

## Case Report

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| 1. Case Number :                 | 0297-22                           |
| 2. Advertiser :                  | Guzman y Gomez                    |
| 3. Product :                     | Food/Bev Venue                    |
| 4. Type of Advertisement/Media : | Transport                         |
| 5. Date of Determination         | 25-Jan-2023                       |
| 6. DETERMINATION :               | Upheld – Modified or Discontinued |

### ISSUES RAISED

AANA Food and Beverages Code\3.1 Must not target children

### DESCRIPTION OF ADVERTISEMENT

This advertisement contains the text 'Soft serve your mum says yes to!' and an image of three different soft serve ice creams on a hot pink background. Below the image is the text: 'real cream'; 'natural vanilla flavour'; 'no added preservatives'.



### THE COMPLAINT

Comments which the complainant/s made regarding this advertisement included the following:

*This advertisement is targeting children with unhealthy soft serve icecream that is packed with sugar and fat. The advertisement is bright pink and the image of the three soft serves take up most of the advertisement and would be very appealing to*

children. The text 'soft serve your mum says yes to' is obviously aimed at children to pester their mums to get this discretionary item.

Despite trying to say that it's 'real cream, vanilla flavour, no added preservatives' is a sneaky method to convince children and their parents that this product is a healthy option - of which it isn't and shouldn't be promoted as such.

## **THE ADVERTISER'S RESPONSE**

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

*Guzman y Gomez Submissions in response to Complaint 0297-22*

*We write in response to your letter dated 21 December 2022 in relation to Complaint 0297-22 (the "Complaint") made in respect of a bus advertisement for Guzman y Gomez soft serve and dessert sauces (the "Advertisement"). The Advertisement has been published on the Guzman y Gomez Facebook, TikTok and Instagram pages, as well as on buses, trains and on billboards.*

*Thank you for providing Guzman y Gomez the opportunity to respond to the Complaint. Guzman y Gomez confirms its support for the Ad Standards Community Panel and its commitment to ensuring that the marketing and advertising of Guzman y Gomez products complies with relevant laws, industry codes and initiatives.*

### *Advertisement Description*

*The Advertisement is key visual artwork for the Guzman y Gomez Soft Serve Campaign (the "Campaign"). The visual is a picture of three different soft serve ice creams on a hot pink background in order, as follows: vanilla soft serve in a cup with Dulce de Leche sauce and a churro; vanilla soft serve in a cone; and vanilla soft serve in a cup with chocolate sauce. Above the images of the soft serves in white writing is the claim 'Soft serve your mum says yes to!' Below the claim are the following words each separated by a white bullet point: 'real cream'; 'natural vanilla flavour'; 'no added preservatives'. Below these words justified left in yellow writing is the claim 'Pure Joy!' In the bottom right corner of the visual is the GYG logo.*

### *Description of Complaint*

*The complainant has raised an issue that falls within the Australian Association of National Advertisers ("AANA") Food and Beverage Advertising Code ("Food and Beverages Code"). The complainant has asserted that the Advertisement targets "children with unhealthy soft serve icecream [sic] that is packed with sugar and fat" and the complainant notification confirms that the issues fall under section 3.1 of the Food and Beverages Code.*

*Section 3.1 of the Food and Beverages Code states that:*

*Advertising (including sponsorship advertising) of Occasional Food or Beverage Products must not target Children.*

*The practice note related to section 3.1 states:*

*Advertisers must be able to demonstrate that they have evaluated or that care has been taken to evaluate the expected average audience composition before the placement of Occasional Food or Beverage advertisements to ensure they are not targeted at children.*

*After careful consideration of the Food Standards Australia nutrient Profile Scoring Criterion, Guzman y Gomez considers that the soft serves depicted in the Advertisement do not meet the Nutrient Profiling Scoring Criterion (“NPSC”) and are therefore classified as Occasional Food or Beverage Products (“OFBP”) and fall under section 3 of the Food and Beverages Code.*

*Guzman y Gomez understands that the Community Panel will assess the Advertisement against section 2 of the AANA Code of Ethics, the Code for Advertising & Marketing Communications to Children (“AMCC”) and section 2 of the Food and Beverages Code. As such, GYG has considered these codes below.*

