



Case Report

1	Case Number	0256/17
2	Advertiser	Retail Food Group
3	Product	Food / Beverages
4	Type of Advertisement / media	App
5	Date of Determination	21/06/2017
6	DETERMINATION	Dismissed

ISSUES RAISED

Food and Beverage Code 2.1 (b) - Contravenes community standards
Food and Beverage Code 2.2 - healthy lifestyle / excess consumption
Advertising to Children Code 2.01 Community Standards
Advertising to Children Code 2.14 Food and beverages
2.7 - Native Advertising Advertising not clearly distinguishable

DESCRIPTION OF THE ADVERTISEMENT

This App by Donut King is called Donut Rush and features cartoon imagery of iced doughnuts which have to be collected in order to win a voucher which can be redeemed at Donut King in exchange for doughnuts. The text in the App includes: “The kingdom’s supply of donuts is running out! Join the Donut Warriors in their rush to collect all the remaining donuts”. Other visuals in the advertisement include milkshakes, jelly pits and ice-cream snow drifts.

THE COMPLAINT

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

This webpage, YouTube ad and Apple App featuring ‘Donut Rush’ promotion is obviously aimed at children due to the very fun and colourful visuals, language and sounds and the fact that it is easy to win lots of doughnuts (and even a year worth) promotes excessive consumption. The language and theme used draws upon a child’s sense of imagination and would likely attract the attention of children (‘Kingdom’, ‘Donut Warriors’, ‘jelly pits’, use of a unicycle etc).

The game is simple to play, fun and colourful and very child-like. The cartoon characters themselves are child-like with a school character (wearing a school bag), punk kid and skateboarding character all demonstrating how this game is aimed at and would highly appeal to children. Yes there is small print stating that permission is required however two clicks are needed to see the terms and conditions where it states the age restriction and it is far too easy for a child to not click through and just continue on with the game. It should be very clear the age restriction should come up before they play; also if a child does win a parent should be in attendance to receive the prize (not currently the case).

The game itself is very interactive and could be additive as it is very easy to win prizes, to the young impressionable children it could be difficult to distinguish whether this is an ad or entertainment.

Interestingly one YouTube gamer stated that the game is 'childish' but at least you get free doughnuts.

Guideline 3 of the Australian Dietary Guidelines recommend to limit intake of foods containing saturated fat, added salt, added sugars (discretionary foods) and only include in the diet sometimes and in small amounts (NOT every day!). Discretionary foods are energy dense and nutrient poor and contribute to the obesity epidemic, doughnuts produced by Donut King would be classified as a 'discretionary choice'.

ABS statistics show that discretionary foods make up to 40% of a child's diets which is appalling. Having an app that is very appealing to a child, easy to use and redeem free doughnuts would only encourage children to choose these unhealthy foods every day.
<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4364.0.55.007~2011-12~Main%20Features~Discretionary%20foods~700>

The Australian Dietary Guidelines state that discretionary choices are best avoided or limited to no more than 1/2 serve a day unless the child is taller or more active (can have up to 2 serves a day), which excludes the majority of children as they are currently not meeting the physical activity guidelines.

https://www.eatforhealth.gov.au/sites/default/files/content/The%20Guidelines/n55b_educator_guide_140321_1.pdf

<http://www.aihw.gov.au/risk-factors/insufficient-physical-activity/>

According to the Australian Dietary Guidelines, one 'serve' of a discretionary food is the amount that contains 600kJ. <https://www.eatforhealth.gov.au/food-essentials/discretionary-food-and-drink-choices> Donut King Website states that they energy (kJ) per doughnut (that is redeemable within this competition) ranges from 625-1910kJ.

<https://www.donutking.com.au/donuts/> Therefore all doughnuts would be regarded as more than one discretionary portion, therefore exceeds the $1/2$ serve a day recommendation.

Allowing participants to receive up to four donuts of their choice (excluding Royal Range), is promoting excessive consumption and goes against what is recommended in the Australian Dietary Guidelines. For example if they choose the Chocolate Custard Ball doughnuts this would be equivalent to 6,040 kJ, which is over 2/3rds of recommended ADULT daily energy intake.

Furthermore in the small print it is noted that participants could receive 6 cinnamon donuts

if they won a 'Tier four' prize and if Donut King Fries were not available which equates to a 3,750kJ and almost half of an average ADULT daily intake allowance (8700kJ).

One of the prizes is a voucher that encourages participants to buy one doughnut and get one half prices, again encouraging overconsumption.

