



## Case Report

<b>1</b>	<b>Case Number</b>	<b>0528/16</b>
<b>2</b>	<b>Advertiser</b>	<b>Frucor Beverages Australia</b>
<b>3</b>	<b>Product</b>	<b>Food and Beverages</b>
<b>4</b>	<b>Type of Advertisement / media</b>	<b>Print</b>
<b>5</b>	<b>Date of Determination</b>	<b>07/12/2016</b>
<b>6</b>	<b>DETERMINATION</b>	<b>Dismissed</b>

### ISSUES RAISED

Food and Beverage Code 2.1 (a) - Misleading / deceptive  
Food and Beverage Code 2.1 (b) - Contravenes community standards  
Food and Beverage Code 2.2 - healthy lifestyle / excess consumption  
Food and Beverage Code (Children) 3.1 misleading/urgency/price minimization  
Food and Beverage Code (Children) 3.2 encourage excess consumption  
Advertising to Children Code 2.02 Factual presentation  
Advertising to Children Code 2.05 Safety  
Advertising to Children Code 2.11 Premiums

### DESCRIPTION OF THE ADVERTISEMENT

Woolworths catalogue advertisement featuring the V Energy Drink 4-pack and individual cans which feature unique skills 'Escaping Alien Abduction', 'Fighting off a Shark', 'Entry level Spanish', etc. accompanied by the tag line 'Drink up Skill up – Improve yourself a bit with 24 skills to collect'.

### THE COMPLAINT

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

*This advertisement is in breach of food and beverage codes: 3.1, 2.1, 2.2, 3.2*

*1)misleading to children/ young people since communication is in a manner that would be misconceived at appropriate levels of understanding to a target audience of young people under 18....a primary consumer group of this product.*

*2)encourages excess consumption by implying that consumption of drinks, beyond what would be recommended will be of benefit and suggesting that this would be a commonly*

*consumed amount to be consuming.*

*3) is untruthful about the benefits of consumption. This product does not provide skills and does not improve your skills.*

*It additionally is in breach of advertising and marketing communications to children codes 2.2; 2.5, 2.11*

*1) is misleading and ambiguous to children. It is not clearly understood by young people who consume this product in terms of the performance features that it highlights and suggests will improve in the individual as a result of purchasing/ consuming this product.*

*2) This is a commercial communication. It is not related to the product which is for sale.*

*3) it portrays unsafe use/ consumption amounts of this product to children and provides an unrealistic impression of the amounts which people consume. Suggesting that this product be purchased in excess- encouraging 24 to be purchased/ consumed. This amount would not be recommended for young people or a recommended amount to be consumed within a reasonable weekly / fortnightly shopping period.*

*3) Promotes irresponsible excessive consumption, as per above.*

## **THE ADVERTISER'S RESPONSE**

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

*We refer to the Complaint made in connection with the 'V Energy Drink – Drink up Skill up-Promotion' Advertisement featured in the Woolworths shopping catalogue on 7 November 2016 (the Advertisement) and thank you for the opportunity to provide a response.*

*We are committed to conducting all advertising and promotions to the highest standards and we take seriously any complaints made in relation to any such advertising and promotion.*

*As requested, we have addressed the Complaints by reference to all relevant advertising Codes, including the AANA Code of Ethics (AANA Code of Ethics) and the AANA Food & Beverages Advertising and Marketing Communications Code (AANA Food Code).*

*Having considered the Advertisement and the Complaint, and the requirements of the AANA Code of Ethics and the AANA Food Code, we respectfully submit that the Advertisement does not in any way contravene the AANA Code of Ethics or the AANA Food Code.*

*Please note that we have not assessed the Complaint by reference to the:*

- AANA Code for Advertising and Marketing Communications to Children, as the Advertisement is not targeted to children (please see our explanation below); or*
- Australian Food and Grocery Council Responsible Children's Marketing Initiative, as the Advertisement is not targeted to children; or*
- Australian Quick Service Restaurant Industry Code, as Frucor is not a signatory to this initiative.*

