any breach of the Ethics Code and that none of the matters set out in section 2 of the Ethics Code are infringed by the Advertisement. The Advertisement could not be construed as infringing prevailing community standards nor as containing any statements that are misleading or deceptive. There are no product-specific statements contained in the Advertisement and no statements that could otherwise offend the Ethics Code.

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 Code for Advertising and Marketing Communications to Children, 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 breaches the AFGC RCMI because it is directed primarily to children, and because Drumstick ice creams do not represent a healthy dietary choice.

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 not advertise food and beverage products to children under 12 in 'media' unless those products represent healthy dietary choices. The Board noted that the advertised product Drumstick ice creams are not a healthier dietary choice. As a result the product cannot be advertised to children under 12 in 'media'.

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 also noted the recent Guideline to the RCMI Initiative which provided that advertising or marketing communication activities are captured under the RCMI Initiative if:

1. the audience of the communication activity is predominantly children (under 12);
2. the media in which the communication activity appears is clearly directed primarily to children (under 12)
3. The communication activities are, regardless of the audience, clearly directed primarily to children under 12.

The Board also noted that under the Guideline 'the key to determining whether the media or communication activities are directed to children is whether the themes, visuals, language and concepts are those that are attractive to children under 12.' The Board also noted, however,

that while useful in determining whether the advertisement is directed to children, the requirement is that the advertisement is ‘clearly directed primarily’ to children.

The Board noted the extensive information provided by the advertiser about the range of programmes in which the advertisement was broadcast. The Board noted that the programmes in which the advertisement has been scheduled to appear are programmes that are directed to adults and families and are not programmes which are primarily directed to children or likely to have predominantly child audiences.

In particular, the Board noted that one complaint indicates that the television programmes in which the advertisement was broadcast were ‘Junior Masterchef’, ‘The X Factor’, ‘The Simpsons’ and the Commonwealth Games, ”. In relation to these programmes the Board noted that these programmes were and are popular programmes among 5 – 12 year olds. Despite their popularity with children, however, the programmes do not have an audience of ‘predominantly’ children. Similarly, these programmes are not primarily directed to children.

The Board noted one complainant’s information that the advertisement was broadcast during ‘My Friends Tigger and Pooh’. The Board considered that this programme is clearly directed primarily to children and that advertising Drumstick Ice Cream during this programme is a breach of the RCMI. The Board noted the advertiser’s response which indicated the steps taken by Nestle to ensure that its advertisements are not broadcast in contravention of the RCMI. The Board accepted that this broadcast during ‘My Friends Tigger and Pooh’ was in error and also noted the steps that Nestle has subsequently taken to ensure that there is no similar error made. Despite being broadcast in a child’s programme in error, the Board considered that the advertisement breached the RCMI.

The Board then considered whether the advertisement complied with the requirements of the AANA Code for Advertising and Marketing Communications to Children (the Children’s Code). To fall within this Code, or Part 3 of the AANA Food and Beverages Advertising and Marketing Communications Code (the Food and Beverages Code), the advertisement must be ‘having regard to the theme, visuals and language used [...] directed primarily to children and are for product.’

The Board first considered whether the advertisement is directed primarily to children. The Board noted the practice note for the Food and Beverages Code which requires that ‘in its determination of whether any advertising or marketing communication is directed toward children, the Board will apply the same criteria as used in considering complaints under the [Children’s Code]. The Board will consider the advertiser’s stated intent but will also make an evaluation based on its own review of the advertising or marketing communication material and the product being promoted.’

The Board noted that the dictionary definition of ‘primarily’ is ‘in the first place’ and that to be within the Children’s Code the Board must find that the advertisement is aimed in the first instance at children. The Board considered the theme of the advertisement, the visuals and the language. The Board noted the advertiser’s response that the intention of the advertisement is

to appeal to an adult audience. The Board considered that the advertisement was clearly directed to adults and not to children.

On balance, the Board considered that the visuals, language and theme of this advertisement create an overall impact of this advertisement that is not specifically directed or designed to be clearly directed primarily to children. The Board considered that the advertisement was primarily directed to adults.

The Board agreed that the advertisement is not, in the terms of the Children's Code, 'directed primarily at children.'

The Board then considered whether the product is 'a good that is targeted to and of principal appeal to children' as required by the Children's Code. The Board considered that, while some children will be bought this product, the Board considered that this brand of ice-cream is an ice cream that is primarily targeted to adults.

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.

Under section 2.2 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 an ice cream is not, per se, inconsistent with or undermining of a balanced diet or healthy lifestyles and that there was nothing in this advertisement that would amount to undermining of a balanced diet or healthy lifestyle. 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 Code of Ethics, Children's Code or Food Code but that it did breach the AFGC RCMI.

ADVERTISER RESPONSE TO DETERMINATION

The Board upheld the complaint in part on the basis that the product the subject of the advertisement was not a healthy dietary choice and was found to have appeared in programming which was directed primarily to children (Children's Programming). As per our earlier submission in response to the complaint and noted by the Board in its draft case

report, the advertisement should not have appeared during Children's Programming. All networks had been notified by Nestlé that advertisements for Nestlé products nutritionally inappropriate for children were not to be screened during Children's Programming. Specifically the networks were advised that this directive applied to both paid and unpaid media airtime (capturing bonus spots).

In light of the complaint and the screening by a network of the advertisement during Children's Programming contrary to Nestlé's direction, Nestlé is working further with its media buyer (Optimedia) and the networks to ensure there is no repeat of a screening of an advertisement for a Nestlé product nutritionally inappropriate for a children during Children's Programming.