The game itself shows cartoon characters collecting hundreds of sugary doughnuts and also features ice cream snow drifts, jelly pits and milkshakes which all promote the excessive amount of discretionary foods.

THE ADVERTISER'S RESPONSE

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

COMPLAINT REFERENCE NUMBER(S) - 0254/17; 0255/17; 0256/17

We refer to your letter and thank you for affording us an extension of time to properly consider and respond to the abovementioned complaints (the "Complaints").

Noting the Complaints relate to the same "Donut Rush" app and gameplay video distributed across various platforms (Youtube video, the Donut King website and an iOS App), we intend to respond to all Complaints collectively.

The Complainant has raised the following issues with respect to the Complaints (the "Breaches"):

1. Under the AANA Food & Beverage Advertising & Marketing Communications Code (the "Food Code"):

a. Clause 2.1: "Advertising or Marketing Communications for Food or Beverage Products 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."

b. Clause 2.2: "Advertising or Marketing Communications for Food or Beverage Products shall not undermine the importance of healthy or active lifestyles nor the promotion of healthy balanced diets, or encourage what would reasonably be considered as 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."

2. Under the AANA Code for Advertising & Marketing Communications to Children (the "Children's Code"):

a. Clause 2.01: Advertising or Marketing Communications to Children must not contravene Prevailing Community Standards.

b. Clause 2.14: (a) Advertising or Marketing Communications to Children for food or beverages must neither encourage nor promote an inactive lifestyle or unhealthy eating or drinking habits; (b) Advertising or Marketing Communications to Children must comply with the AANA Food & Beverages Advertising & Marketing Communications Code.

3. AANA Code of Ethics (the “Ethics Code”):

a. Clause 2.7 Native advertising: Advertising or Marketing Communications shall be clearly distinguishable as such to the relevant audience.

Donut King Website (the “Website”) (CRN 0254/17)

The Advertiser rejects the Breaches alleged by the Complainant with respect to the Website.

As far the Breaches pertaining to the Children’s Code go - the Complainant infers that the Website constitutes an Advertising or Marketing Communication to Children.

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 appeal to children]’.

We are of the view that the Website 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 Website is the corporate online presence for “Donut King” and performs a variety of functions, some of which include but are not limited to:

a. “Menu” – Details regarding food and beverage products, together with their kilojoule content, available for purchase from Donut King outlets;

b. “Barista’s Shout Day” – An upcoming, limited time marketing campaign;

c. “Donut Rush” – A (now) concluded, limited time marketing campaign; and

d. “Store Locator” – A facility which identifies nearby Donut King outlets based on the postcode submitted by the user.

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

1. The ‘theme, visuals and language’ used throughout the Website are not directed primarily to Children. Indeed, we submit that a majority of the Website (such as the ‘Barista’s Shout Day’, ‘FAQ’, ‘About Donut King’, ‘Own a Franchise’ and ‘Franchisee Login’ sections) would be considered ‘boring’, unappealing and irrelevant to Children (Screenshot attached

in Annexure A).

2. The Website 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.

Donut Rush Page

Whilst the complaint relates to the Donut King website, the in the interest of addressing the apparent issue, we take the opportunity to discuss the 'Donut Rush' aspect of the Website (the 'Donut Rush Page'), one of many webpages forming part of the Website.

The Advertiser does not consider the Donut Rush Page (Screenshot attached in Annexure B) can be reasonably categorised as 'Advertising or Marketing Communications to Children' for the purposes of either the Children's Code or Food Code. In this regard, we reject the assertion that this page is primarily directed at Children, having regard to the 'theme, visuals and language used'.

In support of its position, we note that:

- The 'theme, visuals and language' used throughout Website is not directed primarily at children. The theme and visuals not age specific and merely reflect the colour schemes and language that forms the Donut King brand image.*
- The Donut Rush Page does not promote any 'Product' (or 'Children's Food or Beverage Product') as defined in the respective codes.*
- The Donut Rush Page contains no images of food and/or beverages available from a Donut King outlet. Rather, the predominant purpose of the Donut Rush Page is focused on providing information on how to download the App by way of the Video (both of which are discussed in more detail below).*

In the event the Website and Donut Rush Page are considered 'Advertising or Marketing Communications to Children' (a finding we reject), we submit that a reasonable person would find the Website and Donut Rush Page do not (under the abovementioned clauses in the Food and Children's Codes):

- 1. Contravene Prevailing Community Standards (under the Food or Children's Code): or*
- 2. Undermine the importance of healthy or active lifestyles nor the promotion of healthy balanced diets, or encourage what would reasonably be considered as 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.*

In support of Item 2 immediately above, with reference to the relevant AANA Practice Note, we submit that the Website and Donut Rush Page are not disparaging of healthy foods or food choices, or of physical exercise. Furthermore, we submit that nothing in terms of the language, imagery, of theme, encourages excess consumption (or any level of consumption) to the viewer.