*AANA Code of Advertising and Marketing Communications to Children*

*We note that the Complainant addressed concerns in respect of the Advertisement, stating that it is "misleading to children/ young people since communication is in a manner that*

*would be misconceived at appropriate levels of understanding to a target audience of young people under 18....a primary consumer group of this product."*

*We submit that the AANA Code of Advertising and Marketing Communications to Children does not apply for the following reasons:*

- A "Child" for the purposes of the AANA Code of Advertising and Marketing Communications to Children is a person 14 years old or younger;*
- the average consumer of V Energy Drink is between 18-35 years old;*
- the language and tone of the Advertisement is not directed to children, and includes trivial or humorous scenarios that a young adult may identify with, for example, "dressing for the Job", "choosing a flatmate", "parallel parking" and "falconry", scenarios of which are not undertaken by children and unlikely to appeal to children;*
- the language of the Advertisement is not of a childlike nature, and the message of "Drink up; Skill up" and "improve a bit" is clearly targeted towards an adult consumer;*
- the catalogue where the Advertisement was published is not intended to be read or understood by children, but is targeted at adult consumers, being the main grocery buyer; and*
- V Energy Drink includes statements on all packaging/labels that it is "not suitable for children" (given the presence of caffeine).*

*AANA Code of Ethics*

*We submit, having regard to Section 2 of the AANA Code of Ethics that:*

*Clause 2:*

*2.1 the Advertisement does not 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, age, sexual preference, religion, disability, mental illness or political belief, and accordingly, the Advertisement does not contravene Section 2.1 of the AANA Code of Ethics;*

*2.2 the Advertisement does not employ sexual appeal, and accordingly, the Advertisement does not contravene Section 2.2 of the AANA Code of Ethics;*

*2.3 the Advertisement does not present or portray any violence, and accordingly, the Advertisement does not contravene Section 2.3 of the AANA Code of Ethics;*

*2.4 the Advertisement is not in any way sexually suggestive, and accordingly, the Advertisement does not contravene Section 2.4 of the AANA Code of Ethics;*

*2.5 the Advertisement does not feature language which is inappropriate in the circumstances and is not inappropriate for the relevant audience and medium, and accordingly, the Advertisement does not contravene Section 2.5 of the AANA Code of Ethics; and*

*2.6 the Advertisement does not depict any material which is contrary to Prevailing Community Standards on health and safety, and accordingly, the Advertisement does not contravene Section 2.6 of the AANA Code of Ethics.*

*On the basis of the above, we do not consider that the Advertisement contravenes the AANA Code of Ethics, having regard to Sections 2 and 3 of the Code or otherwise.*

#### *AANA Food Code*

*We submit, having regard to Section 2 of the AANA Food Code that:*

##### *Clause 2:*

*2.1 the Advertisement is truthful and honest, is not designed to be misleading or deceptive or otherwise contravene Prevailing Community Standards, and is communicated in a manner which is appropriate to the level of understanding of the target audience of the Advertisement.*

*We note the Complainant referred to the Advertisement as "misleading to children/young people since communication is in a manner that would be misconceived at appropriate levels of understating to a target audience of young people under 18...a primary consumer group of this product", and "misleading and ambiguous to children. It is not clearly understood by young people who consume this product in terms of the performance features that it highlights and suggests will improve in the individual as a result of purchasing/consuming the product."*

*As stated above, the target market for V Energy Drink is between 18-35 year olds. Most people are familiar with V Energy Drinks and that they contain caffeine and are not recommended for children and such messaging is included on all packaging in a clear and prominent manner. Further, as noted above, the Advertisement is not intended to be read or understood by children, but is targeted at adult consumers, main grocery buyers.*

*The Advertisement is intended to be a light hearted, tongue-in-cheek campaign designed to connect with those audiences, particularly in the 18-24 year age range that enjoy life to the full and don't take themselves too seriously. The Advertisement is part of a broader campaign that uses the tagline "a massive hit to improve you a bit" which has been used by the Advertiser, since 2013.*

