



CASE REPORT

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| 1. Complaint reference number | 54/10 |
| 2. Advertiser | Retail Food Group (Aust) Donut Kings' Ice Age 3 combo) |
| 3. Product | Food & Beverages |
| 4. Type of advertisement | TV |
| 5. Nature of complaint | Food and Beverage Code – untruthful/dishonest
Food and Beverage Code (Children) – premium |
| 6. Date of determination | Wednesday, 10 February 2010 |
| 7. DETERMINATION | Dismissed |

DESCRIPTION OF THE ADVERTISEMENT

This television advertisement depicts animated characters from the Ice Age 3 movie. The advertisement features scenes and characters on which toys are based. It also depicts the iced cake donuts, mini fruit freeze and four wind-up toys that are available to collect over the course of four weeks. The voice over says: "Ice Age 3 has hit Donut King, the delicious world of donuts! \$4.95 gets you an iced cake donut, mini fruit freeze and an ice age 3 wind up toy. Win it on Blue-ray or DVD and get into Donut King today."

THE COMPLAINT

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

Advertisement in breach of the AANA Food and Beverages Code

We are concerned about rising rates of overweight and obesity in Australia, particularly in children.

We are writing to complain about a Donut King advertisement and associated website promoting Donut King's 'Ice Age 3 combo'. (Donut King is owned by the Retail Food Group (Australia).)

We are of the view that the advertisement and associated website breach clauses 2.1, 3.5 and 3.6 of the AANA Food and Beverages Advertising and Marketing Communications Code ('Food and Beverages Code') and therefore breach clause 2.8 of the AANA Code of Ethics.

1 The television advertisement

The television advertisement promotes the Donut King 'Ice Age 3 combo', which includes an Iced Cake Donut, Mini Fruit Freeze and an Ice Age 3 wind-up toy. It features scenes from the movie Ice Age 3 and some of the characters on which the toys are based. It also depicts the Iced Cake Donut, Mini Fruit Freeze and four wind-up toys that are available to collect over the course of four weeks. The voice over states, "Ice Age 3 has hit Donut King, the delicious world of donuts! \$4.95 gets you an Iced Cake Donut, Mini Fruit Freeze and an Ice Age 3 wind up toy. Own it on Blu-Ray or DVD and get into Donut King today!"

We have been unable to find any nutrition information on the kilojoule, sugar, fat and/or sodium content of the products contained in the Ice Age 3 combo. However, we would assume that these products are unhealthy overall and not appropriate for advertising to, or regular consumption by, children.

...

3 Breaches of the Food and Beverages Code

In our view, the advertisement and website breach clauses 2.1, 3.5 and 3.6 of the Food and Beverages Code and consequently, clause 2.8 of the AANA Code of Ethics

3.1 Clause 3.6 – Premiums

Clause 3.6 of the Food and Beverages Code states:

“Advertising or Marketing Communications to Children shall not feature ingredients or Premiums unless they are an integral element of the Children’s Food or Beverage Products/s being offered”.

3.1.1 Advertising or Marketing Communications to Children - Children’s Food and Beverage Product

This advertisement clearly constitutes an ‘Advertising or Marketing communication to Children’ within the meaning of the Food and Beverages Code. The theme (Ice Age 3, a children’s film), visuals (animated film characters) and language (fun tone and wording) of the advertisement are directed primarily to children. The website (featuring promotions for the film, free toys and numerous Ice Age 3 games) is also undoubtedly directed primarily to children

The theme of the combo (a children’s movie) and inclusion of a fun Ice-Age 3 toy also demonstrates that the product itself is targeted and would have principal appeal to children. As such, it meets the definition of a Children’s Food or Beverage Product under the Food and Beverages Code.

3.1.2 Premium – not an integral element of the product

Clause 1.1 of the Food and Beverages Code defines “Premium” as: “anything offered free or at a reduced price and which is conditional upon the purchase of a regular Children’s Food or Beverage Product”.

The Ice-Age 3 toy is offered free conditional upon the purchase of an Ice-Age 3 meal and, in our view, therefore constitutes a “premium”.