Having regard to prevailing community standards, a reasonable person who is accessing the Website, Donut Rush Page, App or viewing the Video would be well versed with other casual games – such as ‘Candy Crush’ or ‘Fruit Ninja’ within the gaming genre and would not consider the App, as well as games of this nature to encourage any level of consumption.

Insofar as that Breach pertaining to the clause 2.7 of the Ethics Code goes, as per the relevant Practice Note, ‘there is no absolute requirement that advertising or marketing communication must have a label. If it is clear to the relevant audience that the content is commercial in nature (for example by the nature of the content, where the content is placed, how consumers are directed to the content, the theme, visuals and language used, or the use of brand names or logos), then no further disclosure or distinguishing element is needed. We submit that given the Website and the Donut Rush Page is accessible only through www.donutking.com.au, the fact that is commercial in nature is self-evident and does not breach the Ethics Code.

YouTube Video (the “Video”) (CRN 0255/17)

The Video, which is available via the Donut Rush Page and Youtube (Screenshot attached in Annexure C) is a short demonstration (approx. 25 seconds) of the Donut Rush App gameplay experience and finishes with a title card which says ‘Play now to win free donuts!’.

The Advertiser rejects all of the Breaches alleged by the Complainant with respect to the Video.

- At most, it is submitted that if the characters depicted in the Video are analysed and considered to be childlike then, with reference to the AANA Practice Note 3, the characters would be ‘reminiscent of childhood’ on the basis of the outdated and nostalgic punk rock look, skateboards, and poindexter appearance of some of the characters.*
- The characters depicted in the App (or in the Video) do not speak any language. The written content as it appears on the Donut Rush page is not age specific.*

We submit that the Video cannot be reasonably categorised as ‘Advertising or Marketing Communications to Children’ for the purposes of either the Children’s Code or Food Code. In this regard, we observe that the mere use of ‘fun and colorful visuals, language and sounds’ does not, in itself, imply that the Video is primarily targeted towards Children. We further observe that the Video does not actually promote any food Product offered for sale at any Donut King outlet.

In relation to the phrase ‘Play to win free donuts!’ at the end of the Video (which is reproduced on the Donut Rush Page), we note the following:

- 1. the offer of free donuts has broad appeal – not just to children. There is no reference, to any degree of specificity the Donut King product range which is more attractive to Children (such as the ‘dinosaur donut’, ‘boys & girls donuts’, ‘sweet talker’, ‘twinkle’ or ‘crocodile donuts’ and the cake novelty donuts, all of which are detailed on the ‘Products’ webpage of the Site)*
- 2. the theme, language and visuals have broad appeal, does not encourage excess consumption of unhealthy foods or disparage a healthy lifestyle in any way which contravene*

the abovementioned Codes.

Insofar as that Breach pertaining to the clause 2.7 of the Ethics Code goes, the AANA's 'Best Practice Guidelines' state:

"Advertisers have flexibility as to how to ensure that material is distinguishable as advertising or marketing communication. Advertisers may use logos or brand names combined with other visual or audio cues where appropriate, such as background shading, outlines, borders, graphics, video or audio messages depending on the medium."

The inclusion of the Donut King trademarks within the Video and in the App is, in the Advertiser's view, makes it easily distinguishable that this is an advertisement.

Donut Rush App (the "App") (CRN 0256/17)

The Donut Rush App can be described as follows: "an interactive mobile application available on apple and android platforms whereby the user operates a touch screen to control a character through a donut kingdom. The objective of the game is to collect as many donuts as possible to win prizes redeemable in store" (Screenshot attached in Annexure D).

The Complainant alleges that the App is obviously directed at Children (as defined in the Children's Code) based on the following assertions:

- The 'very fun and colourful visuals, language and sounds' used; and*
- The ease by which 'free donuts' can be won.*

The Complainant also alleges the App encourages consumption of Discretionary Foods 'everyday' by young Children and that the ease by which the Vouchers can be redeemed by Children (despite the age restriction in the term and conditions) is unacceptable.

