



Ad Standards Community Panel
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AdStandards.com.au

Ad Standards Limited
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Case Report

1. Case Number :	0356-19
2. Advertiser :	Uber Eats
3. Product :	Food/Bev Venue
4. Type of Advertisement/Media :	Email
5. Date of Determination	13-Nov-2019
6. DETERMINATION :	Dismissed

ISSUES RAISED

AANA Code of Ethics\2.6 Health and Safety
AANA Food and Beverages Code\2.2 Healthy lifestyle/ excess consumption
AANA Food and Beverages Code\4.2 Must comply with QSRI
AANA Advertising to Childrens Code\2.1 Community Standards

DESCRIPTION OF ADVERTISEMENT

This email advertisement features an image of a McDonalds drink, fries and a sundae and the text:

Win Uber Eats twice a week for a year

"It's baaaaaack! Play The MONOPOLY Game at Macca's now!

This year is bigger than ever and we have offiically joined the party.

Order in and win. There's heaps of amazing prizes including winning Uber Eats Twice A Week For A Year!

Get McDonald's delivered exclusively via Uber Eats now.

Terms and Conditions apply. Selected items only."

THE COMPLAINT

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

Encouraging people to order discretionary food and drink in order to win prizes (which is basically gambling). The more food you order, the more tickets you receive to the draw, which promotes excessive consumption which is fueling the obesity epidemic we



are currently experiencing. On top of this, if you do win, you might receive uber eats twice a week encouraging consumption of discretionary foods and drinks.

THE ADVERTISER'S RESPONSE

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

Uber Australia Pty Ltd (Uber) makes these submissions in response to complaint 0356-19.

1. 'Uber Eats'

(a) Uber Eats is a platform that connects eaters, restaurant partners (and other types of merchants) and delivery partners in a marketplace. The technology we provide maintains the Uber Eats marketplace by both balancing the interests and improving the experiences of all users.

(b) Uber Eats technology connects users by allowing:

(i) eaters to use the Uber Eats app to search for and order items (such as meals) from restaurant partners, and in the case of delivery items, for those items to be delivered by restaurant partners;

(ii) restaurant partners to advertise their items to a wide base of eaters using Restaurant Manager and to use Restaurant Dashboard to contract with independent delivery partners to make deliveries on the restaurant partner's behalf; and
(iii) delivery partners to use the Uber Driver app to receive restaurant requests for deliveries.

(c) McDonald's is a restaurant partner.

2. Description of Advertisement

(a) The complaint relates to an email advertisement promoting McDonald's, which is available for delivery via the Uber Eats app, and the McDonald's Monopoly promotion (Advertisement), as follows:

[image]

Win Uber Eats twice a week for a year!

It's baaaaaack! Play The MONOPOLY® Game at Macca's® now!

This year is bigger than ever and we have officially joined the party.

Order in and win. There's heaps of amazing prizes including winning Uber Eats Twice A Week For A Year!

Get McDonald's exclusively delivered via Uber Eats now. Terms and Conditions apply. Selected items only.

(b) McDonald's has conducted the Monopoly promotion annually since 1987. This is the first year Uber Eats has been involved in the Monopoly promotion.



3. Advertisement not directed to children

(a) The Advertisement was sent to subscribers of Uber Eats marketing communications. None of the recipients of the Advertisements were children, as far as Uber Eats is aware.

(b) The Uber Eats Terms and Conditions require a user to be at least 18 years in order to register an account.

(c) The Advertisement and the Uber Eats prizes were therefore not directed primarily to children and the Codes and Initiatives specific to marketing to children are not relevant to this response.

4. Response to issues raised in complaint

4.1 Advertisement not contrary to AANA Code or F&B Code

(a) The Advertisement does not promote behaviour that is contrary to prevailing community standards on health and safety (under section 2.6 of the AANA Code of Ethics (AANA Code)) or undermine the importance of a healthy lifestyle or encourage excessive consumption (under section 2.2 of the AANA Food and Beverages Advertising Code (F&B Code)).

(b) We assume that the reference to 'discretionary' food and drink in the complaint is a reference to non-nutritional or low nutritional food and drink, or snack food which should be consumed in moderation, as part of a balanced diet, according to prevailing community standards on health.