We are aware that the Advertising Standards Board (‘ASB’) has previously taken the view that toys included in fast food meals, such as McDonald’s Happy Meals and Hungry Jack’s Kids Club Meals are ‘integral’ elements of these products and therefore do not constitute “premiums”.^[1] This is based on the determination that these products always include the meal and a toy, and that the toy is changed to introduce variety and provide for movie tie-ins. In Case Report 103/05 (against Hungry Jacks) it was also considered relevant that the toys were not available to be sold separately and had no value in and of themselves.

In this case, it is not regular practice for Donut King to sell meals (or combos) that ordinarily include a free toy. The Ice-Age 3 combo is far from a meal and is not always on the Donut King menu. The Ice-Age 3 combo has been created specifically for the purpose of promoting the Ice-Age 3 movie and premiums. We would also note that the Ice-Age 3 toy is available to be purchased independently of the Ice Age Combo for \$2.00, and therefore does have its own value.

In addition, the toy offered varies from week to week, and the toy is clearly not necessary to the completeness of the product. Donut King is a fast food restaurant franchise, whose business is selling food not toys. The inclusion of a free-toy is unnecessary and intended only to entice children to purchase food and beverage products.

For all of these reasons, it is clear that the free toy featured in the advertisement is a premium that is not an integral element of the product being offered.

3.1.3 Practice Note – undue prominence given to the premium

We assume that the Food and Beverages Code Practice Note (Practice Note) no longer applies to the Code. This is because the former reference in the Code to the Practice Note (in clause 1.2) has been deleted, and the Practice Note is no longer published on the AANA or ASB websites. However, the status of the Practice Note is unclear.

We ask the ASB to confirm the current status of the Practice Note. If the Practice Note (or any

other explanatory or practice note) does continue to apply, this should be made clear on the face of the Code, and the Practice Note should be published on the ASB and AANA websites. Failure to make the Practice Note publicly available prevents complainants from being able to properly interpret the Code and determine whether a complaint is appropriate (particularly since the Practice Note changes the Code's meaning). This arguably means that complainants are not being accorded procedural fairness.

However, if the Practice Note does continue to apply, we repeat our view that it inappropriately narrows clause 3.6 of the Code, and should not be followed. The Practice Note states: "[i]n testing whether an advertisement and/or marketing communication features ingredients or premiums that are not an integral part of the product or service, the Board will consider if the ingredient or premium is given undue prominence by way of being made the dominant feature or otherwise occupies more than half of the advertisement."

This differs from a literal reading of clause 3.6, which provides only that advertisements must not 'feature' premiums that are not integral elements of products. Practice notes are ordinarily intended to act only as guides to interpretation of regulatory instruments; they are not intended to override or change the meaning of provisions.

In any event, we are of the view that the advertisement gives undue prominence to the free toys. The majority of the advertisement features the movie and characters for the purpose of promoting the free toys. The advertisement runs for approximately 15 seconds, and the food component of the Ice-Age 3 combo is visible for no more than 5 seconds. The voice over promotes the Ice-Age 3 movie and Donut King generally for approximately 9 seconds and the free toys for approximately 3 seconds, and the references to Donut King and the food and beverage products are inextricably intertwined with the promotion of the film and free toys. Children watching the advertisement would clearly be attracted to the free toys via the joint promotion of the toys, the movie and its characters, and would not view the advertisement as predominantly advertising food and beverage products.

...

The Practice Note also states: "[i]n testing whether an advertisement and/or marketing communication features ingredients that are not an integral element of the product being offered, the Board will consider whether attributes claimed for the product are wholly dependent on its consumption in association with ingredients that are not integral to the promoted product. In determining whether something is in 'integral' element of a product, the Board will consider whether the element is necessary to the completeness of the product or service being offered."

As discussed above, Donut King is a fast food retailer; it is not in the business of selling toys. Clearly, a free toy is not necessary to the completeness of this food combo and is therefore not an integral element of the product being offered.

For all of these reasons, we are of the view that the advertisement and associated website breach clause 3.6 of the Code (regardless of whether the Practice Note applies).

3.2 Clause 3.5 - Pester power

Clause 3.5 of the Food and Beverages Code states "Advertising or Marketing Communications to Children shall not include any appeal to Children to urge parents and/or other adults responsible for a child's welfare to buy particular Children's Food or Beverage Products for them".

