



## Case Report

1	Case Number	0178/17
2	Advertiser	McDonald's Aust Ltd
3	Product	Food / Beverages
4	Type of Advertisement / media	TV - Free to air
5	Date of Determination	10/05/2017
6	DETERMINATION	Dismissed

### ISSUES RAISED

Food and Beverage Code 2.1 (a) - Misleading / deceptive

### DESCRIPTION OF THE ADVERTISEMENT

The advertisement shows a barista making a coffee to background music, then handing it out a drive-thru window. The voice over says “when you try a freshly made coffee at McCafe, you’re enjoying Australia’s most popular barista made coffee. Just one of many reasons to try McCafe.” The commercial ends with the words “Australia’s most popular barista made coffee. One of many reasons to try” on a black background, then the McCafe logo.

### THE COMPLAINT

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

*The advertised statement is that McDonald's coffee is the most popular barista made coffee. Whilst it may be the highest selling in terms of volume, most popular implies customer preference of a majority of barista made coffees had been completed and McDonald's is the preferred choice.*

*I challenge the statement as many purchases are made for convenience, not for quality or preference as the 'best choice' of barista made coffee.*

*The advertised statement should be best-selling, not most popular unless proof of comprehensive market research comparing preferred coffee providers can be evidenced.*

### THE ADVERTISER’S RESPONSE

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

*Thank you for requesting a response to complaint number 0178/17 (Complaint).*

*The Complaint refers to a McCafe commercial (Advertisement). The Complaint is made under section 2.1(a) of the Food and Beverages Advertising & Marketing Communications Code (AANA Code). The Complaint disputes our claim that McCafe coffee is Australia's most popular barista made coffee, and says that we are misleading consumers by making this claim in the Advertisement.*

*The Advertisement does not breach the Code for the reasons stated below:*

*Reason 1: It's a fact that McCafe coffee is Australia's most popular barista made coffee*

*Reason 1.1: The definition of the word 'popular'*

*Key to this claim is the definition of the word 'popular'. The Cambridge English Dictionary defines 'popular' as "liked, enjoyed, or supported by many people". Likewise, the Merriam-Webster Dictionary defines the word to include "suitable to the majority, frequently encountered or widely accepted, commonly liked or approved". At the core of the definition of the word 'popular' is the idea of mass appeal or volume. Whether a product is popular does not hinge on its quality, taste, or other physical properties, but, rather, its adoption and use by the most people. By this standard, McCafe coffee is the most popular barista-made coffee in Australia because, as the Complaint states, we sell the most coffee by volume.*

*The Complaint attempts to re-define the meaning of the word 'popular' to mean something else, but as much as the complainant might wish that the word meant something else, words are defined by their generally accepted meanings (coincidentally, their most popular meanings). The dictionary is generally accepted as the most authoritative source of the meaning of words, and accordingly that is the definition the Advertising Standards Board (ASB) ought to apply.*

*Reason 1.2: Analogous situations*

*Also relevant to this Complaint is the way that the word 'popular' would be applied to analogous products, particularly beer, wine and other beverages. In this case we would like to use the analogy of wine: The most popular wine in Australia may not be the one that has won the most awards, nor is it the one deemed by experts to be the 'best wine'. The most popular wine will generally not be the most expensive wine, sold only at the cellar door or in boutique bottle shops. High price and inaccessibility are likely barriers to popularity in the case of beverage products. Rather, the most popular wine will be the one that is the best tasting at an affordable price point, and accessible to most people. Contrary to the claim made in the Complaint, the convenience of McCafe coffee is entirely relevant to its popularity. The fact that it is easy and convenient to purchase from a wide variety of locations, of sound quality, and sold at a reasonable price, contributes to the popularity of McCafe coffee. In considering this Complaint, the ASB should not consider the hypothetical popularity of McCafe coffee if it were not convenient and widely available, as to do so would be to distort reality and to discard the facts.*

*Reason 1.3: The data supports the claim*

*In light of the definition of the word 'popular', and the analogous situations set out above, the measure of which barista-made coffee is the most popular is the brand of coffee that has the single largest sales volume. The Complaint acknowledges that McCafe barista-made coffee has the largest sales volume in Australia, so this point is not in dispute. The Complaint hinges on re-interpreting the meaning of the word 'popular' to mean something different to what the word actually means. Having established that the word does mean 'sales volume' in this situation, the Complaint has been rebutted. However, for the sake of completeness, we have attached the data that supports our claim.*

*Reason 1.5: If McCafe cannot claim to be the most popular, who can?*

*It is important to the ASB's deliberations that we consider what Australia's most popular barista-made coffee is if it is not McCafe. In the Complaint there is no reference to the brand that the complainant thinks is more worthy of the claim. The claim is a relative claim, meaning that it is made by comparison to other brands. We claim that our coffee is the most popular, which means other brands must be less popular. Likewise, if we are not the most popular, then someone else must be. However, despite looking at the data in a multitude of different ways, we cannot see any other brand in a better position to make this claim than us. We submit that if there is no other brand better able to make this claim than us, then, by process of deduction, we are the most popular.*