4.2 Response to complaint that Advertisement encourages excessive consumption of McDonalds

(a) The complaint claims the Advertisement breaches the AANA Code and F&B Code because it encourages excessive consumption of McDonald's (discretionary food) by offering tokens for a chance to win prizes.

(b) Uber submits that nothing in the Advertisement disparages healthy foods, good lifestyle decisions or exercise, or encourages excessive consumption. In support of this submission, Uber further submits:

(i) the Advertisement does not show the actual consumption of any specific product. The image in the Advertisement is an Oreo McFlurry, a soft drink and fries. These items are not sold together in a meal and are simply indicative of the types of individual items selected to come with a Monopoly token. The Advertisement does not suggest purchasing these items together. The items are not represented in disproportionate portion sizes;

(ii) the Advertisement does not suggest a frequency of consumption that could be construed as encouraging excessive consumption of McDonald's foods and drinks. As per previous Community Panel decisions (including McDonald's 0042/19), promoting a product with a particular nutritional composition does not automatically undermine the importance of a healthy balanced diet;

(iii) each selected McDonald's item purchased during the promotion period comes with at least 1 token for a chance to win. This means a consumer only needs to purchase 1 selected item to participate in the Monopoly promotion;



(iv) the Monopoly promotion runs for 8 weeks. The Advertisement therefore does not create a sense of urgency that might encourage consumers to immediately overorder or make multiple orders within a short period; and

(v) nothing in the Advertisement or the Monopoly promotion terms requires or suggests that an order of multiple items must be consumed by 1 person, even if a consumer orders several items.

(c) Uber also submits that McDonald's has several 'Tick Approved' menu items that are approved by the Heart Foundation. The Tick Approved chicken salad is included in the Monopoly promotion and provides a consumer with 2 Monopoly tokens, the highest possible number of tokens on an item. Tea and coffee are also included in the Monopoly promotion.

4.3 Advertised Uber Eats prizes do not encourage excessive consumption of food, or discretionary foods and drinks

(a) The complaint claims the Advertisement breaches the AANA Code and F&B Code because the nature of the advertised 'Uber Eats Twice A Week For A Year' prize encourages the use of the prize on discretionary foods and drinks.

(b) In general, Uber submits that the Advertisement identifies the Uber Eats prizes as only some of the prizes available to be won in the Monopoly promotion. Other major prizes of the Monopoly promotion include free fuel, gift cards, travel, vehicles and electronics. Food related prizes are therefore a small portion of the prizes available.

(c) Uber submits the Uber Eats prizes do not encourage excessive consumption of foods and drinks of any kind, including discretionary food. In support of this submission we note:

(i) the vast majority of foods options available from the restaurant partners on the Uber Eats app are ready to eat, or ready to heat, meals (arguably non-discretionary food);

(ii) the Uber Eats app aims to provide consumers with convenience and choice, particularly for meals, by enabling eaters to order food from restaurants via the Uber Eats app;

(iii) with more than 21,000 restaurant partners on the Uber Eats app across Australia, consumers have a diverse selection of foods and drinks, including healthy meal options and fresh groceries available to order via the Uber Eats app. A consumer may use the search function in the Uber Eats app to search for 'healthy' and browse the many healthy options offered by restaurant partners;

(iv) consumers use the Uber Eats app to order a range of non-discretionary meal types and a variety of cuisines. Consumers increasingly seek out the many healthy, vegan, vegetarian and allergen friendly options, which the Uber Eats app has responded to and encouraged with increased search functions catering to this significant and growing group of consumers;

(v) the major Uber Eats prize (Uber Eats Twice A Week For A Year) is limited to 2 x \$50 orders per week. This moderate limit on each order is indicative that the prize itself would not have the effect of encouraging or enabling the winner to purchase excessive amounts of food and drink at any time; and

(vi) the other minor Uber Eats prizes (\$100 and \$25 promo codes) are single use only, and moderate amounts which do not promote or encourage excessive consumption.



