

Case Report

1. Case Number :	0065-23
2. Advertiser :	The Cheesecake Shop
3. Product :	Food/Beverages
4. Type of Advertisement/Media :	Email
5. Date of Determination	26-Apr-2023
6. DETERMINATION :	Upheld – Modified or Discontinued

ISSUES RAISED

AANA Food and Beverages Code\3.4 Giveaway products/vouchers
AANA Food and Beverages Code\2.1 Not misleading or deceptive

DESCRIPTION OF ADVERTISEMENT

This email advertisement is promoting an Easter-themed colouring competition. By entering the competition, the participants stand a chance to win one of the six prizes available at each participating outlet. These prizes comprise two art cases per age category, each containing a set of colouring pencils. Participants are eligible to receive a complimentary slice of cake from the 'Daily Treats' product.



THE COMPLAINT

Comments which the complainant/s made regarding this advertisement included the following:

The advertisement was clearly aimed directly to Children and promotes un-healthy eating. The subject line is 'do you know someone under 14 who wants a free slice of cake?' and the email shows a young excited girl. I also feel like the claim 'biggest colouring competition' is false and misleading as they cannot confirm how big this would be, it is depending on their number of entrants. The premise of this advertisement is 'do our competition and we will reward you with cake' which i feel is not a healthy message to young people and Cake should not be used to entice children to engage with your brand.

THE ADVERTISER'S RESPONSE

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

We note that the complaint refers to an advertisement published on various Cheesecake Shop mediums, including email, social media channels and our website advertising a colouring competition as part of an Easter promotion (the Advertisement).

The complaint alleges that the Advertisement is 'clearly advertised at children and promotes un-healthy (sic) eating' (the Complaint) and has identified the following sections which are alleged to have been breached:

AANA Food and Beverages Code section 2.1;

AANA Food and Beverages Code section 3.1;

*AANA Food and Beverages Code section 3.4;
(the Food Code).*

It is the position of The Cheesecake Shop that the Advertisement, does not breach the identified sections of the Food Code, the Code of Ethics or Code for Advertising and Marketing Communications for Children (the Codes), for the reasons outlined below.

Advertisement

A description of the Advertisement

The subject of the Complaint is an Easter-themed colouring competition, directed at children aged 13 years or younger. Participation in this competition is voluntary and entails downloading and colouring an age-appropriate sheet provided by The Cheesecake Shop. After completing the colouring sheet, participants are invited to return it in person to their nearest The Cheesecake Shop outlet during the promotional period. By entering the competition, the participants stand a chance to win one of the six prizes available at each participating outlet. These prizes comprise two art cases per age category, each containing a set of colouring pencils. Participants are eligible to

receive a complimentary slice of cake from the 'Daily Treats' product range (the Promotion).

The Advertisement employs a combination of text, videography and animation. The design and nature of the animation was created to highlight the competition and prizes. We do not dispute that the Advertisement is designed to draw attention to The Cheesecake Shop brand and note that animation and videography content are not the exclusive preserve of children and are a meaningful form of communication with older audiences.

Details of the programs in which the advertisement appears

The advertisement is distributed on:

- a. The Cheesecake Shop website: <https://www.cheesecake.com.au/eastercomp>;*
- b. The Cheesecake Shop Instagram: <https://www.instagram.com/p/CqZ9t77Nz2U/>*
- c. The Cheesecake Shop Facebook*
- d. The Cheesecake Shop promotional email*

Whether the audience of the programs is predominantly children

The Board has previously referred to several case reports where they apply the dictionary definition of 'primarily' to decide whether an Advertising or Marketing Communication is directed at children. As per the definition, 'primarily' means 'in the first place'. Thus, for the Advertisement to come under the purview of the Code, it must be established that Advertisement is aimed primarily at children. The Cheesecake Shop submits that the Advertisement is not directed primarily to children.

In relation to the mediums, The Cheesecake Shop submits the following:

1. The Cheesecake Shop Website

The website (www.cheesecake.com.au) is a corporate online platform for The Cheesecake Shop and performs a variety of functions including, but not limited to, providing details regarding food and beverage products available for purchase, information on current promotions (including the Promotion), a store locator and information relating to franchisee enquiries.