*Reason 2: By the Complaint's own admission, the claim is not misleading*

*The Complaint itself reveals that the claim is not misleading. For our claim to be misleading or deceptive, the complainant and other consumers would need to be misled or confused as to our actual meaning. In the Complaint, it is clear that even the complainant recognises that our claim refers to our sales volume. The complainant is not confused, misled or deceived by our claim, the complainant merely disagrees with the measure we have applied (namely popularity), and thinks we should apply a different measure. The complainant also seems to disagree with our choice of words, and suggests that we use the term 'best selling' rather than 'most popular'. While that may be the complainant's preference, in this situation 'best selling' and 'most popular' are one in the same thing. We chose to use the words 'most popular' rather than 'best selling' for creative reasons, and the fact that the complainant would prefer that we express ourselves differently is fine, but does not mean that the complainant or any other person has been misled or deceived.*

*Reason 3: Puffery is not classified as misleading and deceptive conduct*

*Even if the ASB did not accept all of the above reasons and submissions, the claim would still not be misleading or deceptive because it can be classed as 'puffery'. While it is our primary submission that the claim is supported by data and logic, we submit, in the alternative, that our claim that 'McCafe is Australia's most popular barista made coffee' is puffery. This means it is not misleading under section 18(1) of the Competition and Consumer Act 2010.*

*While the data shows that our coffee is the most popular barista-made coffee in Australia, and our Advertisement uses this to encourage consumers to try the coffee, many consumers would still place little reliance on this information in making a decision on where to buy their*

coffee.

*There is a vast array of case law on this matter, but we do not think it is necessary to re-state that case law in full to support our submissions. At a basic level the case law allows advertising to make grand statements such as ‘world’s best food’, ‘world famous desserts’, ‘the best tasting beer’ and other similar claims because the ordinary, reasonable consumer accepts that advertising is about putting a product or service in its most positive light. Consumers are able to see through ‘puffery’ and exaggeration, and make decisions for themselves. The law of misleading and deceptive conduct protects consumers when advertisers make specific claims about their product or services and it’s reasonable for a customer to rely on that information; for example if an advertiser says that their vacuum is the cheapest on the market, customers should be able to rely on that claim, and will be upset if they find out that it wasn’t actually the cheapest. By comparison, customers are unlikely to buy a coffee, find out that it wasn’t actually the most popular, and then decide ‘if it’s only the second most popular, I don’t want to drink it’. The essence of the claim is ‘other people like it (whether for convenience, taste, price, etc.), so you should give it a go’. We expect that many people will try our coffee and some might not like it, but we also expect many people will try it and will be pleasantly surprised.*

*Accordingly, even if all of the evidence supporting our claim is disregarded, the claim is still not misleading because it can be treated as puffery.*

*We submit that the Advertisement complies with the Codes and as a result the Complaint should be dismissed.*

*We have considered other matters under section 2 of the AANA Code of Ethics and submit that the Advertisement does not breach any of the other matters covered by that section.*

## **THE DETERMINATION**

The Advertising Standards Board (the “Board”) considered whether this advertisement breaches the AANA Food and Beverages Advertising and Marketing Communications Code (the “Food Code”).

The Board noted the complainant’s concerns that the advertisement is misleading in its statement that McDonald’s coffee is the most popular barista-made coffee.

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

The Board noted that the product advertised is food and that therefore the provisions of the Food Code apply. In particular, the Board considered section 2.1 of the Food Code which states:

*'Advertising or marketing communications for food ...shall be truthful and honest, shall not be or be designed to be misleading or deceptive or otherwise contravene prevailing community standards, and shall be communicated in a manner appropriate to the level of understanding of the target audience of the Advertising or Marketing Communication with an accurate presentation of all information including any references to nutritional values or health benefits.'*

The Board noted that the advertisement depicts a voiceover describing McDonald's barista-made coffee as Australia's most popular.

The Board noted the complainant's concern that McDonald's coffee is only the most popular because more of it is sold due to convenience rather than choice therefore it should be promoted as Australia's best-selling barista-made coffee rather than most popular.

The Board noted the advertiser's response that McDonald's barista-made coffee has the single largest sales volume in Australia and that if you apply the dictionary definition of 'popular' the advertisement is making a factual claim and is not misleading.

The Board noted the Macquarie Dictionary definition of popular:

“adj. 1. Regarded with favour or approval by associates, acquaintances, the general public, etc...”

The Board noted that while some consumers may buy McDonald's coffee based on its convenience rather than based on choice, in the Board's view the reason for purchasing coffee from a particular outlet is not relevant when it comes to the actual sales figures and considered that the advertisement does not make any claims which cannot be backed up with fact: that based on sales figures, McDonald's coffee is the most popular.

The Board determined that the advertisement did not breach Section 2.1 of the Food Code.

Finding that the advertisement did not breach the Food Code the Board dismissed the complaint.