#### *Response to Complaint*

##### *Advertisement does not target Children*

*Guzman y Gomez is committed to complying with the Food and Beverages Code (and all other AANA Codes) and denies that the Advertisement breaches Section 3 of the Food and Beverages Code (including its subsections), primarily because, in line with the definition of ‘Target Children’ under the Food and Beverage Code, 1) the Advertisement is not principally or significantly appealing to children under the age of 15 (“Children”), 2) the Advertisement is not presented in a way that is principally appealing to Children, and 3) the Advertisement is not broadcast in any media in which Children are a significant proportion of the expected average audience. Further, in assessing the visuals, nature of the product, themes, perspective, language, and call to action of the Advertisement, the Advertisement is not directed primarily to Children. The target market and demographic for all Guzman y Gomez food items, including soft serve, is individuals between the ages of 18 and 35 (“GYG Demographic”), which does not encompass Children. There are also no Children featured in the Advertisement.*

*The Advertisement is not presented in a way that is principally appealing only to Children for the following reason. While the background colour of the Advertisement is hot pink, this is a commonly used colour in advertising and marketing when featuring ice creams and desserts. For example, pink is the principal colour used by Baskin Robbins on their ice cream cups, packaging boxes and spoons, which are all featured in their advertising campaigns. As such, Guzman y Gomez confirms that in its view, the Advertisement does not specifically target children by using the colour hot pink, as claimed by the complainant.*

*The text, “Soft serve your Mum says yes to” in the Advertisement is a tongue-in-cheek reference to a person’s own memories of their mum’s rules. Having a “mum” is not attributable exclusively to Children; that is, a person of any age can, and most likely will, have a “mum”. The text was intended to cheekily call to memory a mum saying no to ice cream, regardless of that person’s age. Further, there is nothing in the*

*Advertisement that 1) incites a sense of urgency around purchasing a soft serve, 2) encourages Children to ask their “mum” to buy them a soft serve, or 3) promotes the excessive consumption of soft serve, which also complies with the requirements under section 2.7 of the AMCC.*

*The Advertisement is featured on trains and buses, as well as online platforms such as Instagram and TikTok, but is not featured on television or radio. Guzman y Gomez notes that the practice note for section 3.1 states that Advertisers must be able to demonstrate that care was taken to evaluate the expected average audience composition before the placement of the OFBP to ensure that they are not targeting Children. The promotion of the Advertisement on buses began outside of the school holiday period in December 2022 so that Children who took public transport to and from school were less likely to view the Advertisement, in accordance with section 3.1 of the Food and Beverages Code. Guzman y Gomez further asserts that while Children would likely make up a significant proportion of the expected average audience of television and radio advertisements (platforms on which the Advertisement was not featured) they would likely not make up a significant proportion of the average audience of bus advertisements where the Advertisement was featured.*

*If the Panel were to assess whether the Advertisement breaches subsections 3.2, 3.3 and 3.4 of the Food and Beverages Code, Guzman y Gomez considers that the Panel would find that no such breaches occurred. These subsections relate to: (3.2) sponsorship advertising must not show OFBP; (3.3) advertising of OFBP featuring a promotional offer must not create a sense of urgency; and (3.4) advertisers must not give OFBP as awards or prizes, none of which are applicable, as the Advertisement is not a sponsorship advertisement, there is no promotional offer associated with the Advertisement, nor does the Advertisement contain an offer of a reward or prize. It is for these reasons that Guzman y Gomez asserts that the Advertisement does not breach any of these subsections.*

*Advertisement does not breach section 2 of the Food and Beverages Code*

*Guzman y Gomez further denies that the Advertisement breaches Section 2 of the Food and Beverages Code (including its subsections), as substantial research was undertaken to assess the quality of ingredients in the soft serve. This is further expanded upon on the Guzman y Gomez website (see <https://www.guzmanygomez.com.au/nutrition/>) where a full ingredient list and nutritional information is provided that substantiates all statements made on the Advertisement, namely that the soft serve contains real cream, natural vanilla flavours, and no added preservatives, as per the requirements under section 2.3 of the Food and Beverages Code. This also refutes the claim that the Advertisement is misleading or deceptive, or likely to mislead or deceive, under section 2.1 of the Food and Beverages Code, as these are statements are ones of fact.*

*The Advertisement contains no explicit or implicit encouragement of excessive consumption of soft serve; while there are three different soft serves featured in the Advertisement, this is to depict the variety of soft serve available, not to encourage*

*over-consumption of soft serve (in line with the second obligation in section 2.2 of the Food and Beverages Code). Guzman y Gomez confirms, in its view, that this would be obvious to the average consumer and GYG Demographic. Further, the Advertisement does not undermine healthy or active lifestyles (in accordance with the first obligation under section 2.2 of the Food and Beverages Code) as the Advertisement does not promote consumption of soft serve as a better alternative to healthy or active lifestyles or healthy balanced diets. The Advertisement does not suggest or state that soft serve should replace foods that meet the NPSC (in accordance with section 2.5 of the Food and Beverages Code), nor does it suggest that soft serve is superior to other foods or food groups (in accordance with section 2.4 of the Food and Beverages Code).*