From the outset, it is noted that downloading any app within the iOS App Ecosystem requires the end user to agree to the 'Apple Media Services Terms and Conditions'.

In order to download any app, an 'Apple ID' is required. One of the pre-conditions to obtaining an Apple ID is that the user "must be age 13" and that "Children under the age of majority should review this [Apple T&Cs] with their parent or guardian to ensure that the child and parent or legal guardian understand it".

The Advertiser rejects the Complaints as it relates to the App for the following reasons:

1. The 'theme, visuals and language' used throughout the App is not directed primarily at children and is however a reflection of the Donut King brand. The App aims to achieve broad appeal and can be easily compared to others in market that fall within the genre of "casual gaming" with gameplay that has universal appeal, particularly with an older audience more familiar with a 'platform game' which originated in the early 1980s and became popular in the mid 1990s, such as 'Super Mario'.

2. The App does not contain images of actual food and/or beverages available from Donut King outlets.

3. *The App in no way disparages a healthy lifestyle or undermines parental control of a child's dietary choices.*

4. *The App is clearly an initiative of the Donut King brand, based on the home screen and is distinguishable as such.*

In view of the above, the Advertiser rejects all Breaches alleged with respect to the App.

The 'Win Donuts for a Year' competition was a separate game of chance which required the user to submit an entry to participate in a draw to win donuts for a year. The competition required the entrant to provide their name and email address and be over the age of 18 in order to be eligible as a winner.

In closing, Donut King takes a responsible approach to informing its customer base and has taken every care, together with its agency BCM Partnership, to ensure compliance with relevant advertising Codes. Given the foregoing, we request that the Complaints be dismissed.

*<https://www.donutking.com.au/donut-rush/>
www.youtube.com/watch?v=XQq-5NJooQE
<https://www.apple.com/legal/internet-services/itunes/au/terms.html>
https://en.wikipedia.org/wiki/Platform_game*

We refer to your email and thank you for affording us an extension of time to supplement our response regarding alleged promotion of excessive consumption.

We respectfully submit that the Website, YouTube Ad and the Donut Rush App (as defined in our prior response) do not, by any means, encourage excessive consumption of donuts for the following (but not limited to) reasons:

The Promotion is not an ongoing marketing promotion and was only for the period of 31 March 2017 to 26 May 2017.

The prizes were eligible to be won by a player of the Donut Rush App collecting a certain number of points and being awarded a coupon. The coupons are then able to be redeemed at participating Donut King outlets. The Prizes were awarded by skill, not awarded by excess consumption of products sold at a Donut King outlet (for example, every time you purchase a donut you go in the draw to win a prize). Therefore even by the method of winning the prize, Promotor does not encourage overconsumption.

By the same logic followed by the Complainant, any food prize that is high in kilojoules awarded in any competition could be seen to be encouraging overconsumption. This is simply incorrect and unreasonable to assert where the prizes are merely the products a typical Donut King outlet offers for sale.

The prizes that the winners are eligible to redeem are at the discretion of the winner to redeem and consume. It is always expected that consumers will act reasonably and should they choose to consume an excessive amount of food, this would be beyond the reasonable control of the Promotor and not as the result Donut King encouraging such behaviour.

In the event that players wish to redeem any of the prizes they win, they are required to do so by physically visiting a Donut King outlet. The Donut King network prides itself on its adherence to food labelling standards and its transparency with consumers in this regard. Indeed, each Donut King outlet is required to display the following on the menu boards in accordance with the relevant state legislation:

a reference statement which informs customers that the average adult daily energy intake is 8700 kJ; and

the average kJ content for each standard food item offered (for the sake of clarity, this includes the prizes).

This means that consumers are clearly informed of their average daily energy intake at the time of choosing the prize. In addition, by way of further transparency, all kilojoule content easily accessible on the Website.

In addition, regarding the prize of either a '4 pack of Donuts' and '6 Cinnamon Donuts' and the 'buy one, get one half price' prizes, we submit that it is reasonable to expect that the winner of these prizes would share the donuts among friends and family, or they may save the donuts for a later occasion. The Donut Rush App itself pictures a group of friends working together to collect points by various icons. The prizes are also available for consumers to purchase in the usual course and form part of the usual product offering at Donut King outlets.

In closing, we reiterate that that none of the above-mentioned instruments promote any excessive consumption of donuts, nor do undermine the importance of healthy lifestyles and healthy balanced diets.