*The taglines "improve yourself a bit with 24 skills to collect" and "Drink up; Skill up" when featured alone and when used in conjunction with each of the so called "skills" referred to on each V Energy Drinks featured in the Advertisement are mere puffery as the "skills" referred to are either fanciful or fictional, i.e. "Escaping Alien Abduction" and "picking Llamas from Alpaca"s", "detecting a lie", "applying sunscreen", "choosing a flatmate". An ordinary person would not consider that by drinking a V Energy Drink, you could be skillful or more skillful in those scenarios, a person's performance in those scenario"s could be improved or that any of those "skills" are skills in the traditional sense.*

*Further, an average consumer would appreciate that a person cannot collect actual "skills" in the same way that a person may collect or consume cans of drink.*

*Accordingly, the Advertisement does not contravene Section 2.1 of the AANA Food Code;*

*2.2 the Advertisement 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 through the representation of product or portion sizes*

*disproportionate to the setting/s portrayed or by means otherwise regarded as contrary to Prevailing Community Standards.*

*We note the Complainant stated that the Advertisement "encourages excess consumption" and suggests "that this product be purchased in excess- encouraging 24 to be purchased/ consumed. This amount would not be recommended for young people or a recommended amount to be consumed within a reasonable weekly / fortnightly shopping period." We note that the Advertisement was featured in the Woolworths shopping catalogue. The Advertisement itself demonstrates that quantities of 4 packs of the drink are sold. The 24 cans that are displayed next to the 4 pack are displayed to indicate the 24 distinct types of cans that can be collected. There is no impetus for consumers to quickly purchase or consume multiple cans in excess. Further, each V Energy Drink contains warning statements i.e. "consume responsibly. 2 cans Max. daily".*

*As clarified in 2.1, an average consumer would not be misled into thinking that they could collect skills by drinking the drinks, and would therefore not be encouraged by the Advertisement to consume excess amounts of the product in order to collect more skills and "improve a bit."*

*Accordingly, the Advertisement does not contravene Section 2.2 of the AANA Food Code;*

*2.3 the Advertisement does not contain any health or nutrition claims. It does not make any direct or indirect reference to health benefits or nutrition and it does not imply that by drinking V it will benefit your health or nutritional needs in any way. The Advertisement's reference to "Drink up; Skill up" and "improve yourself a bit" do not have the specificity needed to be a health claim, and would be understood by the average consumer to be advertising puffery or humour. Accordingly, the Advertisements do not contravene Section 2.3 of the AANA Food Code;*

*2.4 The Advertisement does not include any implied or explicit health related comparisons, and accordingly, the Advertisement does not contravene Section 2.4 of the AANA Food Code;*

*2.5 The Advertisements do not make reference to consumer taste or preference tests, nor use any scientific terms to falsely ascribe validity to advertising claims, and accordingly, the Advertisements do not contravene Section 2.5 of the AANA Food Code;*

*2.6 The Advertisements do not make reference to taste, size, content, nutrition and health benefits which are non-specific to the promoted product or inaccurate in all such representations, and accordingly, the Advertisements do not contravene Section 2.6 of the AANA Food Code;*

*2.7 The Advertisement does not appear within segments of media devoted to general and sports news and/or current affairs, and accordingly, the Advertisements do not contravene Section 2.7 of the AANA Food Code;*

*2.8 The Advertisement does not portray V as a substitute for meals, and accordingly, the Advertisements do not contravene Section 2.8 of the AANA Food Code;*

*2.9 The Advertisement complies with the AANA Code of Ethics and the AANA Code for*

*Advertising and Marketing Communications to Children is not relevant, and accordingly, the Advertisements do not contravene Section 2.9 of the AANA Food Code.  
We note that clause 3 of the AANA Food Code does not apply to the Advertisement, as the Advertisement is not targeted to Children.*

*On the basis of the above, we do not consider that the Advertisement contravenes the AANA Food Code, having regard to Sections 2 and 3 of the Code or otherwise.*

## **THE DETERMINATION**

The Advertising Standards Board (Board) considered whether this advertisement breaches the Responsible Children's Marketing Initiative of the Australian Food and Grocery Council (RCMI), the AANA Food and Beverages Advertising and Marketing Communications Code (the 'Food Code') and the AANA Code for Advertising and Marketing Communications to Children (the 'Children's Code').