The intended audience for the advertisement and webpage is clearly children who would be too young to go to Donut King independently. The advertisement and website promotion therefore implicitly appeals to children to urge parents to take them to Donut King and buy them an Ice-Age 3 combo. The offer of the free toy is designed to encourage children to desire the Ice-Age 3 combo, and thus to pressure their parents to purchase the combo for them.

By advertising that a different toy is available each week, the advertisement creates a sense of urgency for children not to miss out on collecting a particular toy, and creates pressure for children to pester parents to take them to Donut King each week so they are able to collect all four toys.

We are therefore of the view that the advertisement and associated website breach clause 3.5 of the

Food and Beverages Code.

3.2.1 Practice Note – direct encouragement to urge parents to buy products

As discussed above the status of the Practice Note is unclear, but since it is not referenced or published we assume that it no longer applies.

However, if the Practice Note does continue to apply, we believe it inappropriately narrows the meaning of clause 3.5 of the Code, and should not be followed. The Practice Note states: “In considering whether an advertisement and/or marketing communication contains an appeal or encouragement to children to urge parents or other adults to buy particular products for them, the Board will form its own view of what a reasonable child of the target audience would understand from the communication and, in addition, will form a view inclusive of the following pointers:

- Although children may be expected to exercise some preference over the foods and beverages they consume, advertisements and/or marketing communications must be prepared with a due sense of responsibility and should not directly encourage children to urge the purchase of particular products for them

- Advertisements and/or marketing communications must not give children cause to pester or otherwise make a nuisance of themselves in relation to the promoted products. [As an example, in a supermarket setting, children should not be portrayed asking for a particular product or putting it into a shopping trolley without asking, while voice or text messages must not include such urging as “Ask Mummy to buy you one.”]”

The Practice Note has previously been interpreted such that clause 3.5 prohibits only advertisements that expressly state (i.e. “Ask Mummy to buy you one”) or imply (i.e. by depicting a child putting a product in a shopping trolley without asking or being a nuisance to get their own way) that a child should ask their parents to buy a product for them. This interpretation is much narrower than a literal reading of clause 3.5, which appears to prevent use of any technique to appeal to children to urge their parents to buy products for them. It also fails to recognise that techniques such as use of movie tie-ins, movie characters and toys are clearly designed to create pester power, and are likely to be far more effective for doing so than directly asking children to pester parents for products. Research indicates that premium offers attract children’s attention and interest, and influence children to prefer advertised products.[2] There is also evidence that premiums influence children to pester and beg their parents to buy products for them.[3]

If clause 3.5 is to have any practical effect in preventing pester power, it must be interpreted to apply to promotional techniques, such as use of movie characters and free toys, that are designed to put pressure on children to pester parents for products. We urge the ASB to take a strong and pragmatic approach on this issue, and interpret clause 3.5 in this manner.

4 Clause 2.1 - Breach of prevailing community standards

Clause 2.1 of the AANA Food and Beverages Code states:

“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 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”.

In our view, the advertisement and website are contrary to prevailing community standards in relation to the promotion of unhealthy food and beverages to children using movie characters and free toys. The use of these types of techniques to advertise unhealthy foods to children is unfair and unethical as children’s food preferences are likely to be driven by the desire to obtain a premium rather than the characteristics of the product itself.[4]

A 2008 survey conducted by the Centre for Behavioural Research in Cancer, Cancer Council Victoria (of a random sample of 800 Australian consumers) demonstrated overwhelming public disapproval of marketing techniques (such as the use of movie characters and toys) to target children. In particular, it found that 91% of consumers are in favour of the government regulating the use of toys, give-aways and popular personalities and characters to promote unhealthy food to

children, with half in favour of these practices being stopped completely.

The prevailing community view is clearly that use of movie characters and toys to promote unhealthy food to children is inappropriate, and that children need to be protected from this type of marketing.

Accordingly, we urge the ASB to recognise that the Ice Age 3 advertisement contravenes prevailing community standards in relation to use of premiums and movie characters to promote unhealthy food to children, and therefore breaches clause 2.1 of the Code.

