



Case Report

1	Case Number	0229/12
2	Advertiser	Retail Food Group
3	Product	Food and Beverages
4	Type of Advertisement / media	Internet
5	Date of Determination	27/06/2012
6	DETERMINATION	Dismissed

ISSUES RAISED

Advertising to Children Code 2.15 Food and beverages

DESCRIPTION OF THE ADVERTISEMENT

Website for Donut King which provides product information, store locator and other information. There is a kids' corner featuring colouring in pages and games including pacman and find-a-word. The website address is donutking.com.au.

THE COMPLAINT

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

This website is in breach of the AANA Code for Advertising & Marketing Communications to Children and the AANA Food and Beverages Advertising and Marketing Communication Code.

Website Content

The website includes a "Kids Corner" with activities targeted towards children.

The 'Donut King Fun Page' includes a word puzzle and a maze puzzle. Children who complete the maze puzzle are able to receive a free cinnamon donut by presenting the fun page to the counter of the Donut King store.

There is also a 'Pacman' game which when played includes advertising for the donut king Sensations range. The Sensations range donuts are also integrated into the game itself representing the figures from which the player has to escape. Throughout the game there is a banner at the bottom of the game tab promoting Donut King Sensations rang including the words "8 new donuts to wrap your lips around".

AANA Children's Code

The AANA Code for Advertising & Marketing Communications to Children clause 2.15a states “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 donut king website promotes a range of donut products to children which do not represent healthy dietary choices (see nutrition information) and hence the advertisement is in breach of clause 2.15a.

AANA Food & Beverage Code

AANA Food and Beverages Advertising and Marketing Communication Code Clause 3.2 states; “Advertising or Marketing Communications to Children shall not improperly exploit Children’s imaginations in ways which might reasonably be regarded as being based upon an intent to encourage those Children to consume what would be considered acting reasonably as excessive quantities of the Children’s Food or Beverage Product/s.”

The advertising located within the ‘Pacman’ game reference 8 new donuts as part of the Sensations range. This encouragement to consume 8 new donuts would be considered excessive consumption for children representing an intake of over 8000kJ.

Nutritional Information

Nutrition information for donut king products is not available via the website or in store.

Mandatory energy labelling reveals that the traditional cinnamon donut promoted by the “fun page” provides 625kJ.

The sensations range promoted by the Pacman game includes Double Chocolate Marble at 1150kJ Strawberry & Cream donut at 1130kJ White Choc Marble at 1160kJ and Vanilla Glazed at 811kJ.

Nutrition information is available via Calorie King (www.calorieking.com.au) for selected Donut King products.

The Dietary Guidelines for Children and Adolescents in Australia advise to “Consume only moderate amounts of sugars and foods containing added sugars” “limit saturated fat and moderate total fat intake” and “choose foods low in salt”.

Donut King information indicates that these donuts contain large amounts of energy (kJ).

Further information from CalorieKing indicates that these products are high in saturated fat and sugar and do not represent healthy dietary choices for children.

CalorieKing Nutritional Information

- Sensations: Double Choc Marble Donut

- 1 donut = 1152kJ 8.6g sat fat 15.7g sugar and 178mg sodium

- 100g = 1670kJ 12.4g sat fat 22.7g sugar and 258mg sodium

- Sensations: Strawberry and Cream Donut

- 1 donut = 1132kJ 6.6g sat fat 17.9g sugar and 177mg sodium

- 100g = 1640kJ 9.5g sat fat 26g sugar and 256mg sodium

- Sensations: White Choc Marble Donut

- 1 donut = 1159kJ 7.9g sat fat 16.1g sugar and 181mg sodium

- 100g = 1680kJ 11.5g sat fat 23.4g sugar and 262mg sodium

THE ADVERTISER’S RESPONSE

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

The complainant has alleged a breach of clause 2.15a of the AANA Code for Advertising & Marketing Communications to Children (‘the Children’s Code’) on the basis that “the Donut King website promotes a range of donut products to children which do not represent healthy dietary choices...”.

The complainant also infers that content provided on the Donut King website constitutes a breach of clause 3.2 of the AANA Food & Beverage Advertising & Marketing Communications Code (‘the Food Code’).

We respectfully reject each of these claims.

Clause 2.15a of the Children’s Code states 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.

Clause 3.2 of the Food Code states that:

Advertising or Marketing Communications to Children shall not improperly exploit Children’s imaginations in ways which might reasonably be regarded as being based upon an intent to encourage those Children to consume what would be considered, acting reasonably, as excessive quantities of the Children’s Food or Beverage Product/s.

The term ‘Advertising or Marketing Communications to Children’ is essentially defined in a consistent manner amongst both the Children’s Code and Food Code. Specifically, the term relates to advertising or marketing communications which ‘...having regard to the theme, visuals and language used, are directed primarily to Children and are for Product [being product targeted toward and having principal appear to children]”.

