



CASE REPORT

1. Complaint reference number	319/09
2. Advertiser	Kellogg (Aust) P/L
3. Product	Food & Beverages
4. Type of advertisement	TV
5. Nature of complaint	Food and Beverage Code – untruthful/dishonest
6. Date of determination	Wednesday, 8 July 2009
7. DETERMINATION	Dismissed

DESCRIPTION OF THE ADVERTISEMENT

This television advertisement for Kellogg's Nutri-Grain depicts a young boy on a farm energetically running and playing. His mother feeds him Nutri-Grain on the verandah while a voiceover says "Boys need protein for growth and muscle development" and a superscript reads "as part of a balanced diet and regular exercise". He gets progressively older as the advertisement continues and is shown "surfing" around the farm on an old board with wheels attached and training at the local swimming pool with his mother timing him. A voiceover says "Nutri-Grain is one of the highest protein cereals, so as part of a balanced diet and regular exercise, Nutri-Grain has what it takes to help build your son into an iron man". As a young man, he is shown sitting with his mother at the breakfast table eating Nutri-Grain and opening an entry form to the Gold Coast iron man competition which she has sent off for him. He heads off for the Gold Coast, and the final scene shows him on the farm, growing from a boy to a young man while standing beside a surf board. The surfboard bears the words "Iron Man Food – Kellogg's Nutri-Grain" with a voiceover repeating these words.

THE COMPLAINT

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

In the advertisement broadcast in Brisbane, a young boy (around 7) is depicted running on a farm, pretending to surf on land as he grows up, swimming laps of a local swimming pool. His mother then provides him with a leaflet for the Nutri Grain Gold Coast iron man.

We are writing to draw your attention to three television advertisements for Nutri-Grain cereal, manufactured by Kellogg (Aust) Pty Ltd (Kellogg), that we consider to be in breach of the AANA Code of Ethics and the AANA Food and Beverages Advertising & Marketing Communications Code.

1 Our concerns about marketing by Kellogg

For many years, Kellogg have promoted its Nutri-Grain cereal as 'healthy for', 'good for' and 'beneficial to the active lifestyle of children and adolescents. Long running marketing campaigns have promoted Nutri-Grain as 'Iron Man Food' that is full of vitamins and nutrients that are essential for 'strong', 'healthy' and 'growing' bodies. Nutri-Grain has also been closely associated with the 'Iron Man Series', team sports, athletics and sporting success. This marketing and promotion has been successful and Nutri-Grain is known to be very popular with children and adolescents.

In reality however, Nutri-Grain contains a high level of sugar and salt (and low dietary fibre) and is not a healthy product overall. We believe that the overall impression created through the current Nutri-Grain television advertisements outlined below, that it is 'healthy', 'good for' and 'beneficial to the active lifestyle of children and young people is:

. Misleading and deceptive or likely to mislead or deceive in breach of clause 1.2 of the AANA Code

of Ethics; and

. Misleading and deceptive and in contravention of prevailing community standards in breach of clause 2.1 of the AANA Food and Beverages Advertising & Marketing Communications Code.

2 The problem of overweight and obesity and the impact of unhealthy food marketing

Obesity and overweight among adolescents and children are serious problems in Australia. On conservative estimates, at least 25% of Australian children and adolescents are overweight or obese, and at least 7.8% of these are obese. 1 Children and adolescents who are overweight or obese are likely to suffer from a range of serious health and psychosocial problems, they are also more likely to become obese adults. Obese adults carry an increased risk of many chronic diseases, including type 2 diabetes, cardiovascular disease and some cancers.

We are concerned that the misleading marketing of unhealthy cereals, that are popular with children and adolescents (and are promoted for every day consumption) may be contributing to unhealthy diets. We do not suggest that food advertising and promotion is the sole cause, however there is substantial evidence that it does influence children's food preferences, requests and consumption, and it is viewed by the World Health Organization as a probable causal factor in weight gain and obesity in children. Advertising of unhealthy food to children also undermines initiatives by governments and health agencies, and the efforts of parents, to encourage children to eat a healthy diet.

3 Examples of current Kellogg's Nutri-Grain television advertising

A current television advertisement for Nutri-Grain cereal features an iron man, Zane Holmes, engaging in high levels of physical activity in extreme conditions. The voice over in this advertisement states - "Kellogg's Nutri-Grain has carbs for energy, protein for muscle development and calcium for bone strength. If you want to be your best, then be your best. Remember, you only get out what you put in." Two further current television advertisements for Nutri-Grain cereal depict an active boy, through different stages of his childhood, that grows up into an iron man. In the advertisement broadcast in Sydney and Melbourne, a young boy (around 7 years of age) is depicted with his mother on the beach. He eats Nutri-Grain, goes swimming and as he grows up he is depicted doing push-ups and running, engaging in more swimming and surfing and then winning the iron man competition and receiving a medal. The grown boy then gives the medal to his mother and thanks her. In the advertisement broadcast in Brisbane, a young boy (around 7 years of age) is depicted running on a farm, pretending to surf on land and as he grows up, swimming laps of a local swimming pool. His mother then provides him with a leaflet for the Nutri-Grain Gold Coast iron man competition and he thanks her. The voice over for both of these advertisements states 'Boys need protein for growth and muscle development. Nutri-Grain is one of the highest protein cereals. So as part of a balanced diet and regular exercise, Nutri-Grain has what it takes to help build your son into an Iron Man (the son then thanks his mother, as outlined above). Nutri-Grain, Iron Man Food'.

4 The use of selective claims by Kellogg to potentially create an overall misleading impression

In the television advertisements outlined above, Kellogg is using a marketing tactic that is commonly used by food manufacturers, known as the promotion of 'selective claims'. That is, it selectively promotes certain nutritional and other characteristics of NutriGrain which may be perceived to provide health benefits (for example, "carbos for energy", protein for growth and muscle development" and "calcium for bone strength"), yet failing to disclose other characteristics of Nutri-Grain which makes it unhealthy overall, such as high sugar and salt and low dietary fibre. We are concerned that this use of 'selective claims' misleads (or is likely to mislead) consumers by creating an overall impression that Nutri-Grain is 'healthy', 'good for' or 'beneficial for' them, and that it may drive the consumption of this unhealthy product.