5 Conclusion

For the reasons outlined above, we consider that the Ice Age 3 advertisement and website breach the AANA Food and Beverages Code and the AANA Code of Ethics, and we urge the ASB to request Donut King to withdraw these promotions.

[1] ASB Case Report Numbers 103/05 (McDonald's Australia Ltd's Happy Meals – toy dogs advertisement, 10 May 2005), 197/06 (McDonald's Australia Ltd's Happy Meals – Kitty and Spy Gear advertisement, 13 July 2006) and 103/05, Hungry Jacks King Club Meals – Golden Compass advertisement, 9 April 2008)

[2] Brand, J.E., Television advertising to children: A review of contemporary research on the influence of television advertising directed to children. Prepared for ACMA, May 2007.

[3] Roberts, M., Parenting in an obesogenic environment. Journal of Research for Consumers, 2005(9).

[4] Brand, J.E., Television advertising to children: A review of contemporary research on the influence of television advertising directed to children. Prepared for ACMA, May 2007; Kunkel, D., Wilcox, B., Cantor, J., Palmer, E., Linn, S., and Dowrick, P., Report of the APA Taskforce on Advertising and Children. 2004. American Psychological Association, Washington DC.

THE ADVERTISER'S RESPONSE

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

The Complaint Summarised

Broadly, the Complaint can be categorised into three main issues:

- 1. Whether the advertisement features "Premiums" not integral to the food product, which are prohibited under Clause 3.6 of the AANA Food & Beverages Advertising & Marketing Communications Code ("the Code");*
- 2. Whether the advertisement encourages children to use "Pester Power", as prohibited under Clause 3.5 of the Code; and*
- 3. Whether the advertisement is contrary to prevailing community standards under Clause 2.1 of the Code.*

We also note that the Complaint refers to Clause 3.1 of the Code, which prohibits misleading or deceptive conduct. No further details of the complaint under Clause 3.1 of the Code have been provided by the Complainant. We cannot see any reasonable basis for a complaint under Clause 3.1 of the Code and urge that it be dismissed. Should the ASB feel that a complaint under Clause 3.1 of the Code is warranted, we request the opportunity to respond once the basis for such a complaint has been provided to us.

Details of the Advertisement and the Product Advertised

The offer presented by the advertisement is that an "Ice Age 3 Combo" consisting of one iced donut, one mini fruit freeze and one Ice Act 3 toy is available for the price of \$4.95. The Ice Age 3 toy is available as a separate purchase for \$2.

The particular iced donut advertised as part of the combo was developed solely for the purposes of this promotion and is not generally available. For the purposes of comparison, a similar regular

iced donut is available for sale for \$2.

The mini fruit freeze product in the combo is not a size that is generally available. We cannot provide a unit price for this item.

The iced donut and mini fruit freeze products are not available as a combo or package without the toy.

Application of the Code

Section 3 of the Code applies only to “Advertising or Marketing Communications to Children”. “Advertising or Marketing Communications to Children” is defined under the Code as:

“Advertising or Marketing Communications 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.”

While the definition refers to “theme, visuals and language” as factors to determine whether or not an advertisement is “directed primarily to Children”, we submit that these three factors do not present an exhaustive list of all factors which are to be considered in order to determine whether or not an advertisement is “directed primarily to Children”.

The nature of television advertising dictates that an advertisement is necessarily directed at the viewers of the shows during which the advertisements are shown.

The media booking schedules show that no advertisements were shown during C classified programs or any programs generally regarded as “children’s programs”. Further, the majority of advertisements were shown during school hours, when children aged 14 or under would be expected to be attending school, or after 8pm. The screening times for the advertisement were specifically chosen to avoid direct advertising to children.

For this reason, we do not agree that Section 3 of the Code applies to the advertisement.

However, should the ASB determine otherwise, we respond as follows to the issues raised by the Complainant:

Application of the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children

While we note that the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children (“QSR Initiative”) has not been mentioned by the Complainant, we feel that it is important to distinguish the present advertisement from advertisements for which the QSR Initiative applies, particularly given the recent publicity for an ASB decision against Hungry Jacks (573/09) under the QSR Initiative relating to advertisements involving “Sponge Bob Square Pants”.

Firstly, the QSR Initiative applies only to “meal” offers from members of the QSR Initiative. Donut King is not a member of the QSR Initiative.

