



## Case Report

<b>1</b>	<b>Case Number</b>	<b>0407/10</b>
<b>2</b>	<b>Advertiser</b>	<b>Nestle Australia Ltd</b>
<b>3</b>	<b>Product</b>	<b>Food and Beverages</b>
<b>4</b>	<b>Type of Advertisement / media</b>	<b>TV</b>
<b>5</b>	<b>Date of Determination</b>	<b>13/10/2010</b>
<b>6</b>	<b>DETERMINATION</b>	<b>Upheld - Modified or Discontinued</b>

### ISSUES RAISED

Food and Beverage Code (Children) misleading/deceptive  
Advertising Message AFGC - Advertising Message  
2.8 - Food and Beverage Code untruthful/dishonest

### DESCRIPTION OF THE ADVERTISEMENT

The text "8 kids" appears on the screen in white, bold type and we see 8 different children, shown separately. The text then changes to read "8 artists" and we see 8 different adults. We then see a montage of the kids working with the adults to create different artwork, with each kid/adult pairing using a different colour.

The screen then splits into 9 squares and in the outer squares we see the different children, with the background matching the colour of their artwork. The central square features the words "8 colours of fun" This central square then gets bigger until it fills the screen, and the words "follow the fun at facebook/smarties-australia" are added to "8 colours of fun"

### THE COMPLAINT

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

*The Obesity Policy Coalition (OPC) is a partnership between Cancer Council Victoria Diabetes Australia – Victoria Vic Health and the World Health Organization Collaborating Centre for Obesity Prevention at Deakin University. The OPC is concerned about rising rates of overweight and obesity in Australia particularly in children.*

*We write to complain about a television advertisement for Nestle Smarties which we consider to breach the Responsible Children's Marketing Initiative of the Australia Food and Beverage Industry (RCMI).*

*We believe the advertisement breaches the RCMI because it is directed primarily to children and because Smarties do not represent a healthy dietary choice consistent with established scientific or Australian government standards.*

*Directed primarily to children*

*It is clear that the ad is directed primarily to children. The theme of the ad is children having fun while helping to create artworks inspired by their favourite Smartie colours. The ad features bright Smartie-coloured flashing scenes of young child actors creating colourful artworks dressing up dancing jumping up and down smiling and having lots of fun. The ad is clearly intended to appeal to children's creativity imagination and sense of fun.*

*In addition Smarties are a product that appeal primarily to children and that are normally marketed to children.*

*The ad has recently been broadcast during TV show The X Factor which is watched by very high numbers of children. According to metro TV viewing data (for 5 capital cities) the number of children aged 5-12 years in the audience for The X Factor has ranged from 70 000 to 108 000 and the number of children aged 2-9 years in the metro audience has ranged from 48 000 to 79 000.*

*Nutritional content of Smarties*

*According to the Dietary Guidelines for Children and Adolescents in Australia care should be taken in relation to children's diets to limit saturated fat and moderate total fat intake and consume only moderate amounts of sugars and foods containing added sugars.*

*Smarties are extremely high in sugar and energy and very high in saturated fat and total fat. Sugar is the main ingredient in Smarties comprising 58% of the product. Smarties also contain 17.4% saturated fat 28.4% total fat and 2190kJ per 100 g.*

*Therefore Smarties are clearly not a healthy snack choice for children and do not represent healthy dietary choices consistent with the Dietary Guidelines for Children and Adolescents in Australia.*

*Consumption of products such as Smarties that are high in sugar saturated fat and energy may contribute to weight gain and obesity in children. The OPC believes it is irresponsible for companies to advertise such foods to children particularly at a time when a quarter of Australian children are overweight or obese.*

*Action requested by the ASB*

*We ask the Advertising Standards Board to request Nestle to withdraw the Smarties advertisement on the basis that it breaches the RCMI.*