After reviewing The Cheesecake Shop website function as a whole, it is evident that the primary purpose is to promote The Cheesecake Shop to a mature audience, rather than children. While the site does feature advertising and product promotions, they are not the primary focus. The various sections of the website are not tailored to appeal to children, and The Cheesecake Shop believes that children would find it uninteresting and, as such, are not considered the target audience for this medium. The website therefore cannot be reasonably categorised as intended or directed primarily to children.

2. Promotion email advertisement

The purpose of email campaigns is to promote products, services or events to a specific target audience through email communication. These campaigns are used by The

Cheesecake Shop to increase brand awareness, drive website traffic and boost sales. In order to receive emails from The Cheesecake Shop, a user must subscribe or opt-in to our email list. This ensures the user is interested in receiving our offerings and provides consent to receive email communications. Subscribing also allows the user to control their email preferences and opt-out at any time.

To access, view and participate in the Promotion, a child would need to have access to the email account and The Cheesecake Shop website, then navigate through the banner advertising on the website, and download the colouring sheets. A child would then need a parent or other responsible adult to accompany them to an outlet and submit their colouring sheet to receive the complimentary slice of cake.

The Cheesecake Shop submits:

- a) the email advertisement is not directed primarily at children as a child is unlikely to have access to an email account or opt-in to receive marketing content;*
- b) the advertisement does not appear in a medium directed primarily at children and does not appear in a medium which attracts children as its audience; and*
- c) it is unlikely that a child could or would be able to take the necessary steps to participate in the Promotion without the assistance or supervision of a parent or other responsible adult.*

Accordingly, it is rejected that the email advertisement is directed primarily to children.

3. The social media advertisement

The Cheesecake Shop does not dispute that the visuals of the advertisement are bright and fun and is designed to attract attention to the Promotion and is equally attractive to adults and children. However, the medium is not directed primarily to children as they are below the age of consent to operate a social media account. Additionally, the Board has previously cited in a case report regarding Instagram that it, 'is a Medium which is meant to be restricted to over 13 year olds' (Case Report 0107/18).

On this basis, the Advertisement is not directed primarily to children. Further, the Practice Note to the AANA Code of Advertising and Marketing Communications to Children (the Children's Code) notes at Item 2 that where marketing communications contain messaging and creative that is not directed primarily to children the Children's Code does not apply. The Cheesecake Shop highlights that while the Advertisement can be enjoyed by children, it is at the discretion of the parent or other responsible adult to facilitate a child's participation in the Promotion.

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

AANA Code of Ethics – Section 2

In accordance with Section 2 of the AANA Code of Ethics (the Code of Ethics), the advertisement has been assessed and found to comply with the Code of Ethics. It is submitted that:

- a) nothing in the advertisement disparages or discriminates against any person or group;*
- b) the advertisement does not utilise any form of sexual appeal, nor does it objectify, perpetuate or promote the premature sexualisation of children;*
- c) there is no content, depiction or message that presents or portrays violence in any form;*
- d) the advertisement does not encourage or condone unhealthy or unsafe behaviour;*
- e) the advertisement does not depict nudity in any form; and*
- f) the advertisement is clearly distinguishable as an advertisement for the Cheesecake Shop brand.*

In consideration of the above, the Cheesecake Shop submits that the Advertisement does not breach the Code of Ethics.

Food and Beverages – Advertising Code

The Complaint alleges The Cheesecake Shop has engaged in false and misleading advertising regarding the phrase ‘biggest colouring competition’. According to section 2.1 of the Food Code, advertising that breaches prevailing community standards related to health, nutrition and ingredient components of food and beverage products are prohibited. While The Cheesecake Shop takes these allegations seriously, we would like to clarify that we have not breached the Food Code in this regard and as such misleading and deceptive conduct sections of the Food Code do not apply.

With regards to sections 3.1 and 3.4 of the Food Code, the Advertisement has been reviewed and is confirmed that it does not breach the Food Code for the following reasons:

- a) the Advertisement does not employ ambiguity or incorporate a misleading or deceptive sense of urgency;*
- b) the issue of price minimisation is deemed irrelevant as the Advertisement offers a complimentary slice of cake upon submission of a qualifying colouring sheet;*
- c) the Advertisement does not make any nutritional or health claims in relation to any food or beverage products offered by The Cheesecake Shop; and*
- d) the Advertisement does not contain any information or depictions that could potentially undermine the role of a parent or other responsible adult in guiding a child’s diet and lifestyle.*

Based on the aforementioned reasons, it is concluded that the Advertisement does not breach the Food Code’s advertising standards.