Secondly, even if Donut King were to be a member of the QSR Initiative, we do not consider the products mentioned in the present advertisement to be a “meal” offer. We do not represent or advertise donut combos as “meals” nor do we expect consumers to reasonably consider the advertised combo to constitute a “meal”. We believe that consumers are aware that donut combos are indulgence items, not a “meal”.

“Premium” offer – Clause 3.6 of the Code

The Complainant asserts that:

The Ice-Age 3 toy is offered free conditional upon the purchase of an Ice-Age 3 meal and, in our view, therefore constitutes a “premium”.

We do not agree with this assertion.

As mentioned above, the Ice Age 3 toy is available as part of a combo offer with a donut and a mini fruit freeze drink. The combo offer is not, and has never been, available without the toy.

The Complainant refers to the ASB's previous decisions relating to McDonald's Happy Meals and Hungry Jack's Kids Club Meals and asserts that the ASB's decisions in relation to toys in these advertisements were based on the reasoning that these products have always included a toy. The Complainant asserts that Donut King does not regularly sell combos that ordinarily include a free toy.

We do not agree with this interpretation of the ASB's previous decisions. We do not believe that it is the intention of ASB to continue to allow McDonald's and Hungry Jack's to sell products containing toys, while preventing other food retailers from introducing new food products containing toys.

Our interpretation of the ASB's previous decisions is that if a meal or combo is already sold by a food retailer without a toy, then a "premium" toy must not be offered on top of that regular meal or combo for free or at a discount in an attempt to increase the sales of the regular meal or combo.

This interpretation is consistent with the statement by the ASB in Case Report 572/09 relating to McDonald's Happy Meals that:

*"The Board determined that the toys which come with the Happy Meal do not fall within the Children's Code definition of 'Premium' as they are part of the Happy Meal – **not a product that is additional to the regular product.**" [Emphasis added]*

In the case of the Ice Age 3 Combo, the iced donut and mini fruit freeze products were not, and had never been, available as a combo without the Ice Age 3 toy. The toy is therefore an integral part of the combo product and not a "premium" or improvement to an existing combo offer.

The Complainants further commented that "in Case Report 103/05 (against Hungry Jack's) it was also considered relevant that the toys were not available to be sold separately and had no value in and of themselves". We assume that the Complainant is referring to Case Report 73/08 as Case Report 103/05 appears to be an entirely unrelated matter.

Despite the ASB decision in Case Report 73/08 making reference to the fact that the toys in that case could not be purchased separately, we submit that this factor was not central to the ASB's decision. We submit that where a toy is available for separate sale, the customer is given the option of obtaining the toy without the food product for a price lower than the price of the combo containing the toy.

The basis of the Complainant's submission is that children are likely to be more interested in the toy than the food product. If this is the case, then giving the customer the option of purchasing the toy without the remainder of the combo at a cheaper price is inconsistent with the Complainant's assertion that the toy is used as a "premium" to promote the sale of the food.

In any event, we note that there is no prohibition, whether legal or otherwise, on the sale of toys in conjunction with food products. The prohibition under the Code relates only to the advertising of toys as a free or discounted "premium" to an existing product. For the purposes of the ASB's decision, consideration must therefore be limited to the representation made in the relevant advertisement. In the present matter, the advertisement refers only to the toy as an integral part of a combo which is available as part of a special promotion, and does not suggest in any way that the toy is a "premium" offered for free or at a discount upon purchase of a regular food product.

"Pester Power" – Clause 3.5 of the Code

The Complainant asserts that:

"The intended audience for the advertisement and webpage is clearly children who would be too young to go to Donut King independently. The advertisement and website promotion therefore implicitly appeals to children to urge parents to take them to Donut King and buy them an Ice-Age 3 combo."

We refer to our above comments in relation to the screening times of the advertisement and dispute the Complainant's assertions.

In any event, the Complainant appears to suggest that the advertisement imposes an apparently urgency on viewers to collect each of the four versions of the toy.

We refer the ASB's decision in the above mentioned Case Report 73/08 involving Hungry Jack's and note that in that instance, the advertisement also referred to "four to collect" and included the word "today". The case in that instance was dismissed.