The Donut King Website

The complaint relates to the “Donut King website” (the ‘Site’). A screenshot of the Site is attached for the Board’s consideration and marked Annexure ‘A’.

We are of the view that the Site does not constitute ‘Advertising and Marketing Communications to Children’ because it is not, having regard to its theme, visuals and language used, directed primarily to Children and for Product (as that term is defined in the Children’s Code).

In support of its view, we note that the Site is the corporate online presence for ‘Donut King’ and performs a variety of functions, some of which include but are not limited to:

- a. ‘What’s New’ – A range of the latest in-store promotions;*
- b. ‘Products’ – Details regarding food and beverage products, together with their kilojoule (‘kJ’) content, available for purchase from Donut King outlets;*
- c. ‘Store Locator’ – A facility which identifies nearby Donut King outlets based on the postcode submitted by the user;*
- d. ‘Member’s Club’ – A facility which allows a user to join a mailing list;*
- e. ‘Contact Us’ – A facility which allows a user to provide feedback;*
- f. ‘About DK’ – Information on the history of the Donut King brand and career opportunities;*
- g. ‘Franchisee Sales Information’ – Information on how the user can gather further information about owning a Donut King outlet in Australia; and*
- h. ‘Franchisee Member Login’ – A portal for Donut King franchisees to enter the Donut King intranet.*

Whilst the above is a snapshot only of some of the functions performed by the Site, it sufficiently demonstrates that the Site cannot be reasonably categorised as ‘Advertising or Marketing Communications to Children’ given the following:

- 1. The ‘theme, visuals and language’ used throughout the Site are not directed primarily to Children. Indeed, we submit that a majority of the Site would be considered ‘boring’, unappealing and irrelevant to Children.*

2. *The Site is not 'for Product'. As indicated, it performs a variety of functions, only one of which is to inform the user as to the type and range of food and/or beverage items that may be purchased from a Donut King outlet.*

"Kids Corner"

Whilst the complaint relates to the Donut King website, the complainant attempts to support its allegations by criticizing the 'Donut King Fun Page' ('the Fun Page') and 'Pacman Game' located on the 'Kids Corner' webpage – one of many web-pages forming part of the Site. A copy of the 'Kids Corner' webpage is attached and marked Annexure 'B'.

Donut King positions itself as being "all about fun". Consequently, the 'Kids Corner' webpage asks users "why not keep the child alive in you, by playing in our kids corner".

In any event, we take the following opportunity to address the 'Fun Page' and the 'Pacman Game' in further detail:

Fun Page:

The Fun Page can be described as a printable A4-sized page of activities consisting of a maze, a colouring-in picture and a word cross. Once a child successfully completes the maze, that child may take the Fun Page to a Donut King outlet in order to redeem a free cinnamon donut. A copy of the Fun Page is attached for the Board's consideration and marked Annexure 'C'.

We respectfully submit that the Fun Page cannot be reasonably categorised as 'Advertising or Marketing Communications to Children' for the purposes of either the Children's Code or Food Code.

Whilst we accept that the Fun Page is directed primarily to Children, we reject the suggestion, having regard to the 'theme, visuals and language used', that the Fun Page concerns 'Product' (or 'Children's Food or Beverage Product').

In support of its position, we note that:

- The Fun Page does not contain images of food and/or beverages available from Donut King, but instead, is primarily focused on providing an engaging experience for the child user by way of three activities for completion;*
- The 'cinnamon donut' is not a product targeted toward and having principal appeal to children. To the contrary, the 'cinnamon donut' constitutes a mainstay of the Donut King product range traditionally having mass appeal to, and having been targeted to, all segments of the community.*

Indeed, by way of example the current "Hot Stuff Deal" promoted on the "What's New" web-page on the Site offers a coffee and cinnamon donut deal - an historical backbone of Donut King promotional activity for decades and one incapable of generating either success or longevity if the 'coffee offer' forming part of the deal was paired with a product 'targeted toward and having principal appeal to children'.

The cinnamon donut may be contrasted with a variety of other donut products (none of which are identified or referred to on the Fun Page or Pacman Game) targeted towards and having principal appeal to children, such as the dinosaur donut, boys & girls donuts, the 'sweet talker', 'twinkle' or crocodile donuts and the cake novelty donuts (all of which are detailed on the 'products' web-page of the Site).

Furthermore, in the event the Fun Page is considered 'Advertising or Marketing Communications to Children' (a finding we reject), we submit that a reasonable person would find that it neither encourages nor promotes "an inactive lifestyle or unhealthy eating or drinking habits".

