



Ad Standards Community Panel
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Case Report

1. Case Number :	0292-21
2. Advertiser :	McDonald's Australia Limited
3. Product :	Food/Bev Venue
4. Type of Advertisement/Media :	Internet - Social - Facebook
5. Date of Determination	27-Oct-2021
6. DETERMINATION :	Dismissed

ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

DESCRIPTION OF ADVERTISEMENT

This Facebook post dated 12 October 2021 features an image of McDonalds McFlurry's and the caption "Soft serve mixed with Cadbury Caramilk flakes and sauce...will you be giving it a try? [hand up emoji] YES PLEASE [licking lips emoji] #TastyTuesday *The caramilk McFlurry will be available in all Macca's restaurants from Wednesday, 13 October for a limited time only".

THE COMPLAINT

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

This is a Facebook post that looks like an advertisement, however it doesn't contain the McDonalds logo so it is difficult to know if it is a legitimate advertisement.

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 0292-21 (Complaint). We note that the Complaint has raised issues under the following codes of practice:

- *AANA Code of Ethics – section 2.7;*



McDonald's takes its obligations seriously in respect of adherence to all the codes of practice administered by Ad Standards. McDonald's entirely refutes any suggestion in the complaint or otherwise that the post breaches the Codes. Please see details below.

AANA Code of Ethics

Section 2.7 of the code provides the following:

"Advertising or Marketing Communication must be clearly distinguishable as such to the relevant audience".

In the current case, the complaint claims that the post on the 88.9FM Tamworth Radio Station Facebook page "looks like an advertisement, however it doesn't contain the McDonalds logo so it is difficult to know if it is a legitimate advertisement."

Is the post advertising or marketing communications?

It is our submission that this post is not an advertising or marketing communication and falls outside the bounds of the Codes on the following basis:

- McDonald's was not involved in the creation of this Facebook post and assume that the post was created from a media alert that was sent to the news desk of 88.9FM Tamworth Radio Station by McDonald's internal Corporate Relations team. This media alert was also distributed to various other radio, TV, online and print media outlets across Australia. The media alert was not produced on our website nor available to the public and was sent to media outlets for the purpose of informing them of the new Cadbury Caramilk McFlurry that was about to be launched in our restaurants. This is a standard procedure that McDonald's follows to announce new product launches or updates in our business to media outlets, giving journalists the opportunity to develop editorial content if they so choose.*
- Per the definition of 'advertising' in the Code of Ethics, "[advertising] does not include corporate reports including corporate public affairs messages in press releases and other media statements, annual reports, statements on matters of public policy". Further to this, we understand, per the practice note to the Code of Ethics, that the Codes do not apply to editorial content whereby the "consumer public relations material is provided directly by a brand owner (or their agent) to journalists for editorial".*
- As this material was provided as a media release directly from McDonald's to journalists at the radio station, not available to the public and for the purposes of editorial content, the post should not be considered advertising taken by or on behalf of McDonald's. As such given this material is not an advertising or marketing communication, section 2.7 of the Code of Ethics should not apply to this post.*

Is the advertisement clearly distinguished as such?

Notwithstanding the above, if the Panel considers this content as an "advertising or marketing communication", the second issue to consider is whether the content in question is clearly distinguishable as such.

We submit that the post is clear to the audience that it is advertising or marketing communication on the following basis:



- *The complainant claims that because the post “doesn’t contain McDonald’s logo it is difficult to know if it is a legitimate advertisement”. We note that a brand’s logo is not necessary to clearly distinguish a post as advertising, in fact the Practice Note to the Code of Ethics provides that “there is no absolute requirement that advertising or marketing communication must have a label” as long as it is “clear to the audience that the content is commercial in nature”. This was evident in case number 0207-21 as the Panel provided that “the repeated use of the brand and product names gave a sufficient indication that the post was commercial in nature”.*
- *The combination of the prominent focus on the Caramilk McFlurry product, the caption containing multiple reference to the Caramilk McFlurry, the advertising disclaimer mentioning that the “Caramilk McFlurry will be available in all Macca’s restaurants from Wednesday, 13 October for a limited time only” and the fact it is not an organic or genuine user generated content, it is clear to the audience and the followers of 89fm Tamworth Radio that the post is commercial in nature. These are similar circumstances to the case of 0207-21 where the Panel noted that the “combination of the themes, visuals and language of the ad and the use of the brand and product name multiple times, did mean that the post was clearly commercial in nature.”*
- *This placement of this post should also be considered as this post was contained on the social media page of 89fm Tamworth Radio, which is a media outlet. Per the Practice Note to the Code of Ethics, “when advertisements are targeted to a specific audience, the relevant perspective is that of a typical member of the targeted group”. Unlike influencers or affiliates where it is difficult to distinguish between organic and paid posts, followers of 89fm Tamworth Radio would expect the page to contain commercial post about events, products, or services, available in the local community and would understand the commercial nature of these posts through the themes, language and images used plus the mentioning of the brand name and the product, event or service that is being promoted, as such it is clearly distinguishable as advertising in this context.*