We urge the ASB to remain consistent in its decisions and apply the same reasoning in this instance.

"Prevailing Community Standards" Complaint – Clause 2.1 of the Code

We do not agree with the Complainant's assertions in relation to Clause 2.1.

The Complainant's reference to a survey on government regulation of food advertising to children using toys is irrelevant.

The Complainant's proposal would require the ASB to determine the "healthiness" or "unhealthiness" of foods. We do not believe that this ought to be a function of the ASB, particularly in instances where a food has not been represented as healthy.

We note the ASB's comments in Case Report 197/06 with reference to a McDonald's Happy Meal consisting of a Cheeseburger or "McNuggets", fries, a toy and a drink:

"The Board considered that the advertisement did not depict material contrary to prevailing community standards on health and safety simply by advertising food that is considered by some sectors of the community to be 'unhealthy'. The Board acknowledged that most foods can be part of a healthy balanced diet.

In fact, any determination of an "unhealthy" class of foods would necessarily result in the implication of a "healthy" class of foods. Such an implication would potentially be contrary to the current prohibition against health claims and implications of "health" under the Australia New Zealand Food Standards Code.

Donut King recognises that donuts are an indulgent product. We do not represent our products as "healthy" and we do not encourage over-consumption. The present advertisement was carefully developed to represent to consumers no more than the necessary information about a current product available at Donut King. Ultimately, the consumer is given the choice of whether or not to purchase the Donut King product.

We do, however, recognise the need to improve our products. We are constantly looking at ways of improving the nutrition profile of our products while maintaining the taste that Donut King customers demand. We have recently introduced a new range of donuts using icing and sprinkles free of artificial colours, flavours or preservatives.

Donut King's Advertising Policies

Donut King takes very seriously any complaints we may receive from consumers, or indeed, authorities such as yourself in connection with our business operations. The Complaint in relation to our advertising has been received with concern and we feel it necessary to provide the above detailed response.

Furthermore, we advise that Donut King is a brand owned and managed by the Retail Food Group Limited ('RFG') group of companies.

RFG is cognisant of, and views extremely seriously, its legal obligations and corporate responsibilities in connection with the operation of its franchise systems (including obligations arising under the various voluntary advertising standards codes).

As an indication of this, RFG employs a large internal legal division with expertise in connection with the various advertising standards codes and other trade practices laws, to ensure that all aspects of the group's operations are compliant with legal requirements.

All advertising and marketing materials are subject to stringent review by our legal division prior

to release in order to ensure compliance with all relevant laws, regulations and codes. In relation to the present advertisement, further advice was received from FACTS specifically in relation to the sensitivities of advertising to children and changes were made to the advertisement and the scheduling of the advertisement to avoid such issues.

We urge the ASB to dismiss the Complaint.

THE DETERMINATION

The Advertising Standards Board (“Board”) considered whether this advertisement breaches Section 2 of the Advertiser Code of Ethics (the “Code”), the AANA Food and Beverages Advertising and Marketing Communications Code (the “Food and Beverages Code”), and the Code for Advertising and Marketing Communications to Children (the Children's Code). The Board noted that Donut King is not a signatory to the Quick Service Restaurant Responsible Marketing to Children Initiative and that the Initiative does not apply.

The Board firstly needed to determine whether the advertisement is “Advertising or marketing Communications to Children”, which is defined in the Children’s Code and Food and Beverages Code as meaning:

“Advertising or marketing communications which, having regard to the theme, visuals and language used, are directed primarily to Children and are for Product”.

“Children” are defined in the Codes as being 14 years old or under. The Board considered that the advertised product is a product targeted toward and having principal appeal to children and therefore within the definition of 'product'. The Board determined that noting the product, music, theme and visuals used in the advertisement, the advertisement was directed primarily towards children, was for product and was therefore within the scope of the Children’s Code and Part 3 of the Food and Beverages Code.

Having concluded that the material is an “advertisement to Children” as defined by the Codes, the Board then had to determine whether the advertisement is for a “Children's Food or Beverage Product”. “Children's Food or Beverage Product” is defined in the Children’s Code as meaning; “any food or beverage product other than alcoholic beverages ... which is targeted towards toward and has principal appeal to children.”