5. Other parts of F&B Code and section 2 of the AANA Code

We have considered the Advertisement alongside the rest of the F&B Code and section 2 of the AANA Code and submit the Advertisement does not breach any of the matters covered under those sections.

Given the above, the Advertisement complies with all relevant Codes and Initiatives and the complaint should be dismissed.

THE DETERMINATION

The Ad Standards Community Panel (the “Panel”) considered whether this advertisement breaches the AANA Code of Ethics (the Code), the AANA Food and Beverages Advertising and Marketing Communications Code (the “Food Code”) or the AANA Code for Advertising and Marketing Communications to Children (the “Children’s Code”).

The Panel noted the complainant’s concern that the advertisement promotes excess consumption and depicts material contrary to health and safety standards.

The Panel first considered what the advertisement is promoting, in the context of determining which of the Codes apply.

The Panel considered the definition of advertising or marketing communication which provides:

‘Advertising or marketing communication means:

Any 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 and the like

in the case of broadcast media, any material which promotes a program or programs to be broadcast on that same channel or station

The Panel noted that the exclusions (b) in the definition did not apply to this promotion.



The Panel considered that the advertisement is an advertisement for Uber Eats, but is also an advertisement which is promoting McDonald's products.

The Panel considered that as a promotion for Uber Eats, Uber Eats is not a food or beverage product, and that the Food Code does not apply of itself to the Uber Eats advertisement. However the Panel considered that the depictions of McDonald's food products was a promotion of McDonald's food, and that the inclusion of material from McDonald's amounted to material published by or on behalf of McDonald's, and that McDonald's would have had a reasonable degree of control over the manner in which their products and promotion were referenced.

On that basis the Panel considered that the advertisement is a promotion for Uber Eats, and for McDonald's.

The Panel reviewed the advertisement and noted the response from Uber Eats which covered issues relating to both advertisers.

The Panel first considered the Uber Eats promotion which promotes a competition in which a consumer has a chance to win prizes, including a major prize of Uber Eats twice a week for a year.

The Panel considered whether this promotion met the requirements of the Code of Ethics, in particular section 2.6 of the Code which provides:

'Advertising or marketing communications must not depict material that is contrary to prevailing community standards on health and safety.'

The Panel noted the complaint that the promotion is depicting a competition that is contrary to prevailing community standards on health, by encouraging the purchase of McDonalds, and then offering a prize of Uber Eats twice a week for a year. The Panel considered that the issue of encouraging the purchase of McDonalds' is a matter best considered under the Food Code. With regards to the prize of Uber Eats twice a week for a year, the Panel noted that Uber Eats offers a variety of food types with various nutritional offerings and that it is not possible to say that the promotion is contrary to prevailing community standards on health or safety in that having food delivered to your home or office twice per week would not necessarily be unhealthy. On that basis, the Panel determined that the advertisement did not breach section 2.6 of the Code.

The Panel noted that the product advertised is a promotion for McDonald's food products and that therefore the provisions of the AANA Food and Beverages Advertising and Marketing Communications Code (the Food Code) apply. In particular the Panel considered section 2.2 of the Food Code which provides:

"Advertising or marketing communications...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 Panel noted that the advertisement appears to be promoting McDonalds Monopoly, and encourages consumption by promoting chances to win prizes, including a major prize of Uber Eats twice a week for a year.

The Panel noted the complainant’s concern that a promotion which gives entries based on purchases encourages excess consumption, as it encourages consumers to purchase excess amounts of the product to increase their chances of winning.

The Panel noted that the advertisement has no messaging around frequency of purchase or consumption, and that a promotion based on purchases cannot be reasonably interpreted to be encouraging excessive purchasing/ordering or promoting ‘order every day’ without a more specific call to action in the advertisement. The Panel determined that the advertisement is not encouraging excess consumption of the products depicted in the advertisement.

The Panel noted the complainant’s concern that the major prize of Uber Eats twice a week for a year is also encouraging excessive consumption. The Panel considered that the content of the prize is not of itself encouraging excess consumption as there are many food options with Uber Eats and there is no context to suggest that the twice per week prize would be food that is additional to a usual diet or that the food purchased would be of a particular nutritional composition.