*Guzman y Gomez further rejects the claim that the inclusion of 'real cream', 'natural vanilla flavour' and 'no added preservatives' is an attempt to "convince children and their parents that this product is a healthy option". The Advertisement does not portray the soft serve as healthy or as a healthy alternative to other ice cream; instead, the Advertisement promotes the positive attributes of the soft serve itself, being that it is made from real cream, that it has natural vanilla flavour and that it does not contain added preservatives. No comparison is made, nor does the Advertisement suggest that the Guzman y Gomez soft serve is superior to other vendors of soft serve. Further, the Advertisement does not deny, nor does it suggest a lack of, the presence of sugar or fat in the ingredient list.*

*Guzman y Gomez confirms that, in its view, the Advertisement does not breach section 2 of the Food and Beverages Code.*

*Advertisement does not breach section 2 of the AANA Code of Ethics*

*If the Panel were to assess whether the Advertisement breaches any subsection of section 2 of the Code of Ethics, Guzman y Gomez considers that the Panel would find that no such breach has occurred. Subsections of Section 2 of the Code of Ethics relate to: (2.1) discrimination or vilification of a person or section of the community on account of race, ethnicity, nationality, gender, age, sexual orientation, religion, disability, mental illness or political belief; (2.2) sexual appeal of minors or sexual appeal used in an exploitative/degrading manner; (2.3) the portrayal of violence; (2.4) sex, sexuality and nudity; (2.5) inappropriate language; (2.6) prevailing Community Standards on health and safety; and (2.7) distinguishability as advertising, none of which are represented in the Advertisement. Guzman y Gomez confirms that, in its view, the Advertisement does not breach any of these subsections.*

*Summary*

*In summary, Guzman y Gomez submits that the Advertisement does not breach section 3.1 (nor any other section) of the Food and Beverages Code, nor section 2 of the Code of Ethics. In relation to section 3.1 of the Food and Beverages Code, no breach has occurred on the basis that the Advertisement is not principally or significantly appealing to Children and is not targeted at children, is not presented in a way that is principally appealing to Children, and is not broadcast in any media in which Children are a significant proportion of the expected average audience.*

*Guzman y Gomez submits that the Complaint should be dismissed in its entirety and thanks the Panel for the opportunity to respond to the Complaint.*

## **THE DETERMINATION**

The Ad Standards Community Panel (the Panel) considered whether this advertisement breaches the AANA Food and Beverages Advertising Code (the Food Code).

The Panel noted the complainant's concern that the advertisement is for an occasional food product and targets children.

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

### **Is the advertisement for an Occasional Food or Beverage Product?**

The Panel noted that the definition of Food or Beverage Product in the Food Code is: *"food or beverages products which do not meet the Food Standards Australia Nutrient Profile Scoring Criterion as published from time to time by Food Standards Australia New Zealand"*.

The Panel noted the advertisement is promoting soft serve ice cream cones and sundaes. The Panel noted that the advertiser had stated that the product does not meet the FSANZ criteria and is an occasional food product.

### **Section 3.1 Advertising (including sponsorship advertising) of Occasional Food or Beverage Products must not target Children.**

The Panel noted that the Food Code defines "target children" as:

*"Target Children is determined by the context of the advertisement and the following three criteria:*

- 1. Nature and intended purpose of the product being promoted is principally or significantly appealing to Children;*
- 2. Presentation of the advertisement content (e.g. theme, images, colours, wording, music and language used) is principally appealing to Children;*
- 3. Expected average audience at the time or place the advertisement appears includes a significant proportion of Children."*

The Panel noted that the Practice Note provides guidance on the interpretation of "target children":

*“All three criteria will be considered by the Community Panel in determining whether or not advertising targets Children. The weighting given by the Community Panel to each of the three criteria will be determined on a case by case basis. In the event of a complaint being considered by the Community Panel, the advertiser should be in a position to provide details in terms of the nature and intended purpose of the product, the presentation of the advertisement content and the expected average audience at the time or place the advertisement appears.*

*“In relation to the third criteria, measures to determine if Children are likely to be a ‘significant proportion’ of the expected average audience may include one or a combination of the following:*

- Where data exists, 25% or more of the predicted audience will be Children. In relation to outdoor advertising, if across a campaign the data shows a predicted audience with less than 25% Children, and there is a Children’s event or concert that is incidental to the ad placement, the audience of that incidental Children’s concert or event will not be captured.*
- C&P programmes.*
- Programs, artists, playlists, video, movies, magazines or other content with significant appeal to Children (e.g. featuring personalities or characters popular with Children).*
- Compliance with the Outdoor Media Association Placement Policy and Health & Wellbeing Policy which regulate the placement of advertising at primary and secondary schools which are locations where Children regularly and predictably gather. Where accurate program audience data is not available, the Community Panel may have regard to other factors listed above such as the program content, the time or the location where the advertisement is being shown (in line with the above provision).”*

**Point 1: Is the nature and intended purpose of the product principally or significantly appealing to children?**

The Panel noted the advertiser’s response that the product is aimed at adult consumers aged 18-35.

