



**ADVERTISING
STANDARDS
BUREAU**

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Case Report

1	Case Number	0257/14
2	Advertiser	Wendy's Supa Sundaes Pty Ltd
3	Product	Food / Beverages
4	Type of Advertisement / media	Free TV
5	Date of Determination	23/07/2014
6	DETERMINATION	Dismissed

ISSUES RAISED

Food and Beverage Code 2.1 (b) - Contravenes community standards
Advertising to Children Code 2.01 Community Standards
- Other Social Values
2.4 - Sex/sexuality/nudity S/S/N - general

DESCRIPTION OF THE ADVERTISEMENT

The advertisement has simple animated figures on a pink background which incorporates three (3) scenes as follows:

- (1) is a llama from the neck up which has a hot dog stuck in its throat.
- (2) is of a milkshake using its straw as a periscope, scanning from side to side.
- (3) is of a horse from the neck up which has an ice-cream cone land on its head. The horse then says, "I'm a unicorn!",
a voiceover states the tagline of "Wendy's, Wendy's, Yum!"

THE COMPLAINT

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

*Whilst having a morning coffee and before heading off to work I was watching what my child was watching. I was unsurprised by all the toy advertising however when a clearly Junk food ad for Wendy's came on I was quite upset.
I thought Australia had regulation for exactly this reason?*

THE ADVERTISER'S RESPONSE

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

In response to the Complaint, please note the following:

Programs where the Advertisement Appears

As part of our recent media negotiations with Channel 9, they agreed to provide Wendy's with bonus air time for the Advertisement during children's programming (Bonus Time). Channel 9 did not provide Wendy's with spot guides advising us which programs our brand commercials, including the Advertisement, would feature in during the Bonus Time.

We note that, as a result of the Complaint, the specific program that the Advertisement was featured during was "Dora the Explorer", however, the Advertisement is also run across a number of different programming times, and the Advertisement does not specifically target a particular audience/demographic.

For completion, the Advertisement has also aired 6,941 times on a number of other metro television stations including Channel 10, Eleven and Go, during varied time slots since 3 November 2013. In addition, the Advertisement has also aired on a number of regional television stations during this time, which have not been incorporated within the number represented above.

Whether the audience of the programs is predominately children

Further to above, the Advertisement has featured across a number of different time slots, and the target audience is not exclusively children.

Substantiation of any health, nutrition or ingredient claims or statements made in the advertisement

We confirm that there are no health, nutrition or ingredient claims or statements of any kind made in the Advertisement as it is purely intended and targeted as brand promotion.

Comments in relation to the Complaint

In relation to the AANA Food and Beverages Advertising and Marketing Communications Code we note that the Advertisement:

- a. is designed as a brand advertisement, advertising Wendy's, and not a specific food or beverage product;*
- b. is truthful and honest and has not been designed to be misleading or deceptive (clause 2.1);*
- c. is not a product advertisement and there is no reference to nutritional values or health benefits (clause 2.2);*
- d. does 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 and, given that the Advertisement is a brand advertisement, does not incorporate portion sizes of products (clause 2.3);

e. does not incorporate a health or nutrition claim (clause 2.4);

f. does not reference consumer taste or preference tests (clause 2.5);

g. does not include claims relating to material characteristics such as taste, size, content, nutrition and health benefits (clause 2.6);

h. does not use sporting, news or current affair personalities (clause 2.7);

i. does not portray that the products are intended or suitable as substitutes for meals (clause 2.8);

j. does not contravene the AANA Code for Advertising & Marketing Communications to Children, outlined in point 8.2 below, and, in addition:

i. is not designed and delivered in a manner to be understood by children and is not misleading or deceptive, and does not seek to mislead or deceive, in relation to any nutritional or health claims (clause 3.1);

ii. does 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 as excessive quantities of the children's food or beverage products (clause 3.2);

iii. does not state or imply that possession or use of a children's food or beverage product will afford physical, social or psychological advantage over other children or that non-possession would have the opposite effect (clause 3.3);

iv. does not undermine the role of parents or carers in guiding diet and lifestyle choices (clause 3.4);

v. does not include any appeal to children to urge parents or other adult's responsible for a child's welfare to buy particular children's food or beverage products for them (clause 3.5);

vi. does not feature ingredients or Premises (clause 3.6).