The use of 'selective claims' to market products that are directed to, or are popular with, children (such as Nutri-Grain) is of particular concern. Children are particularly vulnerable members of the public, and are more likely to be misled by the use of selective claims than other consumers. Psychological research has found that children are highly vulnerable to advertising messages because they lack the experience and cognitive ability necessary to assess the messages critically." It follows that advertisements for products that are likely to be popular with, or are likely to appeal to children, must be clear and must not mislead or deceive (or be likely to mislead or deceive) children.

While we accept that advertising will always involve a degree of "puffery", the selective promotion of certain nutrients and characteristics of a product, and the failure to disclose other characteristics which make it unhealthy overall, arguably constitutes more than "puffery" when used to deliberately create the impression of healthiness. If a corporation is appealing to the concept of healthiness as a marketing tool, it is arguably misleading and deceptive to do so and yet fail to mention other information that is relevant to the product's healthiness (and that, in fact, shows the claims of "healthiness" to be overstated or untrue). Furthermore, while some "puffery" may be expected in marketing, standards should be significantly higher when consumer's health is involved, and in particular, when food products are being marketed to, or are popular with, children. It is also well established that silence of itself may constitute misleading and deceptive conduct. The essential question is whether, in all of the circumstances constituted by acts, omissions, statements or silence, there has been conduct likely to mislead or deceive. A public opinion survey conducted by the Centre for Behavioural Research in Cancer, Cancer Council Victoria, in November 2008, demonstrated the public's frustration with the use of selective claims in food marketing. In this survey, consumers were asked (among other things) whether they were in favour or against government introducing regulations so that food companies cannot promote healthy aspects of foods that are mostly unhealthy. Overall, 9 in every 10 consumers were in favour, while 74% were strongly in favour of regulations against unbalanced food promotions. Consumers clearly view the use of selective claims as misleading, unacceptable and in breach of prevailing community standards.

5 The promotion of Nutri-Grain to children, adolescents and parents as beneficial to an active lifestyle

The television advertisements outlined above demonstrate the marketing of Nutri-Grain as "Iron Man Food" and continues the association of Nutri-Grain with good health, sports and the Iron Man Series. The advertisements promote Nutri-Grain to children and adolescents, sending the message that to be healthy, athletic and successful at sports (now and in the future) they should eat Nutri-Grain products. The advertisements are also clearly aimed at mothers and are designed to manipulate mothers into believing that if they are "good parents" they will purchase Nutri-Grain for their children. Mothers are led to believe that if they feed their children Nutri-Grain, their children are more likely to be healthy, strong and successful in their sporting pursuits. The advertisements also send the message that their children will love and thank them. Not only do these advertisements take advantage of a parent's vulnerabilities, they also mislead parents and their children about the role Nutri-Grain may play in the health of growing children and their achievement of sporting success.

6 Nutri-Grain is not a healthy product overall

The advertising of Nutri-Grain cereal fails to disclose that Nutri-Grain contains 32% sugar, 600 mg of sodium per 100g and only 2.7% fibre. Following 'cereals', 'sugar' is the second highest ingredient contained in Nutri-Grain.

Applying the Nutrient Profiling Model, developed by the Food Standards Authority in the United Kingdom for the purposes of regulating the television advertising of High Fat, Sugar and Salt (HFSS) foods to children, Nutri-Grain would be classified as HFSS foods. Under this Nutrient Profiling Model, foods are allocated points for the presence of risk increasing components (kilojoules, saturated fat, sugar and sodium) and points are deducted for the presence of risk decreasing components (percentage of fruit, vegetables and nuts, fibre and protein). An overall score is then calculated and foods with an overall score of 4 or more are classified as HFSS.

According to this model the overall score of 12 would be given to Nutri-Grain cereal. In particular, 4 points would be allocated for Energy, 7 points for sugar and 6 points for sodium (17 points in total). With respect to risk decreasing components, only 2 points would be allocated for fibre and 5 points for protein (although this would amount to only 2 points in total given protein is discounted where a food scores 11 or more risk increasing points, but also scores less than 5 points for fruit, vegetables and nuts). Clearly the few health benefits that may be gained from fibre and protein in these products are considered to be outweighed by their high energy, sugar and salt content (and their lack of any fruit, vegetables and nuts). Indeed, the high carbohydrate and energy content of Nutri-Grain that is promoted through its marketing campaigns as being beneficial to children and adolescents would be considered a factor under the Nutrient Profile Criteria for causing the product to be less healthy. Approximately half of the carbohydrate content of Nutri-Grain cereal is sugar. In our view, to suggest that the high energy and carbohydrate content makes Nutri-Grain

products healthier is misleading of itself. A similar Nutrient Profile Scoring Criteria, closely based on the UK Nutrient Profile criteria, has been developed and proposed by the Food Standards Australia and New Zealand (FSANZ) for determining whether food products are eligible to make health claims based on their nutrient profiles. Applying this Nutrient Profile Scoring Criteria, similar results are obtained - Nutri-Grain would receive 17 points and therefore would not be classified as healthy enough to be eligible to make health claims.

The Dietary Guidelines for Australian Adults and the Dietary Guidelines for Australian Children and Adolescents recommend the consumption of only moderate amounts of extrinsic sugar. Extrinsic sugar provides the consumer with energy but no specific nutrients. It is also likely to contribute to weight gain and dental caries. The World Health Organization refers to extrinsic sugars as 'free sugars' and states that consumers should consume no more than 10% of their daily energy requirements per day (or 50g for an average adult). The sugar content of Nutri-Grain cereal (32g per 100g) amounts to more than half of the recommended daily intake of sugar for adults. The daily consumption of anyone of these products would therefore contribute significantly to children reaching, and most likely exceeding, their daily recommended sugar intake.

We are not suggesting that Kellogg is bound to advertise its products in strict adherence to Nutrient Profiling Models or dietary guidelines. However, the Nutrient Profiling Models and dietary guidelines provide clear evidence that Nutri-Grain is not healthy overall. While it may be expected that Kellogg would not seek to highlight the less healthy or unappealing qualities of its products, we believe it is misleading to deliberately create an impression that Nutri-Grain is healthy (or overstate its healthiness) when in reality, it is an unhealthy product. As raised above, this is particularly so given this product is marketed to, and is popular with, children.

In our view, children and parents are highly unlikely to suspect that Nutri-Grain cereal is unhealthy overall. It has been consistently promoted as healthy, full of beneficial nutrients and essential for growth and the active lifestyle of children and adolescents. It is promoted as being suitable for every-day consumption. Even if the taste and look of Nutri-Grain may cause some consumers to expect that it may contain some sugar, the overwhelming marketing that it is indeed a healthy product would dissuade any concern that its sugar level may be high, or that it could be unhealthy overall. In our view, very few children or parents would suspect that Nutri-Grain can in fact contribute to weight gain and in turn, other health problems.