We also wish to confirm our desire (evidenced we think by our comprehensive response to the Complaint) to work co-operatively with the ASB to resolve any concerns which it may or may not hold in respect of the Complaint.

We trust the above offers adequate additional detail to enable due consideration and thank you for the opportunity to do so.

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), the AANA Food and Beverages Advertising and Marketing Communications Code (the 'Food Code'), or the AANA Code of Ethics ("the Code").

The Board noted the complainant's concern that the advertisement is promoting unhealthy food to children, promotes excess consumption, and is not clearly distinguishable to children as advertising material.

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

The Board noted that the advertiser is not a signatory of the Australian Food and Grocery

Council's Quick Service Restaurant Industry (AFGC QSRI) Initiative therefore this Initiative does not apply.

The Board considered whether the Children's Code applied.

The Board considered the definition of advertising or marketing communication to children. Under the Children's Code, Advertising or Marketing Communications to Children means "Advertising or Marketing Communications which, having regard to the theme, visuals and language used, are directed primarily to Children and are for Product." The Board noted that Children are defined as "...persons 14 years old or younger" and Product is defined as "...goods, services and/or facilities which are targeted toward and have principal appeal to Children."

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 states that whether an advertisement or marketing communication is "directed primarily to children" is an objective test based on several factors including, but not limited to the combination of visual techniques, product and age of characters and actors. The use of any one factor or technique in the absence of others may not necessarily render the marketing communication "directed primarily to children."

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 noted the marketing communication is an App which can be downloaded using the iOS App Ecosystem. The Board noted the advertiser's response that in order to download the App the user must have an Apple ID, and in order to have an Apple ID the user must be age 13 or over. The Board also noted that the age gate on this App is 17 years however the Board considered that to fall under the Children's Code the requirement is that the advertisement itself is directed primarily to children: the medium on which the advertisement is accessed is not relevant.

The Board noted the theme of the advertisement, an interactive game called Donut Rush, in App format, involving the collection of doughnuts in order to progress and collect a redeemable voucher. The Board noted that the skill level of the game is relatively simple but considered that it was similar to games such as Candy Crush, which are also simple to play, and in the Board's view, given the popularity of such games amongst adults as well as children, the theme of the Donut Rush game is directed at a broad audience. The Board noted that when you have collected a set number of points you can redeem a voucher for a free doughnut and considered that this is a reward which is appealing to people who pay for food and would be incentivised to play the game and use the vouchers when visiting the advertiser's restaurants. The Board considered that this aspect of the game is more appealing to older teenagers and to adults. Overall the Board considered that whilst the simplistic nature of the game itself could be of appeal to children in the Board's view the overall theme is not clearly directed primarily at Children.

The Board noted the visuals of the advertisement. The Board noted that it had considered a number of advertisements containing cartoon imagery, including cases where the Board upheld the complaints (0179/13, 0180/13) and cases where the Board dismissed the

complaints (0229/11, 0190/13). The Board noted that in the current advertisement while the simple visuals would be of appeal to children the Board considered they would also be of appeal to adults who enjoy playing such interactive games.

The Board then considered the language used in the advertisement. The Board noted the background music and considered that it is repetitive and likely to be irritating after listening to for some time, and in the Board's view children would be more likely to tolerate this noise than adults. The Board noted however that the sound is not integral to the playing of the game and considered that as the sound can be muted, this background music is not a key factor in deciding whether the advertisement is directed primarily to children or not. The Board noted the onscreen text which includes instructions for playing the game as well as information when the game ends, "You don't have any Donut Warriors left!" and considered that while this language is relatively simple in the Board's view it is consistent with the type of language used in interactive games and is not language which is directed primarily to children.

The Board noted that including cartoon images will not of itself mean that an advertisement is directed primarily to children. It is essential for the Board to consider all elements of the advertisement and to make a decision based on how all of the elements of the advertisement interact, and the overall impression that they make, in determining whether an advertisement is clearly directed primarily to children. In this instance the Board acknowledged that the interactive game would be of appeal to children but considered that the theme, language and visuals are commonly used in similar games which are attractive to adults and in the Board's view the Donut Rush game has a broad appeal and is not directed primarily to children.

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 Donut King is a popular restaurant chain selling doughnuts, hotdogs, soft serve, and beverages and considered that while it does sell novelty doughnuts aimed at children, the majority of its products are aimed at adults and in the Board's view doughnuts in general are a product enjoyed by all ages and not targeted to children.