In relation to the AANA Code for Advertising & Marketing Communications to Children, we note that:

a. the Advertisement (clause 2.2):

i. does not mislead or deceive children;

ii. is not ambiguous;

iii. accurately represents the brand Wendy's;

iv. does not include reference to any additional features (i.e. size or performance) or the

price of any accessory parts as these are not applicable;

v. is a commercial communication;

vi. does not incorporate a price or imply that the contents of the Advertisement is immediately within reach of every family budget.

b. the contents of the Advertisement is not unsuitable for children (clause 2.3);

c. the Advertisement does not employ sexual appeal or sexual imagery nor does it imply that children are sexual beings (clause 2.4);

d. the Advertisement does not portray images or events which depict unsafe use or unsafe situations which may encourage children to engage in dangerous activities and does not advertise a product which has been declared unsafe or dangerous by an authorized Australian governmental authority (clause 2.5);

e. the Advertisement does not portray images or events in a way that is unduly frightening or distressing to children and does not demean any person or group on the basis of ethnicity, nationality, race, gender, age, sexual preference, religion or mental or physical disability (clause 2.6);

f. the Advertisement does not (clause 2.7):

i. undermine the authority, responsibility or judgment of parents or carers;

ii. contain an appeal to children to urge their parents, carers or another person to buy a product for them;

iii. state or imply that a product makes children who enjoy it superior to their peers;

iv. state or imply that persons who buy the product are more generous than those who don't.

g. the Advertisement does not contain any disclaimers, qualifiers or asterisked information (clause 2.8);

h. the Advertisement does not incorporate a competition (clause 2.9);

i. the Advertisement does not use popular personalities or celebrities to endorse, recommend, promote or advertise the products (clause 2.10);

j. the Advertisement does not offer a premium (clause 2.11);

k. the Advertisement is not for, and does not relate to, alcohol products (clause 2.12);

l. the Advertisement does not relate to the collection of personal information (clause 2.13);

m. the Advertisement does not encourage or promote an inactive lifestyle or unhealthy eating or drinking habits and complies with the AANA Food & Beverages Advertising & Marketing Communications Code pursuant to point 8.1 above (clause 2.14).

In relation to the AANA Code of Ethics we note that the Advertisement:

a. does not:

i. to the best of our knowledge, contravene any Commonwealth or State laws;

ii. mislead or deceive (clause 1.2);

iii. contain a misrepresentation likely to cause damage to the business or goodwill of a competitor (clause 1.3);

iv. exploit community concerns in relation to protecting the environment by portraying distinctions in products or services advertised in a misleading way or in a way which implies a benefit to the environment (clause 1.4);

v. make claims about the Australian origin or content of products advertised in a manner which is misleading (clause 1.5);

b. does not:

i. portray people or depict material in a way which discriminates against, or vilifies a person or section of the community on account of race, ethnicity, nationality, gender, religion, disability, mental illness or political belief (clause 2.1);

ii. employ sexual appeal in a manner which is exploitative and degrading of any individual or group of people (clause 2.2);

iii. present or portray violence (clause 2.3);

iv. include sex, sexuality or nudity (clause 2.4);

v. use inappropriate or obscene language (clause 2.5);

vi. depict material contrary to the Prevailing Community Standards on health and safety (clause 2.6);

c. does not contravene the AANA Code of Advertising & Marketing Communications to Children (clause 3.1 and item 8.2 above);

d. does not include advertisement for motor vehicles (clause 3.2);

e. does not contravene the AANA Food & Beverages Advertising & Marketing Communications Code (clause 3.3 and item 8.1 above).

We trust that the above is sufficient information in response to the Complaint, however if you require any additional information or documentation, please let me know.

We look forward to receiving confirmation of the outcome of the Complaint as a result of the next Board meeting.

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 promotes unhealthy products to children.