A study was recently undertaken by the consumer group 'Choice', regarding the nutritional content of 42 breakfast cereals that are popular with children. It found that only 2 of the 42 cereals were suitable for everyday consumption. The other 40 (which included Nutri-Grain) were found to contain too much sugar and/or salt.

These issues were also recently highlighted in the media by the well-known parents advocacy group 'Parents Jury'. In collaboration with nutritionist Rosemary Stanton, Parents Jury investigated 'Cereal Offenders', that is cereals that claim to be nutritious but are in fact unhealthy overall. It found that Nutri-Grain was one of the worst 'offenders' for being 'heavy on marketing spin and light on good nutrition'. For more information about these investigations and the findings regarding Nutri-Grain, we would encourage you to view the Parents Jury website at www.parentsjury.org.au.

7 Action requested of the ASB

For all of the reasons given above, we believe that the marketing of Nutri-Grain has the potential to undermine public health messages and contribute to children consuming an unhealthy diet.

Accordingly, we request the ASB to consider whether the advertisements for Nutri-Grain outlined above breach clause 1.2 of the AANA Code of Ethics, clause 2.1 of the AANA Food and Beverages Advertising & Marketing Communications Code or any other clauses of the AANA Codes that the ASB considers potentially relevant.'

THE ADVERTISER'S RESPONSE

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

The complaint alleges breach of the AANA Code of Ethics and the AANA Food and Beverages Advertising Code ("the Codes"). Whilst Kellogg takes all complaints of this nature extremely

seriously it denies that it has breached the Codes.

I address the specific issues raised in the complaint below. For convenience I have adopted the numbering system used in the complaint.

Summary

The advertisements are not misleading and do not otherwise breach the Codes. Based on Nutri-Grain's overall nutritional profile, it is Kellogg's position that when consumed as part of a balanced diet and regular exercise, Nutri-Grain is a suitable breakfast option for active people including teenagers, and this is how Kellogg has positioned Nutri-Grain in the advertisements under consideration.

Kellogg acknowledges that overweight and obesity are a problem in Australia, however, the complainants provide no evidence that the consumption or advertising of breakfast cereals (sweetened or unsweetened) in general, nor Nutri-Grain in particular is contributing to the problem.

The complainant does not allege that any of the claims made are misleading but rather relies on an argument that "silence" amounts to misleading conduct. It is Kellogg's submission that this argument is somewhat tenuous in the particular circumstances of the advertisements. In the present case there can not be any "reasonable expectation" on the part of consumers that the sugar, salt and fibre content of the product will be disclosed in a television advertisement. Consumers understand and expect that advertisers of food products will emphasise the nutrition attributes of their products. Full nutrition information, including the sugar, salt and fibre content of the product is disclosed on pack, including in a prominent position on the front of pack and is accordingly available to consumers at the point of sale. A copy of the NIP is attached.

Further, Nutri-Grain is an extremely well known product having been marketed as an energy food and associated with iron man and surf life saving since the 1980s. Given the sweet taste of the product it should be obvious to consumers that the product contains added sugar. Nutri-Grain's positioning in the advertisements is synonymous with the promotion of a healthy, active lifestyle, and is referenced in the context of a balanced diet. As the complainants point out, "Nutri-Grain has been closely associated with the "Iron Man Series", team sports, athletics and sporting success." Based on Nutri-Grain's promotion of an active lifestyle, its overall nutritional profile, the inclusion of statements and voiceovers relating to Nutri-Grain as part of a balanced diet and regular exercise and the prominent disclosure of the nutrition attributes on the product labelling, Kellogg's maintains that when consumed as part of a balanced diet and regular exercise, Nutri-Grain is a suitable breakfast option for active people.

The advertisements are not intended to "manipulate" mothers nor "take advantage of a parent's vulnerabilities" but rather shows mum's role in promoting and encouraging an active and healthy lifestyle for her son.

The advertisement referred to in the complaint as "Iron Man Zane Holmes" (Kellogg's name for this advertisement is "Beat Your Best") is a teen targeted advertisement, while the advertisements referred to in the complaints as "Beach Boy" (Get the Ball Rolling) and "Farm Boy" (Jason) are targeted at main grocery buyers and not children/teens.

Kellogg disputes that Nutri-Grain is not a healthy product overall, and says that Nutri-Grain is a breakfast cereal that contributes some of the many nutrients required to achieve a healthy diet. The complainant's contention that the product is "not healthy overall" is based on the presence or absence of individual nutrients present in the product without any regard for the overall diet. This ignores the fact that consumers should consume a wide variety of foods and that no one food will meet a person's dietary needs. The Dietary Guidelines for Australians recommend that a wide variety of foods be consumed. The presence of sugar and sodium in Nutri-Grain, or that it is not a source of fibre does not inherently make it an "unhealthy" food - for example a cup of grapes contain approximately 26g of sugar, however, no nutritionist would dispute that grapes could form part of a balanced diet. A serve of Nutri-Grain contains 9.6g of sugar, which is 11% of the Daily Intake (DI) for sugar and contains 180mg of sodium, which is 8% of the DI for sodium.

Further, when examined in the context of an active lifestyle, the contribution of a 30g serve of Nutri-Grain (480kJ) to the estimated energy requirements ranges between 3.1% and 4.6% of an active boy's estimated energy requirements.

The complainant uses the nutrient profiling scoring systems developed by the UK Food Standards Authority and Food Standards Australia and New Zealand (FSANZ) as evidence that Nutri-Grain is unhealthy overall. Kellogg disagrees with the coinplainant's assertion that these scoring systems demonstrate that Nutri-Grain is "unhealthy" because the model is not an appropriate tool to determine whether a food is healthy or not. The System is being developed to determine whether a food can carry a nutrition and health claim not to determine which foods are healthy or unhealthy; the FSANZ system is still in draft and not yet finalised nor ratified by the Australian Government; and the draft system has a number of flaws and as such authorities such as the European Food Safety Authority (EFSA) have rejected the FSANZ model (and are developing a different system which recognises the important role of key foods like breakfast cereals to the achieving a balanced diet for good health).

Accordingly the complaint should be dismissed.