Conclusion

The Cheesecake Shop takes a responsible approach to informing its customer base and has taken every care to ensure compliance with the identified Codes. For the reasons

outlined above, we consider the Advertisement is compliant with the Codes and therefore the Complaint should be dismissed.

We express our commitment to collaborating with the Ad Standards Board to address any concerns related to the Complaint in a cooperative and productive manner. We trust that the information provided above has offered adequate additional detail for the Board's due consideration. We thank you for affording us the opportunity to clarify our position.

THE DETERMINATION

The Ad Standards Community Panel (the Panel) considered whether this advertisement breaches the AANA Food and Beverages Advertising Code (the Food Code).

The Panel noted the complainant's concern that the advertisement:

- Is providing cake to entice young people to engage with the brand.
- Is aimed directly to children and promotes un-healthy eating.
- Is false and misleading by saying it is Australia's biggest colouring competition.

The Panel viewed the advertisement and noted the advertiser's response.

The Panel noted that the product advertised is a food product and therefore the provisions of the Food Code apply.

Section 2.1 Advertising for Food or Beverage Products must not be misleading or deceptive or likely to mislead or deceive.

The Panel Noted the Practice Note to this section of the Food Code which provides:

"In determining whether advertising for food or beverage products is misleading or deceptive or likely to mislead or deceive, the Community Panel will consider the likely audience for the advertising, including whether the advertisement is directed at the public at large or a more targeted audience. The Community Panel will consider whether or not an Average Consumer within the target audience would have been misled or deceived or likely to be misled or deceived by the advertisement."

The Panel considered that most members of the community would understand the phrase "Australia's biggest colouring competition" to be puffery and would not be misled or deceived by the statement.

Overall, the Panel considered that the advertisement is unlikely to mislead or deceive an average consumer within the target audience.

Section 2.1 Conclusion

The Panel considered that the advertisement is not misleading or deceptive and does not breach Section 2.1 of the Food Code.

Is the advertisement for an Occasional Food or Beverage Product?

The Panel noted that the definition of Food or Beverage Product in the Food Code is: *“food or beverages products which do not meet the Food Standards Australia Nutrient Profile Scoring Criterion as published from time to time by Food Standards Australia New Zealand”*.

The Panel noted the advertisement does not feature an individual product but is a promotion offering a free slice of one of the advertiser’s cake products. The Panel noted that the advertiser had not supplied information indicating how their products scored under the Nutrient Profile Scoring Criterion.

The Panel considered that it was reasonable to assume that the majority of the products sold by the advertiser would be Occasional Food or Beverage Products.

3.4 Advertisers must not give to Children as awards or prizes Occasional Food or Beverage Products or vouchers that can be used for Occasional Food or Beverage Products.

The Panel noted the complainant’s concern that the promotion was directed to children.

The Panel noted that section 3.4 of the Food Code does not require the advertisement to be directed primarily to children, only that Occasional Food or Beverage Products should not be given to children as awards or prizes.

The Panel noted the complainant’s concern that cake was being given as a reward to children to enter the competition.

The Panel noted the advertiser’s response that it would be unlikely for children to be able to complete the necessary steps to enter the competition without the supervision of an adult or guardian. However, the Panel considered that this did not override the fact that only children can enter the competition, and that in doing so they are awarded a slice of cake for participation.

The Panel determined that this advertisement did contain a promotion where Occasional Food Products are given to children as awards.

3.4 Conclusion

The Panel determined that the Occasional Food or Beverage Products were given directly to children as an award or prize and, therefore, the advertisement was in breach of Section 3.4 of the Food Code.

Conclusion

Finding that the advertisement was in breach of Section 3.4 of the Food Code the Panel upheld the complaint.

THE ADVERTISER'S RESPONSE TO DETERMINATION

The Easter campaign is finalised and the advertisements have been discontinued.