Overall the Board considered that the advertisement is not directed primarily to children and the product is not a product targeted to or of principal appeal to children therefore the provisions of the Children's Code do not apply.

The Board noted that the product advertised is food and that therefore the provisions of the AANA Food and Beverages Advertising and Marketing Communications Code (the Food Code) apply.

The Board noted in particular 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 (0101/14, 0262/15, 0593/16,

0057/17), the promotion of a product which may have a particular nutritional composition is not, per se, undermining the importance of a healthy or active lifestyle or contrary to prevailing community standards.

The Board then noted the Practice Note to section 2.2 which states:

“The Board will not apply a legal test, but consider material subject to complaint as follows:

(1) In testing whether an advertising or marketing communication undermines the importance of a healthy lifestyle, the Board will consider whether the communication is disparaging of healthy foods or food choices or disparaging of physical exercise. Such disparagement need not be explicit, and the Board will consider the message that is likely to be taken by the average consumer within the target market of the communication.”

The Board noted that the advertisement makes no reference to exercise and includes only images of doughnuts and milkshakes, not other food, and considered that the advertisement is not disparaging of healthy food choices or of physical exercise.

The Board considered that the promotion of a Donut Rush game is not in breach of community standards generally and that the promotion of vouchers is not, per se, inconsistent with or undermining of a balanced diet or healthy lifestyles.

“(2) In testing whether an advertising or marketing communication encourages excess consumption through representation of products or portion sizes disproportionate to the setting portrayed, or by any other means contrary to prevailing community standards, the Board will consider whether members of the community in the target audience would most likely take a message condoning excess consumption.”

The Board considered that the style of game is common among many interactive games that involve the collection of quantities of a certain thing or tokens in order to progress or to achieve certain goals. The Board noted the complainant’s concern that the depiction of iced-doughnut shaped tokens as well as ice-cream snow drifts, milkshakes, and jelly pits, is promoting the excess consumption of these types of food but considered that in the context of an animated game these images are unlikely to suggest to the person playing the game that they should consume vast quantities of any of these products. The Board noted that the animated characters are not shown to eat the doughnuts as part of the game and considered that the concept of collecting doughnuts along the way in order to make certain achievements was a common theme across games played via Apps and was not a depiction that encourages excessive consumption.

The Board noted the complainant’s concern that the vouchers offered as rewards for playing the App promote excess consumption: buy one, get one half price, win up to four doughnuts, win six cinnamon doughnuts.

The Board noted the advertiser’s response that to obtain the vouchers the participant needs to play a game, not consume a quantity of doughnuts, and that when redeeming the vouchers at a participating outlet there is plenty of information on display at each outlet regarding average adult daily energy intake and the average kilojoule content of each standard food item offered, included those items eligible to be claimed with vouchers.

The Board noted that the vouchers do not state that the products claimed should or could be eaten by only one person and many people would share doughnuts should they claim a four or six pack. The Board acknowledged that there is nothing preventing a person from eating more than one doughnut, whether bought or claimed as part of a voucher earned as a result of playing the App, but considered that the advertisement itself is not encouraging or condoning this behaviour.

Overall the Board considered that the advertisement did not depict, encourage or condone excess consumption and determined that the advertisement did not breach Section 2.2 of the Food Code.

The Board then considered the AANA Code of Ethics.

The Board considered whether the advertisement complied with Section 2.7 of the Code which requires that “Advertising or Marketing Communications shall be clearly distinguishable as such to the relevant audience.”

The Board noted that this new provision came into effect on 1 March 2017. The Board noted the advice provided in the Practice Note to Section 2.7: “If it is clear to the relevant audience that the content is commercial in nature (for example by the nature of the content, where the content is placed, how consumers are directed to the content, the theme, visuals and language used, or the use of brand names or logos), then no further disclosure or distinguishing element is needed.”

The Board noted that when downloading the Donut Rush App the Donut King logo is clearly visible on the game’s home page and the details provided about the App identify it as being a Retail Food Group product. The Board noted that the App is age gated for people aged over 17 years and considered that this audience would be fully aware that the App is promoting Donut King products. The Board acknowledged that children would access the game – either by using their parents’ phones or asking their parents to download the game – but considered that the relevant audience is persons aged over 17 and in the Board’s view the game is clearly distinguishable as advertising material to this relevant audience.

The Board determined that the advertisement did not breach Section 2.7 of the Code.

Finding that the advertisement did not breach the Children’s Code, the Food Code, or the Code of Ethics, the Board dismissed the complaint.