In the first instance, a user may only obtain a single free donut upon redemption of the completed Fun Page. This is clearly demonstrated on the Fun Page which requires a Donut King employee to stamp the Fun Page with a 'donut received stamp' to ensure that it may be

redeemed once only. This limitation reinforces that consumption is restricted to one cinnamon donut only.

Furthermore, the 'free cinnamon donut' constitutes a reward for completing a mentally engaging activity. Redemption of that reward is discretionary.

There is no suggestion, express or implied, within the Fun Sheet (nor the Site) that the Fun Page constitutes anything other than what it innocently is – an activity sheet for children that offers a reward to encourage participation and completion.

The Fun Sheet certainly does not encourage or promote inactive lifestyles nor unhealthy eating or drinking habits.

Pacman Game:

The Pacman Game referred to in the complaint can be described as an interactive web-based game whereby the user operates a computer keyboard to control a character through a maze. The objective of the game is the same as the regular Pacman computer game, however, the game-play is tailored so that the character controlled by the user is a 'mouth' and that the 4 'enemies' the user must avoid are four donuts, each modelled after the 'Donut King Sensations' ("Sensations") range.

At the bottom of the game screen is a logo for the Sensations range along with the text "8 New Donuts to wrap your lips around". Prior to the game commencing, there is a picture of a box of 6 'Sensations' donuts. Screenshots of the Pacman Game (prior to the game commencing and during game-play) are attached to this submission for the Board's consideration and marked Annexure 'D'.

The complaint alleges that the Pacman Game breaches:

- clause 2.15(a) of the Children's Code for reasons consistent with those allegedly giving rise to a breach of the same clause by the Fun Page discussed above; and*
- clause 3.2 of the Food Code on the basis that it represents "encouragement to consume 8 new donuts [which] would be considered excessive consumption for children, representing an intake of over 8000kJ".*

Consistent with our comments above, we maintain that the Children's Code does not apply to the Pacman Game for the following reasons:

a) Consistent with the introduction provided on the 'Kids Corner' web-page of the Site, the game is not targeted primarily at children but seeks broad appeal.

It is based on the Pac-Man video game first released in May 1980 – a game synonymous with video gaming and which represents a 1980's popular culture icon which has spawned various sequels over subsequent decades.

These attributes, and the broad appeal fostered amongst the community, were the inspiration and rationale for the form of game provided on the Site and now complained of.

b) The 'Sensations' range of donuts is not a product targeted toward and having principal appeal to children.

To the contrary, the 'Sensations' donut range was developed to target a mature demographic and offer a donut range with a more adult inspired taste palate. This is evident by the 'Sensations' range which, whilst now generally limited to vanilla glazed donuts and yeast rings topped with Cadbury chocolates, upon release in 2008 included such flavours as Blueberry & White Chocolate, Apple & Rhubarb Crumble, Cookies & Choc Mouse, White Choc Marble and Banana Custard & Caramel.

The Donut King 'Sensations' range may be contrasted with donuts primarily targeted at and having appeal to children, none of which are identified on the aforesaid game, and which are referred to above, eg. dinosaur donuts. Distinguishable from the 'Sensations' range, these types of donuts incorporate additional confectionary (such as sprinkles and 'smarties') and

also come in 'fun' shapes (such as a dinosaur or a star), which are intended to appeal to children.

c) *The Pacman Game neither promotes nor encourages an inactive lifestyle nor unhealthy eating or drinking habits.*

Insofar as clause 3.2 of the Food Code is concerned, we also reject the complainant's allegations.

In the first instance, the comments made at Items (a) and (b) also operate so as to exclude the operation of clause 3.2 of the Food Code to the game.

Secondly, and even in circumstances where the Code were to apply (which is denied), there exists no legitimate basis for a reasonable person to infer, or indeed suspect, that the game in question seeks or has the effect of improperly exploiting "children's imaginations in ways which might reasonably be regarded as being based upon an intent to encourage those children to consume what would be considered, acting reasonably, as excessive quantities of the Children's Food or Beverage Product".

We would respectfully suggest that a reasonable person would not find in the game any attempt whatsoever to improperly exploit childrens' imaginations, let alone an attempt for the purposes outlined above.

The complainant alleges that the 'Sensations' range advertising connected with the game is "encouragement to consume 8 new donuts [which] would be considered excessive consumption for children..."

In support of this statement, the complainant provides her calculation of the total calorific intake associated with the entire Sensations range, implying that the game improperly exploits children's imaginations pursuant to an intent to encourage simultaneous consumption of all eight 'Sensations' donuts.

We respectfully find this implication ridiculous, particularly in circumstances where the majority of game-play requires the user to avoid the four Sensations donut 'enemies' given contact will end the game, and thereby, the game-play experience.

In any event, the complainant does not demonstrate, nor attempt to demonstrate, the basis upon which she contends that the game, or products referenced in connection with it:

d) improperly exploits children's imaginations; or may

e) be reasonably regarded as being based upon an intent to encourage excessive consumption; or in fact

f) does encourage excessive consumption.