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

The Board noted that the advertiser is not a signatory to the AFGC RCMI initiative and therefore the initiative does not apply.

The Board first considered whether the advertisement is an advertising or marketing communication 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 Part 3 of the Food Code or 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 a television branding advertisement for Wendy’s Supa Sundaes Pty Ltd.

The Board considered the theme of the advertisement (displaying food and the consumption of foods by cartoon drawings), the visuals (a bright pink background with two dimensional characters eating hotdogs, acting as a periscope and pretending to be a unicorn) and the language (strange voices making noises and saying “Wendy’s, Wendy’s yum”).

The Board noted that it has considered the issue of whether or not an advertisement is directed primarily to children in a number of advertisements.

With regards to visuals in the current advertisement the Board considered the animated nature of the advertisement. The issue of animated characters is one where the Board has previously stated that animation per se does not mean that an advertisement will be considered to be directed primarily to children. Specifically the Board noted scenes in advertisements for Kellogg LCMs (0179/13 and 0180/13) (which predominantly featured real life images of children at school but also included images of cartoon snails and dinosaurs) and for Kellogg's Coco Pops (0144/13) (which predominantly featured the image of a cartoon bowl of coco pops playing a well-known pool game). By contrast however in a number of other advertisements including animated characters (eg: Kraft 0229/11 and Smiths Chips 0190/13) the Board had considered that the advertisements were not directed primarily to children. The Board reiterated that 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 the current advertisement the Board considered that the visual images are of two dimensional characters eating and moving on screen and that the images contain quirky animations related to consumption of the product. In connection with the animated voices, the overall feel was in the Board's view no more compelling to a child than to an adult. The Board noted the bright colours of the advertisement but considered that overall the visuals would be of appeal to a broad audience and in the Board's view are not directed primarily at children.

With regards to the language the Board noted the advertisement has a unique sound, with different voices and things making noises to accompany the various scenes, in particular the continual statement Wendy's Wendy's Yum. Although this is a simple catchy phrase the Board considered that this language and music was not likely to be of more appeal to children than it would be to adults.

The Board agreed that the advertisement would be attractive to children but considered that it would also be attractive to older teens and adults and that overall it was not possible to reach a decision that the advertisement was directed primarily to children under 14.

The Board noted that, although in this instance it had determined that the advertisement was not of itself directed primarily to children under 14, if an advertiser chooses to make an advertisement which has themes, visuals and language that are attractive to children, it does run the risk of the Board determining that, on balance, the advertisement is in fact directed primarily to children.

Having determined that the marketing communication and the product are not directed primarily to children the Board determined that the provisions of the Children's Code and Part 3 of the Food Code did not apply.

The Board noted the complainant's concerns that the advertisement contravenes prevailing

community standards in its promotion of an unhealthy food product broadcast during or alongside children's programming.

The Board noted section 2.1 of the Food Code which provides that: "advertising or marketing communications ...must not otherwise contravene Prevailing Community standards."

Consistent with previous decisions, (Haribo Australia 0405/12 and Muffin Break 233/12), the Board considered that the advertisement of a product of a particular nutritional profile is not of itself contrary to prevailing community standards. In this case however the advertisement was broadcast in children's programming. The Board noted that many advertisers have signed up to the AFGC RCMI and QSRI which impose a voluntary obligation upon those companies only to advertise 'healthier choice' products in children's programming. The Board noted that Wendy's has not signed up to these initiatives. The Board therefore applied its view of whether or not advertising Hotdogs, Milkshakes and Ice-creams in children's programming is contrary to prevailing community standards. The Board considered that most people in the Australian community would not consider the promotion of these particular products in children's programming contrary to community standards, on the basis that the advertisement itself is not directed primarily to children. However the Board noted that this attitude appears to be changing and advertisers should carefully consider the content and placement of advertisements and specifically turn their minds to changes in community standards.

Based on the above the Board determined that the advertisement did not breach Section 2.1 of the Food Code.

Finding that the advertisement did not breach the Children's Code or Food Code the Board dismissed the complaint.