1. Our concerns about marketing by Kellogg

The complainant objects to Kellogg's marketing (past and present) of Nutri-Grain as "'healthy', 'good for' and 'beneficial to the active lifestyle' of children and young people" and alleges that Nutri-Grain is "not a healthy product overall" due to its fibre, sugar and sodium content.

It is Kellogg's submission that each advertisement must be considered individually on its merits. The content of past advertisements is not relevant to the question of whether any of the advertisements breach the Codes. Accordingly my comments are confined to the three advertisements under consideration. The specific concerns raised by the complainant are addressed below in sections 2-6.

2. The problem of overweight and obesity and the impact of unhealthy food marketing

The complainants provide data on the current rates of overweight and obesity in Australia and link that data to further complications including psychological problems and disease. The complainants then proceed to suggest a link between "unhealthy cereals" and weight gain and obesity in children. Kellogg acknowledges that overweight and obesity are a problem in Australia: however, the complainants provide no evidence that the consumption or advertising of breakfast cereals (sweetened or unsweetened) in general, nor Nutri-Grain in particular is contributing to the problem.

Obesity in children and in fact in all people results from an imbalance in energy intake through food and an expenditure of energy through physical activity. It is a complex social issue in that it has many factors including: genetic, perinatal, early life factors, diet, and family factors. Recent increases in overweight and obesity in our population is also related to technological, social, economic and environment changes that have reduced physical activity and increased food access and passive energy consumption.

Physical activity can play a large role in obesity. With many less physical activities available to children they are in general becoming more sedentary. In a 2006 survey by The Queensland Government and The University of Queensland, only three in ten Year 1 boys and four in ten Year 1 girls met physical activity targets. This increased to four in ten of Year 5 boys and just over half of Year 5 girls. In the 2007 Australian National Children's Nutrition and Physical Activity Survey, it was also noted that obese children tended to have lower physical activity levels (PALS) than children of normal weight. In addition, in that study, only 33% of children 9 - 16 years old met the recommendations for screen time in the National Physical Activities Guidelines of no more than 2 hours of non educational screen time per day.

Thus, the obesity issue is multifaceted. Both energy intake through food and energy output through physical activity must be factored into the issue. In fact, in a review, the WHO calls for an integrated, multi-sectoral, population-based approach, which includes environmental support for healthy diets and regular physical activity. Clearly, the solution to this issue lies in a multi-component change in behaviours as a society and not a purely food and diet focused effort.

Related to energy intake, a 30g serve of Nutri-Grain provides 480 kJ, which is equivalent to 6 percent of the DI for energy. Further, the issue of whether there is a link between food advertising and obesity in children is a policy issue and is not relevant to the issue of whether the specific advertisements under consideration breach the Codes.

3. Examples of current Kellogg's Nutri-Grain television advertising.

The complaint makes reference to three specific Nutri-Grain advertisements. As stated above my comments are confined to the three advertisements under consideration.

Each of the three advertisements makes nutrient function claims that highlight how the nutrients in Nutri-Grain play a role in supporting an active lifestyle. Substantiation for each of these claims is included as a schedule to this response.

The advertisements also encourage an active lifestyle and participation in sports. As stated by the complainant the Iron Man Zane Holmes (Beat Your Best) TVC features Zane Holmes "engaging in high levels of activity in extreme conditions". The Beach Boy (Get the Ball Rolling) TVC shows the main character running, swimming and doing push ups, and engaging in an iron man competition. Farm Boy (Jason) shows the main character running, pretending to surf and swimming laps of a pool. The advertisements are therefore consistent with health messages regarding physical activity.

In addition, I note that each of the advertisements display the statement "As part of a balanced diet and regular exercise" as either a voiceover, written statement or both.

4. The use of selective claims by Kellogg to potentially craft an overall misleading impression.

It is notable that the complainant does not allege that any of the individual claims made in the advertisements are misleading. The advertisements are not misleading or deceptive. Substantiation for each of these claims is included as a schedule to this response for your reference.

The complainant alleges that Kellogg's use of "selective claims" creates an overall misleading impression. The complainant relies on the legal principle that silence can, in some circumstances, amount to misleading conduct. It is Kellogg's submission that this argument is somewhat tenuous in the particular circumstances of the advertisements.

*Kellogg acknowledges that from time to time the Courts have held that silence can amount to misleading conduct, however, further submits that the circumstances where this is so are extremely limited. In *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 Chief Justice Black of the Federal Court said:*

Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive.

In the same case Justice Gummow said:

The cases in which silence may be so characterised are no doubt many and various and it would be dangerous to essay any principle by which they might be exhaustively defined. However, unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does not exist.

In the present case there can not be any "reasonable expectation" on the part of consumers that the sugar, salt and fibre content of the product will be disclosed in a television advertisement. Consumers understand and expect that advertisers of food products will emphasise the nutrition attributes of their products. Further, full disclosure of the nutrition profile of a product is impractical in a short television advertisement. Full nutrition information, including the sugar, salt and fibre content of the product is disclosed on pack, including in a prominent position on the front of pack and is accordingly available to consumers at the point of sale. Further, Nutri-Grain is an extremely well known product having been marketed as an energy food and associated with iron man and surf life saving since the 1980s. Given the sweet taste of the product it should be obvious to consumers that the product contains added sugar.

Below are two examples of cases where it was held that silence did not amount to misleading conduct:

- *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd (1986) 12 FCR 477* - in this case the Court held that the failure to disclose to purchasers of a fungicide product that it was not registered under State law (meaning that it was illegal to sell) did not amount to misleading conduct.

- *Leda Holdings Pty Ltd v Oraka Pty Ltd (1998) ATPR 41-601* - in this case the Court held that a landlord did not engage in misleading conduct when it failed to inform the tenant that less than 50% of the shops were occupied.

Some assistance can also be drawn from comparative advertising cases where it has been held that persons engaged in comparative advertising are entitled to emphasise aspects of their product which may be superior to a competitors, even if their competitor's product may be superior in another respect. For example, a trader may choose to emphasise their product's superior quality, even though their competitor's product is significantly cheaper (and vice versa) (see *Country Road Clothing Pty Ltd v Najee Nominees Pty Ltd (1991) ATPR 41 -1 06*; *Gillette Australia Pty Ltd v Energizer Australia Pty Ltd (2002) ATPR 41 -887*; *Telstra Corporation Limited v SingTel Optus Pty Ltd [2007] FCA 824*).