We would respectfully suggest that the reason for this is that there is no such basis and that a reasonable person having regard to prevailing community standards would not find in the game, nor anything else on the Site, any attempt whatsoever to improperly exploit children's imaginations, let alone an attempt for the purposes contemplated by clause 3.2 of the Food Code.

Ultimately, we find the suggestion that this organisation would intentionally encourage excessive consumption of donut products, whether by children or any other age demographic, offensive and wholly reject it.

Nutrition Information

We note that the complainant maintains in her complaint that "nutrition information for Donut King products is not available via the website or in store".

We respectfully question the basis for this claim, and the bona fides of the complainant's comments, given that:

a) nutritional information concerning food items forming part of the Donut King product range (including donuts, hot dogs, beverages and ice-cream) is provided on the 'Products' web-page which forms part of the Site; and that

b) *nutritional information concerning Donut King products is displayed throughout all NSW Donut King outlets (being the State in which the complainant resides) in compliance with the legislative requirements of that State.*

Summary

In closing, Donut King takes a responsible approach to informing its customer base and has taken every care, together with its advertising agency and media buyer, to ensure compliance with relevant advertising Codes.

We respectfully maintain that the material complained does not constitute 'Advertising or Marketing Communication to Children' and as a consequence neither clauses 2.15(a) or 3.2 of the respective Children's Code and Food Code apply.

In the event that the Board takes a different view to that expressed above, we wholly deny that the material complained of contravenes prevailing community standards or that, having regard to the material complained of, the aforementioned clauses have been breached.

Given the foregoing, we request that the complaint be dismissed.

THE DETERMINATION

The Advertising Standards Board ('the Board') considered whether this advertisement breaches the AANA Code for Advertising and Marketing Communications to Children (the 'Children's Code') and the AANA Food and Beverages Advertising and Marketing Communications Code (the 'Food Code').

The Board noted the complainants' concerns that the advertisement does not represent a healthy dietary choice for children and undermines the importance of a healthy, active lifestyle.

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

The Board considered the definition of advertising or marketing communication. Under the Children's Code, advertising and/or marketing communication means "...or (b) any activity which is undertaken by or on behalf of an advertiser or marketer for payment or other valuable consideration and which draws the attention of the public or a segment of it to a product, service, person, organisation or line of conduct in a manner calculated to promote or oppose directly or indirectly the product, service, person, organisation or line of conduct."

The Board agreed that the website could be considered to draw the attention of a segment of the public to a product in a manner calculated to promote or oppose directly or indirectly that product.

The Board then considered whether the website is an advertising or marketing communication to children under 14 years of age.

The Board considered whether the advertisement is directed primarily to children (14 years or younger). 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 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 Kids corner component of the website, in relation to the visuals and the language and considered that the advertisement was primarily directed to children even though the children would likely be assisted in reaching the site and would be under adult supervision.

The Board then considered whether the product itself was directed to children. The definition in the Children's Code states that "Product means goods, services and/or facilities which are targeted toward and have principal appeal to Children". The Board noted that although the "Kids Corner" of the website is targeted to children, donuts themselves are not targeted to and of principal appeal to children. In particular the use of the Sensations Range of donuts lessens the appeal to children considerably as the products available in store that tend to be chosen by children include the crocodile and novelty donuts.

Having determined that the product is not directly primarily to children the Board determined that the advertisement did not breach Section 2.15(a) of the Children's Code.

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

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

The Board considered that, consistent with previous decisions (Hungry Jacks 282/11, Mars 208/11), promotion of a product which may have a particular nutritional composition is not, per se, something which is contrary to prevailing community standards.

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

The Board considered that, consistent with previous decisions (Hungry Jacks 282/11, Mars 208/11), promotion of a product which may have a particular nutritional composition is not, per se, encouraging or promoting an inactive lifestyle or unhealthy eating habits. The Board considered that there was nothing in this particular marketing communication that would be considered by reasonable people to be a depiction of an inactive lifestyle or unhealthy eating habits.

The Board then considered whether the website was encouraging what would reasonably be considered excess consumption. The Board noted that the inclusion of a kids corner on the website and a computer game such as pacman as part of that is designed to appeal to a broad audience. The reality of the game is that the animated mouth is in fact moving away from the donuts rather than toward them. The Board noted again that the use of the Sensations range rather than the novelty range of product, would lessen the appeal to children. The Board did not consider that the game is suggestive that children should be encouraged to consume excessive amounts of donuts but rather to participate in a fun game that would likely be monitored by parents/guardians.

The Board considered that the advertising or promotion of donuts in this advertisement does not promote excess consumption in the manner it is depicted in the advertisement and determined that the advertisement did not breach the AANA Food Code.

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