## **THE ADVERTISER'S RESPONSE**

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

### *1. Overview*

*The key issue raised by the Complaint is whether the Advertisement constitutes "advertising to children" under the applicable Codes. Nestle submits that the Advertisement is an example of a children's product being advertised to mums and other adult caregivers demonstrated by the conceptual nature of the Advertisement and the specific direction in the Advertisement to mums/adult caregivers to visit the SMARTIES Facebook page at [www.facebook.com/smartiesaustralia](http://www.facebook.com/smartiesaustralia) ("Face book"), which contains activities targeted to*

*them. Moreover, the television program that is specifically referred to in the Complaint is clearly a program that primarily targets adults rather than children, demonstrated by its "PO" classification.*

## *2. "Advertising to Children" under the relevant Codes*

*Nestle is committed to the Australian Food and Grocery Council's Responsible Children's Marketing Initiative (RCMI) and has prepared a Company Action Plan (CAP) accordingly. A copy of Nestlé's CAP is attached. Nestlé's advertising is reviewed by its legal and corporate communications teams to ensure compliance with not only the legislative framework regulating advertising but also the self-regulatory Codes administered by the Board. The definition of "Advertising or Marketing Communications to Children" in the Food and Beverages Marketing Communications Code (FBA Code) is as follows:*

*Advertising or Marketing Communications to Children means Advertising or Marketing Communication which, having regard to the theme, visuals and language used, are directed primarily to Children and are for a Children's Food or Beverage Product.*

*In its Practice Note to the FBA Code, the Board states that, in considering whether an advertising or marketing communication is directed towards children, the Board will consider the advertiser's stated intent but will also make an evaluation based on its own review of the material and the product being promoted. While SMARTIES is a product which principally appeals to children, Nestle submits that the placement of the Advertisement in programs such as the X Factor, targeting adult viewers, demonstrates that the Advertisement is not directed at children. The target audience for the Advertisement is mums and other caregivers who understand the place of products such as SMARTIES in their children's diet. The complainant states that because there may be children watching X Factor and because the Advertisement contains "bright, Smartie-coloured imagery" it is an advertisement directed towards children. With respect to the complainant:*

*(a) The "X Factor" program is rated PG (Parental Guidance recommended) and therefore could not reasonably be construed as a program targeting children; and*

*(b) The fact that children under the age of 14 years may see the Advertisement does not automatically mean that the Advertisement is therefore directed at children.*

*Nestle submits that as the Advertisement is not primarily directed to children, the Advertising to Children Code and Part 3 of the FBA Code do not apply and that Nestle is not in breach of its commitments under the RCMI.*

## *3. Audience & Programming*

*Nestle directed its media agency that the target audience for the Advertisement was to be Main Grocery Buyers (MGB's) with children aged between 5 and 12 years. The Advertisement has been shown during day-time talk shows and adult day-time programming generally as well as during programs shown at or later than 7:30pm whose primary audience was the target audience.*

### *3.1 The "X Factor" Program*

*The Complaint refers to numbers of children between the ages of 5 and 12 years and between 2 and 9 years who may be in the audience for the program "X-Factor" which is shown from 7:30pm until 8:30 pm on Sunday nights. With respect to the complainant, it is not reasonable to consider "X-Factor" as a program that is targeted primarily to children particularly when the classification of "X-Factor" is PG. The fact that there may be some children who watch a program which is intended to appeal to adults or older teenagers is not within the control of an advertiser.*

*Nestle is of the view that, given the nature of this program, any children under the age of 14 years who would be watching the program are likely to be accompanied by their parents, and that the likelihood of children as young as 2 years old watching the program, as is suggested*

*in the Complaint, is extremely low. Nestlé's media agency has confirmed that the number of persons watching this program who are under the age of 12 years is less than 9%.*

#### *4. Advertisement*

##### *4.1 Context*

*The Advertisement is part of a campaign aimed at providing mums/primary adult caregivers with ideas for artistic/craft activities to undertake with their children inspired by "The 8 colours of SMARTIES". The closing frame of the Advertisement contains the words "follow the fun at facebooksmarties~australia" and refers to the SMARTIES Facebook page which is targeted at the large community of mothers! primary caregivers who regularly access the internet (it is relevant that, according to the terms and conditions of use of the Facebook website, children under the age of 13 are not permitted to set up a Facebook account). The SMARTIES Facebook page contains videos of and written instructions for creative in-home activities for caregivers to undertake with their children. I attach a sample of an activity page printed out from the SMARTIES Facebook website, which indicates that the page is directed at adult caregivers.*