So for example in *Gillette Australia Pty Ltd v Energizer Australia Pty Ltd (2001) ATPR 41- 887* Justice Lingren said:

It cannot be accepted as a general proposition that in order not to be misleading or deceptive, comparative advertising must refer to all of the criteria by reference to which the goods might be compared. Most goods have several "selling features" and consumers understand that a comparative advertisement referring to only one of them does not necessarily exhaust the field. Consumers understand that the advertiser has selected a feature which favours the advertised product, in the hope that the feature will be so important to consumers that they will not be interested to inquire into other potential bases for comparison.

The complaint cites the findings of a public opinion survey conducted by the Centre for Behavioural Research in Cancer, Cancer Council Victoria in support of its argument, however, the footnote cites a "Confidential Internal Memorandum". Kellogg submits that it would be unfair for the ASB and a breach of natural justice to place any reliance on the findings of confidential, unpublished research whose results and methodology have not been subject to public scrutiny.

If the ASB does decide to place reliance on the results of an unpublished survey, then Kellogg makes the submission that to the extent that the complainant states that the survey apparently "demonstrated the public's fixstration with the use of selective claims in food marketing" then this shows that consumers expect advertisers to emphasise certain characteristics of their products, which, in light of the legal authorities referred to above, is an argument against the advertisements being misleading.

5. The promotion of Nutri-Grain to children, adolescents and parents as beneficial to an active lifestyle.

Promotion of Nutri-Grain

Nutri-Grain's positioning is synonymous with the promotion of a healthy, active lifestyle, and is referenced in the context of a balanced diet. As the complainant points out, "Nutri-Grain has been closely associated with the "Iron Man Series", team sports, athletics and sporting success." Kellogg's Nutri-Grain is high in carbohydrate and protein, a good source of Vitamins B1, B2, B6, niacin, and iron and a source of calcium. These nutrients, as part of a balanced diet play significant roles in terms of energy metabolism, muscle maintenance and bone strength in the body, and are therefore considered beneficial to an active lifestyle.

Carbohydrates comprise starch, sugars and most componeilts of fibre. Sugars are the simplest form of carbohydrates, whereas starches are more 'complex' as they comprise longer chain molecules which are ultimately broken down during digestion. The main food sources of carbohydrates are foods like breads, breakfast cereals, pasta, rice, fruit, starchy vegetables such as potato and corn and legumes.

Kellogg's Nutri-Grain is high in carbohydrates from corn, oats, wheat and sugar, comprising 20.8g (of which 9.6g is sugar) per 30g serve. Whilst sugar is the 'simplest' form of carbohydrate, all carbohydrates are digested to ultimately end up in the same form in our body - as glucose, which our bodies then use as a fuel for energy. For everyday activities, the body obtains around half of its energy from carbohydrates and around half from fats. However, at high intensity exercise, at least 70% of the energy is derived from carbohydrates.

The store of carbohydrate in the body (stored as glycogen) is limited. Therefore, an adequate supply of carbohydrate in the diet is essential to provide appropriate muscle fuel. The total carbohydrate content of a 30g serve, inclusive of sugars in Nutri-Grain is 20.8g, or over 70% of the energy from Nutri-Grain is derived from carbohydrate. Therefore, given that the human body relies heavily on carbohydrate as a fuel during activity, the carbohydrate profile of Nutri-Grain is desirable for active people.

The table below depicts the energy needs of boys age 10-18 based on values obtained from the Nutrient Reference Values (NRVs) for Australia and New Zealand. The energy needs were calculated based on a Physical Activity Level (PAL) of a student engaged in sports and leisure activities for 30-60 minutes, 4-5 times per week, as defined by the NRVs (i.e PAL value of 2.0). The Department of Health and Ageing recommends that children aged 5-18 engage in physical activity for at least 60 minutes each day. The contribution of a 30g serve of Nutri-Grain (480kJ) to the Estimated Energy Requirements (EER) is expressed as a percentage. Based on these calculations a 30g serve of Nutri-Grain provides between 3.1% and 4.6% (depending on age) of an active boy's EER.

Age (Male)	Weight (kg)	Height (M)	Estimated Energy Requirements (EER) (kJ)	% of EER contributed from 30g serve Nutri-Grain
10	31.9	1.39	10,400	4.6
11	35.9	1.44	11,000	4.4
12	40.5	1.49	11,600	4.1
13	45.6	1.56	12,400	3.9
14	51	1.64	13,200	3.6
15	56.3	1.7	14,000	3.4
16	60.9	1.74	14,700	3.3
17	64.6	1.75	15,200	3.2
18	67.2	1.76	15,600	3.1

In addition to the role carbohydrate plays in activity, several vitamins and minerals are also considered essential in terms of their role in energy metabolism. Specifically, the B-group vitamins, B1, B2 and niacin are all required to help release energy from carbohydrate, making the energy available to the body. The mineral iron carries oxygen around the body to assist in the energy production from carbohydrate. As the form of iron present in plant based foods is less well absorbed compared to the iron from animal foods, Vitamin C is added to assist the absorption of iron in Nutri-Grain.

Whilst protein is not directly related to energy metabolism, protein is required for muscle growth and development, which are important for active people. Most of the vital body proteins are in a constant state of breakdown, rebuilding and repair. Consequently, a continual supply of dietary protein is essential to ensure that the rebuilding and repair continues. Therefore as protein forms muscle tissue, it could be stated that dietary protein is required to assist with the maintenance and development of muscles. Nutri-Grain is high in protein, providing 6.6g of protein per 30g serve and 23% of the total energy from protein.

Finally, vitamin B6 is required to help build new body proteins. Kellogg's Nutri-Grain is a good source of vitamin B6. The visuals in each of the advertisements depict people engaging in vigorous exercise such as running, surf-ski paddling and swimming thereby encouraging an active lifestyle. Reinforcing this message is the statement "As part of a balanced diet and regular exercise" as either a voiceover, written statement or both. Encouraging an active lifestyle is consistent with health messages.

Based on Nutri-Grain's promotion of an active lifestyle, its overall nutritional profile, the inclusion of statements and voiceovers relating to Nutri-Grain as part of a balanced diet and regular exercise and the prominent disclosure of the nutrition attributes on the product labelling, Kellogg's maintains that when consumed as part of a balanced diet and regular exercise, Nutri-Grain is a suitable breakfast option for active people and that it is not promoted in a manner that misleads consumers.