The Panel considered that the advertisement did not encourage excess consumption and did not breach section 2.2 of the Food Code relating to excess consumption.

The Panel considered whether the products identified in the advertisement consisted of a depiction which undermines a healthy balanced diet.

The Panel noted that the advertisement depicts a number of McDonald’s products.

The Panel considered that, consistent with previous decisions (Ferrero 0345/17, Hungry Jacks 282/11, and Mondelez 0550/17), promotion of a product which may have a particular nutritional composition is not, per se, undermining the importance of a healthy balanced diet and considered that the promotion of McDonald’s products generally and of the images in the advertisement did not of themselves undermine the importance of a health balanced diet. The Panel then considered whether the products of poor nutritional value that were depicted, were depicted in a manner that undermine the importance of a healthy balanced diet.

The Panel considered that the products were considered in the context of being available as prizes and as a way of gaining entries for prizes, but in the context depicted they were not shown as preferable to healthier products or as replacements for healthier products. The Panel considered that overall the products in the



advertisement were not depicted in a manner that suggested the consumption was in place of a healthy balanced diet, and overall gave no context other than a depiction of certain products being consumed on one social occasion.

Overall, the Panel determined that the advertisement did not breach Section 2.2 of the Food Code.

The Panel then considered whether the advertisement is directed primarily to children. The Panel considered Section 4.2 of the Food Code which provides:

“Advertising or Marketing Communication for Food or Beverage Products by a Quick Service Restaurant must comply with Schedule 1 of the QSRI, where applicable”.

The Panel noted that the QSRI refers to the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children and noted that the QSRI is designed to ensure that only food and beverages that represent healthier choices are promoted directly to children.

The Panel considered the definition of advertising or marketing communications to children within the QSRI. The definition states that ‘Advertising or Marketing Communications which, having regard to the theme, visuals and language used, are directed primarily to Children and are for food and/or beverage products.’ Under this initiative children means “persons under the age of 14 years of age.”

The Panel noted that the QSRI captures Advertising and Marketing Communications to Children where:

...the theme, visuals and language used, are directed primarily to Children and are for food and/or beverage products;

2. Advertising or Marketing Communications that are placed in Medium that is directed primarily to Children (in relation to television this includes all C and P rated programs and other rated programs that are directed primarily to Children through their themes, visuals and language); and/or

3. Where Children represent 35 per cent or more of the audience of the Medium.

The Panel noted that with regards to point 1 the Panel must consider whether the communication activity is directed primarily to Children – regardless of its placement.

The Panel noted that the dictionary definition of “primarily” is “in the first place” and that to be within the QSRI the Panel must find that the advertisement is clearly aimed in the first instance at Children under 14 and that it must have regard to the ‘theme, visuals and language’ used in determining this issue.



The Panel considered that the product in the advertisement was one of appeal to both adults and children and considered that the static, non-animated depiction of food products were consistent with McDonald's branding and likely to appeal to adults and children alike. The Panel considered the overall impact of the advertisement is one of general appeal which may include children, but is not directed primarily to children under 14.

The Panel considered point 2 and 3 and considered that the advertisement was an email sent to people with an Uber Eats account. The Panel considered that purchasing UberEats requires a credit card, and considered that it is unlikely that most members of the community would consider an email targeting account holders to be a medium that is directed primarily to children, or a medium that would have an audience of more than 35% children.

Based on the requirements outlined in the QSRI the Panel considered that as the advertisement was not directed primarily to Children, did not appear in a medium directed primarily to Children and did not appear in a medium which attracts an audience share of more than 35% of Children, the QRSI does not apply in this instance and therefore the advertisement did not breach Section 4 of the Food Code.

The Panel then considered whether the advertisement complied with the requirements of the AANA Code for Advertising and Marketing Communications to Children (The Children's Code).

To fall within this Code, or Part 3 of the Food 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".

For the reasons outlined above, the Panel considered that the advertisement is not directed primarily to Children.

The Panel determined that as this email advertisement is not directed primarily to Children, the Children's Code and Part 3 of the Food Code do not apply.

Finding that the advertisement did not breach the AANA Code of Ethics, the AANA Food Code or the AANA Children's Code, the Panel dismissed the complaint.