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 noted the complainant's concern that the advertisement is misleading to children, encourages unsafe, excess consumption of an energy drink, and is untruthful about the benefits of the product.

The Board first considered whether the advertisement complied with the AANA Code for Advertising and Marketing Communications to Children.

The definition of what is 'advertising and marketing communications to children' in the AANA Children's Code means: means Advertising or Marketing Communications which, having regard to the theme, visuals and language used, are directed primarily to Children and are for Product. The Children's Code further provides that 'the Board shall have regard to the Practice Note to this Code in determining whether Advertising or Marketing Communications are to children under this definition.'

The Board noted that the definition of Children in this Code is persons under 14 years of age.

The Board noted that the advertisement is an image of a carton of 4 cans of V Energy drink next to lots of individual cans with the text, "Drink up Skill up". The Board noted the placement of the advertisement in the Woolworths catalogue.

The Board noted that supermarket catalogues provide information on weekly specials available to buy when grocery shopping and considered that while some children may like to look at them in the Board's view these catalogues are clearly directed at the main grocery buyer and are not directed primarily to children.

The Board considered that as the advertisement is not directed primarily to children and the advertised product, V energy drinks, are a Product aimed primarily at adults, and not to children, the provisions of the Children's Code are not applicable in this case.

The Board noted that the product advertised is a beverage and therefore the provisions of the AANA Food and Beverages Advertising and Marketing Communications Code (the Food Code) apply.

In particular the Board considered Section 2.1 of the Food Code which provides:

“Advertising or marketing communications for food or beverage products shall be truthful and honest, shall not be or be designed to be misleading or deceptive or otherwise contravene Prevailing Community Standards, and shall be communicated in a manner appropriate to the level of understanding or the target audience of the Advertising or Marketing Communication with an accurate presentation of all information including any references to nutritional values or health benefits.”

The Board noted the complainant’s concern that the reference to ‘drink up skill up’ implies drinking the product will improve your skills. The Board noted the advertiser’s response that the skills referred to are printed on individual cans of V energy and are fanciful or fictional – for example, ‘Escaping alien abduction’ and ‘detecting a lie’.

The Board acknowledged that the phrase ‘skill up’ could be seen as misleading by some members of the community but considered that in the context of a print advertisement for an energy drink which is clearly labelled ‘skills’ the statement is advertising puffery which is unlikely to be taken seriously by most reasonable members of the community.

The Board noted the advertiser’s response that the product does include a required warning statement and stated that the average consumer of this product is aged between 18-35 years. The Board noted that it cannot comment on the labelling aspects of the product, but only the promotion as it appears on the print advertisement.

The Board noted that the advertisement’s reference to “improve yourself a bit” and considered that consistent with its previous determination against a similar complaint in case 0171/15, this reference is advertising puffery or humour and is not of the specificity needed to be a health claim or likely to mislead consumers about possible gains purely due to the consumption of the beverage.

Based on the above the Board considered that the advertisement does not contravene prevailing community standards and determined that the advertisement did not breach Section 2.1 of the Food Code.

The Board then noted Section 2.2 of the Food Code which states: “the advertising or marketing communication... 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 Board noted that the advertisement depicts a four pack of V energy, as well as an image of numerous individual cans but considered that the advertised price makes it clear that the advertisement is promoting the purchase of the 4 pack.

The Board noted the reference to ‘drink up skill up’ and considered that there was no call to action to drink a particular number of drinks and in the Board’s view the advertisement does not depict, encourage or condone excess consumption of the advertised product but rather you can select the ‘skill’ you want and then choose the corresponding can of drink.

The Board considered that the advertisement did not undermine the promotion of a healthy balanced diet and did not encourage excess consumption and therefore determined that the advertisement did not breach Section 2.2.

The Board noted that, as per the assessment against the AANA Children's Code, Section 3 of the AANA Food and Beverages Code does not apply as the marketing communication is not directed primarily to children and the product is not of principal appeal to children under 14.

Finding that the advertisement did not breach the Food Code on any other grounds, the Board dismissed the complaint.