The complaint also alleges that the advertisements are designed to "manipulate" mothers and "take advantage of a parent's vulnerabilities". No evidence is provided by the complainant in

relation to these allegations and Kellogg denies these allegations. The advertisements are not intended to "manipulate" mothers nor "take advantage of a parent's vulnerabilities" but rather shows mum's role in promoting an active and healthy lifestyle choice for her son. Mum's role is recognised and appreciated by her son as shown through the act of the older son thanking his mum in the final scene.

Submissions regarding advertising to children, adolescents and parents

The advertisement referred to in the complaint as "Iron Man Zane Holmes" (Kellogg's name for this advertisement is "Beat Your Best") is a teen targeted advertisement, while the advertisements referred to in the complaints as "Beach Boy" (Get the Ball Rolling) and "Farm Boy" (Jason) are targeted at main grocery buyers and not children/teens. Iron Man Zane Holmes (Beat Your Best) This advertisement is no longer being broadcast and last ran in late 2008. It is currently only available on the Nutri-Grain website.

The advertisement is directed at older teens 15 years and over, which is demonstrated by the style of the advertisement (ie, heavy metal soundtrack and the industrial/action visuals) meaning that the advertisement is not a "Advertising or Marketing Communications to Children" under the AANA Code for Advertising & Marketing Communications to Children (Marketing to Children Code).

Beach Boy (Get the Ball Rolling) and Farm Boy (Jason) The theme, language and visuals used in these advertisements are very different to that used in the Iron Man Zane Holmes (Beat Your Best), and reflect that these advertisements are clearly targeted at adults (in particular, main grocery buyers). The themes of the advertisement are clearly adult focused - the advertisements show mum's role in promoting and encouraging an active and healthy lifestyle choice for her son.

Both advertisements include the statement as a voiceover:

So, as part of a balanced diet and regular exercise, Nutri-Grain has what it takes to help build your son into an iron man. The reference to "your son" makes it clear that the statement is directed at main grocery buyers.

Kellogg's media buy for the advertisements is targeted towards mothers who are the main grocery buyers of households. This is supported by the attached media schedule which includes such shows as the following:

- Beach Boy (Get the Ball Rolling) - Better Homes & Gardens, CSI, House, Cold Case, Will & Grace; and
- Farm Boy (Jason) - Better Homes & Gardens, Out of the Blue, All Saints, Prison Break, Bones.

6. Nutri-Grain is not a healthy product overall

The complainant alleges that Nutri-Grain is "not a healthy" product overall due to its sugar, salt and fibre content. Kellogg disputes that Nutri-Grain is not a healthy product overall based on the explanation provided below.

Nutri-Grain's Role in the Overall Diet

The complainant focuses on individual nutrients present in the product without any regard for the overall diet. The approach taken by the complainant in this regard is inconsistent with Australian Government Guidelines regarding healthy eating. The Australian Guide to Healthy Eating recommends that Australians eat a wide variety of foods, including breakfast cereals. Importantly, it notes that while eating a wide variety of foods is the best way to achieve a healthy diet and meet nutrient needs, that no one food will meet all of our dietary needs:

Each food plays a role. None of these foods can do the job alone.. . Each food has a contribution to make - a small part to play in good nutrition, health and wellbeing. The notion that each food plays a role in contributing to an overall healthy diet is endorsed by a variety of nutrition authorities, including the Dietitians Association of Australia", the Victorian Government's Better Health channel" and Nutrition Australia.

Kellogg does not make any representations regarding the "healthiness" of the product. Kellogg makes claims regarding the nutrition attributes of the product and the role that these nutrients (and Nutri-Grain) can play in a balanced diet. Importantly, each of the advertisements displays the

statement "As part of a balanced diet and regular exercise" as either a voiceover, written statement or both to contextualise the claims made.

The presence of sugar and sodium in Nutri-Grain does not inherently make it an "unhealthy" food. For example, reduced fat cheeses are a significant source of protein and calcium yet can contain more than 420mg of sodium per 30 ~ based on values contained in FSANZ's nutrient database, NUTTAB. Similarly, a 250mL glass of orange juice is an important source of vitamin C but contains 17g of sugar. Fresh and dried fruits, which the Dietitians Association of Australia (DAA) recommends as a nutritious lunchbox idea, are considered a good source of nutrients, yet they too can contain a high sugar content. For example a serve of grapes (1 cup) contains over 25g of sugar. A 30g serve of Nutri-Grain contains 9.6g of sugar, which provides 11% of the total DI for sugar and 180mg of sodium which is 8% of the total DI for sodium.

Nutri-Grain is not a source of fibre. Kellogg acknowledges that fibre plays an important role in the context of the overall diet. However the mere absence of fibre in Nutri-Grain does not inherently make it an "unhealthy" product. For example, lean red meat contains no fibre yet it is an important source of protein, iron and zinc. Milk is another example of a food that provides little or no fibre but is a valuable source of other important nutrients, including calcium and protein. Nutri-Grain contains nutrients that are considered essential as part of a healthy diet. These nutrients and their function in the body are summarised in the table below.

Nutrient	Function	% RDI
Protein	Essential for the growth and maintenance of healthy muscles	13%
Carbohydrates	Provide energy for activity	7%
Thiamin (B1)	Helps to release the energy from food	50%
Riboflavin (B2)	Helps to release the energy from food	25%
Niacin (B3)	Helps to release the energy from food	25%
Vitamin B6	Helps build body proteins	25%
Vitamin C	An antioxidant which helps protect the body's cells, especially important during strenuous exercise. Helps to absorb iron.	25%
Folate	Needed for normal growth and development	25%
Calcium	Needed for strong, healthy bones	10%
Iron	Important to help transport oxygen to working muscles	25%

Nutri-Grain is a breakfast cereal that contains some nutrients that should be limited and other nutrients that are essential to a healthy diet. In keeping with the Australian Guidelines recommendation that Australians meet their nutrient requirements through consuming a wide variety of foods, all communications of Nutri-Grain state that it be consumed as part of a balanced diet.

Based on this evidence, Kellogg maintains that Nutri-Grain is not an unhealthy product overall.

Nutrient Profiling Scoring Systems

The complainant uses nutrient profiling scoring systems developed by the UK Food Standards Authority and FSANZ as evidence that Nutri-Grain is unhealthy overall. Kellogg disagrees with the complainant's assertion that these scoring systems demonstrate that Nutri-Grain is "unhealthy" because the model is not an appropriate tool to determine whether a food is healthy or not as explained below.