*Nestle has received a very positive reception to the SMARTIES Facebook page and the activities contained on it from the community of mums/caregivers who have so far joined the page. The members of Facebook who have become "fans" of the SMARTIES Facebook page are 95% female and are mostly between the ages of 25 - 44 yrs of age. This reflects the target market of the Facebook activity, as well as the target audience of the Advertisement.*

##### *4.2 Content of the Advertisement*

*In terms of the content of the Advertisement, although the Advertisement may be about children it is not directed at children.*

*The complainant contends that the Advertisement is directed primarily to children because: "the theme of the ad is children having fun while helping to create artworks inspired by their favourite Smarties colours .... The ad is clearly intended to appeal to children's creativity, imagination and sense of fun. "*

*It does not follow that any advertisement that is colourful or that tries to convey a sense of imagination and fun must be directed at children even when the advertisement is shown during adult programming. The point of showing children having fun and experimenting with colour working alongside artists in the Advertisement is to appeal to, inspire and engage mums/adult caregivers and to drive them to the online Facebook activity which is specifically targeted to them.*

*Nestle submits that the Advertisement (which shows children working with adult artists who describe the children's work), is fairly conceptual and unlikely to be well understood by children.*

*This is because it is specifically pitched at adult caregivers wanting inspiration for creative and artistic activities that may engage their children.*

##### *4.3 Health, nutrition and ingredient claims.*

*A viewing of the Advertisement will confirm that there are no statements in the Advertisement which could be construed as health, nutrition or ingredient claims or statements.*

*In relation to the complainant's statement that SMARTIES "are not a healthy snack choice for children, and do not represent a healthy dietary choice", the Advertisement does not make any representations as to the health benefits of SMARTIES. The Board has previously noted in its determination of Complaint Reference number 55/10 that "it is not the role of the ASB Board to determine the healthiness or unhealthiness of foods." Nestlé's position is that adult caregivers, who are the target audience of the Advertisement, well understand the place that a product such as SMARTIES plays in their children's overall diet.*

#### *5. AANA Code of Ethics*

*We are aware that the Board prefers that advertisers consider all of the issues raised by an advertisement the subject of a complaint against the relevant Codes, including issues not specifically mentioned in a complaint. Nestle submits that the Advertisement does not contain any breach of the AANA Code of Ethics and that none of the matters set out in section 2 of the Code are infringed by the Advertisement. The Advertisement could not be construed as infringing prevailing community standards nor as containing any statements that are misleading or deceptive.*

*In fact there are no product-specific statements contained in the Advertisement and Nestle submits that there are no statements in the Advertisement that could otherwise offend any other provision of the Codes.*

## **THE DETERMINATION**

The Advertising Standards Board (Board) considered whether this advertisement breaches Section 2 of the Advertiser Code of Ethics (the "Code") and the AFGC Responsible Children's Marketing Initiative of the Australian Food and Grocery Council (AFGC RCMI).

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

The Board noted the complainant's concern that the advertisement breaches the AFGC RCMI because it is directed primarily to children, and because Smarties do not represent a healthy dietary choice.

The Board considered whether the advertisement met the requirements of the AFGC RCMI. The Board noted that under the AFGC RMCI the advertiser has committed to:

‘not [advertising] food and beverage products to children under 12 in media unless;

1. Those product represent healthy dietary choices, consistent with established scientific or Australian Government standards; AND

2. The advertising and/or marketing communication activities reference, or are in the context of, a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages:

- Good dietary habits, consistent with established scientific or government criteria
- Physical activity.’

The Board noted that the advertiser has agreed that the advertised product does not represent a healthy dietary choice under the Initiative and does not meet the criteria that the advertiser has set.