The Panel noted that the test is whether the product is *principally or significantly* appealing to children, not *only* appealing to children, and the Panel considered that ice-creams generally are a product of significant appeal to children.

The Panel considered that the soft serve ice cream products in this advertisement would be products which children enjoy and considered that the product was significantly appealing to children.

**Point 2: Is the content of the advertisement principally appealing to children?**

The Panel noted that to be within Section 3 of the Food Code the Panel must find that the advertisement is aimed in the first instance at children under 15.

Is the theme of the advertisement principally appealing to children?

The Panel noted that the theme of the advertisement is promoting soft serve products which are made with natural flavours and no preservatives, so mothers are more likely to say yes to children asking for them.

The Panel noted the advertiser's response that adults also have mothers, and that the messaging was not directed at children.

The Panel considered that children are the most likely to have parents not allowing them to buy or consume ice cream, and as such the messaging would appeal most to children and young teenagers who need their parents' permission to buy the product.

The Panel considered that the theme would be more appealing to children under 15 than to older teenagers or adults.

Are the visuals of the advertisement principally appealing to children?

The Panel noted that the background of the advertisement is bright pink.

The Panel noted the advertiser's response that the bright pink colour of the advertisement was similar to other ice cream brands' colours and was therefore not intended to target children.

The Panel noted that the bright colour would attract the attention of children, but that it would also be attractive to adults who associate the colour with ice creams.

The Panel noted the visuals of the ice cream products would also attract the attention of children, but would be equally attractive to adults.

Overall, the Panel considered that the visuals were bright and colourful and would be equally appealing to children under 15 and adults.

Is the language/wording/music of the advertisement principally appealing to children?

The Panel considered that the wording of the advertisement was simple but not overly child-like. The Panel noted that the smaller text which states, "Real cream. Natural vanilla flavour. No added preservatives", was factual information which would be most attractive to adults looking to make comparisons between similar products.



However, the Panel considered that words “Soft serve your mum says yes to” would primarily attract the attention of children, and that this was the larger text on the screen and was the dominant language in the advertisement.

The Panel considered that the language of the advertisement would be more appealing to children under 15 than to older teenagers or adults.

Is the content of the advertisement overall principally appealing to children?

The Panel reiterated that it is essential that they consider all elements of the advertisement and 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 principally appealing to children.

The Panel considered that the overall impression of the advertisement was the theme of the product being something children could ask their parents for. The Panel noted that this may not have been the intent of the advertiser, however the dominant messaging in the advertisement would be principally appealing to children.

Overall, the Panel considered that the advertisement would attract the attention and interest of children under 15 ahead of any other audience.

**Point 3: Does the expected average audience of the advertisement include a significant proportion of children?**

The Panel noted the advertisement had been placed on a public bus.

The Panel considered that public buses would have a broad audience which would include children, however as children under 15 don't make up 25% of the Australian population, children would be unlikely to make up 25% of the viewers of these bus ads. The Panel noted that buses are however one of the main forms of transport for children under 15.

The Panel noted that the bus ad does not have an expected average audience which would include a large proportion of children.

**Does the advertisement target children**

The Panel noted that in order to determine whether an advertisement targets children it is required to weigh each of the three criteria above.

The Panel considered that the product being advertised is significantly attractive to children and the overall presentation of the advertisement is principally appealing to children. The Panel noted that the general audience of the advertisement would

probably not include an audience of more than 25% children, but would still be seen by a large number of children.

Overall, the Panel considered that Points 1 and 2 were strongly met, and that these two criteria were sufficient to determine that this advertisement was targeted to children under 15.

### **Section 3.1 conclusion**

The Panel noted that this advertisement for an Occasional Food or Beverage Product did target children, and therefore the Panel determined that the advertisement did breach Section 3.1 of the Food Code.

### **Conclusion**

Finding that the advertisement did breach Section 3.1 of the Food Code the Panel upheld the complaint.

### **THE ADVERTISER'S RESPONSE TO DETERMINATION**

We write to confirm that whilst we do not agree with the Community Panel's determination that our advertising campaign is targeted at children, we respect the work of the Panel and have taken steps to discontinue the advertisement in its current form.