The draft Nutrient Profiling Scoring System, proposed by FSANZ as part of P293: Nutrition Health and Related Claims, has been developed as a potential method for determining if a product is eligible to carry nutrition and health claims and not as a classification system to determine suitability of a food for consumption. It is important to note that this system is still in draft and has not been, accepted by the Ministerial Council for Food Regulations and has been the subject of much debate and discussion both in Australia and also overseas. There are a number of reasons why the system is flawed including:

1. The draft Nutrient Profiling Scoring System proposed treats all foods as homogeneous by having a single nutrient scoring system. This is inconsistent with the Australian Guide to Healthy Eating

which has been developed recognising the food supply is heterogenous. That is that different foods in different food groups for example cheese (which contributes fat, calcium and vitamin A & E to the diet) in the dairy & dairy alternatives group have different nutrient profiles to other foods such as meat (which contributes iron, zinc and protein to the diet) in the meat and meat alternatives group or breakfast cereal (which contribute carbohydrates and B vitamins) in the breads and cereals group.

2. The draft Nutrient Profiling Scoring System also sets the reference amount of food as 100g, which does not take into account that different foods have different recommended serve sizes and number of serves to be consumed depending on the age, gender and exercise level of the individual. The serve sizes and number of serves are recommended due to the amount and type of nutrients that are provided by the different types of foods to achieve a balanced diet for good health. For example, breads and cereals are the main food group that contributes carbohydrate and it is recommended that acceptable macronutrient distribution range for carbohydrate intake in adults and children is 45-65% of dietary energy intake to achieve good health and reduce risk of chronic disease.

3. The draft Nutrient Profiling Scoring System disregards the vitamin and mineral content of the foods. It is a system that only focuses on energy, sugar, sodium, saturated fat, fibre and protein. Again for a balanced diet to achieve good health, estimated average requirements or average intakes for vitamins and minerals have been set by the Australian Government The Australian Guide to Health Eating recognises the contribution of breakfast cereals to vitamin and mineral intakes. A system that disregards a foods contribution of these important nutrients is inherently flawed.

Furthermore, nutrient profiling systems have been the subject of intense debate and review around the world. EFSA", after an extensive review of the scientific evidence and the various systems that have been developed, state:

The nutrient profile of the overall (habitual) diet is an important determinant of health and the nutrient profile of a 'balanced' diet is defined by science based recommendations for intakes of energy and nutrients. Because diets are composed of multiple foods, overall dietary balance may be achieved through complementation of foods with different nutrient profiles so that it is not necessary for individual foods to match the nutrient profile of a 'balanced' diet. Nevertheless, individual foods might influence the nutrient profile of the overall diet, depending on the nutrient profile of the particular food and its intake... .The Regulation requires that the setting of nutrient profiles should take into account the dietary role and importance of food groups and their contribution of nutrients to the overall diet of the population (or specific population groups). Food groups with important dietary roles include vegetable oils, spreadable fats, dairy products, cereals and cereal products, fruits and vegetables and their products, meat and meat products, fish and fish products, and nonalcoholic beverages. The different dietary roles of such food groups are related to differences in their nutrient composition, as well as their (habitual) intake, and are recognised in food based dietary guidelines in Member States.

EFSA has rejected the FSANZ model (which is similar to a UK nutrient profiling system) on the basis that this scheme does not take into account the different roles that different foods have in the diet. Currently the Nutrient Profile system in Europe is being developed based on a nutrient profile for foods in general with different profiles for various stand alone categories of foods (including a standalone category for breakfast cereals which recognises the important contribution that breakfast cereals make the nutrition quality of the diet).

Based on the above, Kellogg would assert that it is not relevant to use the FSANZ Nutrient Profiling System as a basis to 'determine the quality of Nutri-Grain. The System is being developed to determine whether a food can carry a nutrition and health claim not to detennine which foods are healthy or unhealthy; the FSANZ system is still in draft and not yet finalised nor ratified by the Australian Government; and the system has a number of flaws and as such authorities such as the EFSA have rejected the FSANZ model (and are developing a different system which recognises the important role of key foods like breakfast cereals to the achieving a balanced diet for good health).

Other Matters Raised by the Complainant

The complainant also refers to the sugar content of Nutri-Grain on a per 100g basis and states that this represents over half the recommended daily sugar content for adults. This disregards the

fact that a serve of Nutri-Grain is 30g and provides 9.6g of sugar which is 11% of the DI for adults. DI values are defined in the Food Standards Code, which regulates the labeling and advertising of food in Australia.

7. Action requested of the ASB

For the reasons stated above it is Kellogg's submission that the advertisements do not breach the Codes, and that the complaints should be dismissed.

THE DETERMINATION

The Advertising Standards Board ("Board") considered whether this advertisement breaches Section 2 of the Advertiser Code of Ethics (the "Code").

The Board noted the complainant's concerns that the current advertisement is misleading and deceptive or likely to mislead or deceive because the advertisement creates the impression that the product is 'healthy for', 'good for' and 'beneficial to the active lifestyle of' children and adolescents when the product is high in sugar and salt, low in dietary fibre and not a healthy product overall.

The Board noted that the product advertised is food and that 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 ...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 of 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 that 'prevailing community standards' means the community standards determined by the Advertising Standards Board as those prevailing at the relevant time, and based on research carried out on behalf of the Advertising Standards Board as it sees fit, in relation to the advertising or marketing of food or beverage products taking into account at a minimum the requirements of the Australia New Zealand Food Standards Code, the Australian Dietary Guidelines as defined by the National Health and Medical Research Council and the National Physical Activity Guidelines as published by the Federal Government of Australia.'

The Board noted the explanatory notes to the Food Code prepared by AANA which, in relation to section 2.1, provide:

Section 2.1

The Board will not attempt to apply legal tests in its determination of whether advertisements are truthful and honest, designed to mislead or deceive, or otherwise contravene prevailing community standards in the areas of concern to this Code.

In testing the requirement that advertisements and/or marketing communications should be truthful and honest, the Board will consider whether the information most likely to be taken from the advertisement by an average consumer in the target market would be reasonably regarded as truthful and honest.

In testing the requirement that advertisements and/or marketing communications should not be designed to be misleading or deceptive, or otherwise contravene prevailing community standards, the Board will consider the advertiser's stated intention, but may also consider, regardless of stated intent, that an advertisement is by design misleading or deceptive, or otherwise contravenes prevailing community standards in particular regard to stated health, nutrition and ingredient components of the food or beverage product.