The Board noted the information provided by the complainant, that the advertisement is broadcast in programmes that are directed primarily to children. The Board noted the information provided by the advertiser about the programming in which the advertisement is

broadcast. The Board noted that under the AFGC RCMI the relevant requirement is that the company not advertise food and beverage products to children under 12 in 'media'. Media is defined as: 'Media means television, radio, print, cinema and third-party internet sites where the audience is predominantly children and/or having regard to the theme, visuals, and language used are directed primarily to children.'

The Board noted that the television programs in which the advertisement is broadcast are not programmes where the audience is 'predominantly' children: i.e.: there are not viewing audience of more than 50% children under 12. The Board then considered whether any of the programming in which the advertisement was broadcast is 'having regard to the theme, visuals and language used directed primarily to children.' The Board was of the view that most of the programming in which the advertisement appeared is not directed primarily to children – although some children may well view the programmes. However the Board considered that a number of movies in which the advertisement appeared are in fact 'directed primarily to children.' Movies in this category included 'Robots' and 'The Shaggy Dog'.

On the basis that the product advertised does not represent a healthy dietary choice and that the advertisement for that product did appear in programming which was directed primarily to children, the Board determined that the advertisement breached the first core principal of the AFGC RCMI and upheld the complaint.

The Board 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 AANA Food and Beverages Advertising and Marketing Communications Code (the Food and Beverages Code), the Board must consider whether the advertisement 'having regard to the theme, visuals and language used are directed primarily to children and are for product.'

The Board first considered whether the advertisement is directed primarily to children. 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 apply the same criteria as used in considering complaints under the [Children's Code]. 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 Children's Code and relevant part of the Food and Beverage Code the Board must find that the advertisement is aimed in the first instance at children. The Board considered the theme of the advertisement (artistic works themed with the colour of Smarties), the visuals (children and adults engaging in art work and play) and the language (discussion about the artwork and creative process). The Board noted that there are no depictions of children with/consuming the product. The Board noted that the advertisement uses child actors and that this can indicate that an advertisement is targeted to children. However the Board considered that the visuals, language and theme of this advertisement create an overall

impact of this advertisement that is not specifically directed or designed to be appealing to children. The Board considered that the advertisement was more likely to be taken as being primarily directed to adults. The Board agreed that the advertisement would be attractive to children but that it is not, in the terms of the Children's Code, 'directed primarily at children.'

The Board then considered whether the product is 'a good that is targeted to and of principal appeal to children' as required by the Children's Code. The Board noted that the advertiser considers that the product Smarties is a product which principally appeals to children. The Board agreed with the advertiser that the product is a 'good that is targeted to and of principal appeal to children'.

Overall the Board considered that, although the advertisement is for a children's product and will be seen by children, it is not directed to children in the first instance. The Board therefore considered that the Children's Code and Part 3 of the AANA Food and Beverages Advertising and Marketing Communications Code (the Food and Beverages Code) do not apply to this advertisement.

The Board considered that the advertisement complied with all relevant provisions of the Food and Beverages Code, in particular that it did not encourage excess consumption.

The Board determined that the advertisement did not breach the AANA Code of Ethics, Children's Code or Food and Beverages Code.

## **ADVERTISER RESPONSE TO DETERMINATION**

I refer to your letter of 15 October 2010 to Nestlé Australia Ltd advising that the above complaint was upheld in part, the Board determining the advertisement in question breached one of the codes administered by the ASB. As requested, I provide an "Advertiser's Statement" confirming the discontinuation of the advertisement. In this regard I note the campaign which included the advertisement had run its course and that no further media time was planned or booked for the advertisement.

The Board upheld the complaint on the basis that the product the subject of the advertisement was not a healthy dietary choice and was found to have appeared in programming which was directed primarily to children (Children's Programming). I note it was inadvertent on the part of Nestlé and unplanned that the advertisement appeared during Children's Programming. Nestlé, now aware of the inadvertent and unplanned screening of the advertisement during Children's Programming, is in the process of putting in place procedures to ensure that no other Nestlé products that do not represent healthy dietary choices appear inadvertently during Children's Programming.