AANA Advertising to Children Code

We note that this Code is only applicable if the post is considered as Advertising or Marketing Communications to Children.

We submit that this Code is not applicable to the post considering the language used in the post and the visuals and theme of the Advertisement have a primary appeal to adults rather than children aged 14 years or younger.

AFGC- Quick Service Restaurant Initiative

The QSRI is applicable if the post is considered as Advertising or Marketing Communications to Children or the program is directly primarily to children. In this respect, we submit that the post is not in breach of the QSRI based on our submissions above.

Other Parts of Section 2 of the AANA Code of Ethics



McDonald's does not believe the post is in breach of the following parts of section 2 of the Code of Ethics:

- *2.1 – Discrimination or vilification;*
- *2.2 – Exploitative and degrading;*
- *2.3 – Violence;*
- *2.4 – Sex, sexuality and nudity;*
- *2.5 – Language;*
- *2.6 – Health and Safety; and*
- *2.7 – Distinguishable as advertising (see details above)*

Conclusion

For the reasons above McDonald's concludes that the post does not breach any of the codes. McDonald's is committed to ensuring all advertisements are clearly distinguishable as advertising and marketing communications, especially in relation to posts on social media. Therefore, McDonald's respectfully disagrees with the complaint and requests that the Panel dismiss the complaint on the above basis.

THE DETERMINATION

The Ad Standards Community Panel (the Panel) considered whether this advertisement breaches Section 2 of the AANA Code of Ethics (the Code).

The Panel noted the complainant's concern that they could not determine if the post was advertising.

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

Section 2.7: Advertising shall be clearly distinguishable as such.

Is the material advertising?

The Panel noted that it must consider two matters:

- Does the material constitute an 'advertising or marketing communication', and if so
- Is the advertising material clearly distinguishable as such?

Does the material constitute an 'advertising or marketing communication'?

The Panel noted the definition of advertising in the Code. Advertising means:

“(a). any advertising, marketing communication or material which is published or broadcast using any Medium or any activity which is undertaken by, or on behalf of an advertiser or marketer,

- *over which the advertiser or marketer has a reasonable degree of control, and*
- *that draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct,*



(b). but does not include:

- *labels or packaging for products*
- *corporate reports including corporate public affairs messages in press releases and other media statements, annual reports, statements on matters of public policy*
- *in the case of broadcast media, any material which promotes a program or programs to be broadcast on that same channel, station or network.”*

The Panel noted the advertiser’s response that the material was provided to journalists at the radio station as a media release, and that they had no control or influence over what the station chose to post.

A minority of the Panel considered that the media release sent by the advertiser included wording which sounded like an advertisement: “The caramilk McFlurry will be available in all Macca’s restaurants from Wednesday, 13 October for a limited time only”, as well as a high-quality image of the product which could be used in promotion. A minority of the Panel considered that this material would have been provided by McDonald’s in the hope that it would be reposted by media outlets as a means of advertising their product. A minority of the Panel considered McDonald’s had control over distribution of the image and media release, and as such could be seen to have a reasonable degree of control over the advertisement.

The majority of the Panel noted that media releases were explicitly excluded from the definition of advertising in the Code, and the Code was not intended to apply to corporate reports or subsequent editorial material. The Panel considered that McDonald’s did not have control over the radio station choosing to use their material, or how they chose to use it. The Panel noted that brands sending media releases to journalists regarding new products is standard practice in the industry, and it was up to journalists to determine whether to use the material. The Panel noted that there was no commercial agreement for the post to be produced, and no incentive had been provided to the station for the production of the material.

The Panel considered that McDonald’s did not have a reasonable degree of control over the material being posted, and therefore the post did not meet the definition of advertising in the Code.

2.7 conclusion

In the Panel’s view the material was not advertising, and therefore Section 2.7 of the Code does not apply.

Conclusion

Finding that the material did not meet the definition of advertising, the Panel dismissed the complaint.