Thus, advertising and/or marketing communications may make reference to one or more of the nutritional values and/or health benefits of a product but such references must be accurate and appropriate to the level of understanding of the target audience, and must not misleadingly represent the overall nutritional or health benefits of the product

Some complaints made under this Code that the Board is better able to determine under the

broader aspects of the AANA Code of Ethics will be considered under that Code e.g. (complaints about matters such as 'taste and decency', language, sex and violence).

The Board then considered section 2.1 of the Code and noted that section 2.1 requires it to consider whether an advertisement is truthful and honest or is misleading, or is designed to be, misleading or deceptive.

The Board noted that its role is different from the role of the court or the ACCC and that it is not for the Board to see itself in the position of the court. The Board has a special role given the broad principles in the various Codes and its role as set out in the provisions of the Codes and other sources such as the Food and Beverage Practice Note. The Board reflects community standards and expectations and these necessarily change over time. Its task is to deal with complaints. By upholding or rejecting a complaint, it determines whether the community considers an advertisement acceptable or not. In this way, it provides guidance to advertisers and assists in maintenance of confidence in advertising. The Board's task, as properly understood, is not to reflect on or speculate about what a court would do if the advertisements were the subject of an allegation of Trade Practices Act breach nor to reach a legal opinion. Rather, the task is to reflect the community's attitude - to assess whether the advertisements meet current community expectations for truthfulness given what the advertisements convey to ordinary consumers and in light of the relevant circumstances and given the grounds of the complaint.

The Board noted that this advertisement refers to the protein in the product, that the advertisement depicts extreme physical activity and that the product has for many years been advertised in the context of sport, particularly iron man style sports and activities.

The Board noted that the advertisement makes reference to the presence of protein in the product and the function it performs: protein for growth and muscle development. The Board noted the substantiation provided by the advertiser, and determined that this statement was not misleading.

The Board noted the complainant's concern that the product presents itself as 'healthy'. The Board considered that there is a difference between a food representing itself as a 'healthy' food and a food that represents itself as a food that is acceptable as part of a balanced diet. The Board considered carefully what message an average consumer would take from this advertisement.

The Board noted that this advertisement shows the statement "as part of a balanced diet and regular exercise" and the voiceover says "Nutrigrain is one of the highest protein cereals, so as part of a balanced diet and regular exercise, Nutrigrain has what it takes to help build your son into an iron man".

The Board considered that consumers would not treat the statement 'helps to build your son into an iron man' as a genuine statement that the product will help a boy become an iron man competitor - rather it would be taken as advertising puffery and a claim that the product will help a child grow. The Board considered that the product contains nutrients which will nourish a person and that the message likely to be taken from the advertisement by a consumer is not misleading.

The Board noted that the advertiser has provided significant information about the protein content of NutriGrain compared to more than 300 other cereals and that NutriGrain is in the top 10% of breakfast cereals for protein per serve. The Board considered that the statement in the advertisement is reasonable and unlikely to be misleading to consumers.

The Board considered the overall impression likely to be taken from this advertisement by a consumer. The Board considered that the overall impression that a consumer would take from this advertisement is that this cereal is appropriate for active children as part of a balanced diet. The Board considered that a reasonable consumer would not see that the advertisement is creating the 'impression of healthiness' just that the product can be consumed by active children as part of a balanced diet. The Board considered that this message was not misleading or deceptive.

The Board noted that the Explanatory Notes to the Code states:

Thus, advertising and/or marketing communications may make reference to one or more of the nutritional values and/or health benefits of a product but such references must be accurate and appropriate to the level of understanding of the target audience, and must not misleadingly represent the overall nutritional or health benefits of the product

The Board noted that:

- this is a well known product which has been on the market for many years
- it has traditionally been advertised in the context of significant physical activity of young men and boys
- the nutrition information on the package indicates the carbohydrate and sugar content of the product as well as the percentage of recommended dietary intake of those nutrients
- the ingredient list lists all of the ingredients of the product and lists sugar as second highest ingredient
- that the target audience for this advertisement is grocery buyers.

The Board discussed whether the community expects all information about a product to be included in an advertisement. In the Board's view current community standards do not expect that an advertisement for a food product will list all, most or even the most significant elements of the food. The community does expect that the information that is presented is correct, and that if a representation is made that a particular product contains certain ingredients or has certain health benefits, that that representation is true and that the complete information about the product will be found in store or on the label and packaging material. In the Board's view it is still a community expectation that advertisements are designed to raise consumer interest in a product but are not expected to be the source of all information on which a consumer will base their purchasing decisions.

The Board noted that there is increasing concern about obesity in Australia and an increasing expectation that more information about the nutritional profile and role of products is available. This change in community standards is reflected for example in the demand for information about the nutritional profile and percentage of recommended dietary intake on labels and packaging. The Board agreed that information about nutrition and the role of various foods in the diet is important information for the community in assisting to deal with obesity. The Board considered however, that there is not yet an expectation in the community that an advertisement for food, in particular where the product is not represented as a health food, will contain comprehensive information about all significant nutrients in the product. The Board noted that this situation may change as community standards change.

The Board noted that the complainant refers to "the sugar content of NutriGrain cereal (32g per 100g) amounts to more than half of the recommended daily intake of sugar for adults." The Board considered it important to note the advertiser response to this issue which is that 'a serve of Nutri-Grain is 30g and provides 9.6g of sugar which is 11% of the DI for adults.'

In the Board's view, the current advertisement does not represent the product as a health food or a healthy food, and therefore there is no expectation on the part of the community that factors such as the sugar content or other nutrient levels would be referred to in the advertisement. The Board considered that the advertisement does not misleadingly represent the overall nutritional or health benefits of the product.

The Board considered that the advertisement does not otherwise contravene community standards and that the information in the advertisement is communicated in a manner appropriate to the level of understanding of the target audience.

The Board considered that the nutrient function claims in the advertisement were supportable and not in breach of section 2.3 or section 2.6 of the Food Code.

The Board noted the complainant's concerns that the product is marketed to children. The Board noted comprehensive information provided by the advertiser regarding the programming for this advertisement. In the Board's view, although some children will view the programs that this advertisement appears in, this advertisement is not directed to children fourteen years or younger and part 3 of the Food Code does not apply. The Board noted however that, had it been directed to children, the advertisement did not contravene any of the provisions Part 3 of the Food Code.

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