Although the product contains a toy, the Board determined that the Donut King Ice Age 3 Combo is a “children's food or beverage product” targeted toward and having principal appeal to Children.

The Board noted the complainant's concern that the advertisement was in breach of sections 2.1, 3.5 and 3.6 of the Food and Beverages Code.

The Board reviewed the advertisement and considered whether the advertisement was in breach of sections 2.1, 3.5 and 3.6 of the AANA Food and Beverages Advertising and Marketing Communications Code. Section 2.1 of the Code states:

"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 of the target audience of their Advertising or Marketing Communication with an accurate presentation of all information, including any references to nutritional values or health benefits."

The Board noted the advertiser's response and agreed that it is not the role of the ASB Board to determine the healthiness or unhealthiness of foods. The Board agreed that the advertisement did not make any representations or value judgments as to the health benefits or otherwise of the product advertised.

The Board agreed that there were not misleading representations in the advertisement and that the Combo featured in the advertisements was emphasised as fun and something that would be understood by the prevailing community to be a treat that was fun to indulge in. The Board agreed that the advertisement was not in breach of section 2.1 of the Food and Beverages Code.

The Board noted that there are mixed views in the community in relation to the advertising of some

food products. Therefore, the Board will consider the interests of all persons in the community and the advertiser's right to advertise their product. The Board noted both the complainant's and advertiser's references to research in this area. The Board noted that there are strong views in the community about advertising food and toy products, and in linking food and toy combinations with popular figures or movie characters. The Board's view is that there is not yet a community standard that treat foods should not be advertised at all, nor is there a standard that food products should not be sold in conjunction with toys or other merchandise. In the absence of a prevailing community standard in this area, the Board determined that the advertising of the Ice Age 3 Combo did not depict material contrary to prevailing community standards on health and safety.

The Board determined that there was no breach of section 2.1 of the Food and Beverage Code nor of section 2.1 of the Children's Code.

The Board then considered whether the advertisement was in breach of section 3.5 of the Food & Beverages Code.

"Advertising and/or Marketing Communications to Children shall not include any appeal to Children to urge parents and/or other adults responsible for a child's welfare to buy particular Children's Food or Beverage Products for them."

The Board noted the complainant's concern that the advertisement breaches section 3.5 as the tie in of a toy will lead a child to ask a parent to purchase the product. The Board considered that the intention of the Code is as articulated in the Practice Note - to interpret otherwise would mean a prohibition on advertising food in conjunction with toy products or other merchandise which is not the intention of the Code. This means that the mere fact that there is a toy advertised as part of a product does not lead to the advertisement containing an appeal to children to urge parents or others to buy the particular product. The Board considered that the advertisement did not include any appeal to children for children to urge parents or other adults to purchase the Ice Age 3 Combo.

The Board determined that the advertisement was not in breach of section 3.5 of the Food and Beverages Code nor of section 2.7 of the Children's Code.

The Board then considered whether the advertisement was in breach of section 3.6 of the Food and Beverages Code. Section 3.6 of the Food and Beverages Code states:

"Advertising or Marketing communications to children shall not feature ingredients or Premiums unless they are an integral element of the Children's Food or Beverage Products being offered."

The Board noted the complainant's concern that the Ice Age 3 Combo did contain a premium. The Board noted the definition of 'premium' in both Codes which states that a Premium is 'anything offered free or at a reduced price and which is conditional upon the purchase of a regular Children's Food or Beverage product.' The Board noted that the toy is not offered free or at a reduced price and that the donut product, and mini fruit freeze are not regular Children's products available for purchase at Donut King. The toy part of the Ice Age 3 Combo is therefore not a premium. The Board considered that the toy offered as part of the Ice Age 3 Combo is not within the definition of a 'premium' and that the provisions of the Codes relating to premiums do not apply. The Board determined that the advertisement did not breach section 3.6 of the Food and Beverages Code nor section 2.12 of the Children's Code.

The Board also considered clause 2.2(c)(i) of the Children's Code which requires that the advertisement must fairly represent, in a manner clearly understood by children, 'the advertised product'. The Board considered that the advertised product is the Ice Age 3 Combo (comprising donut, drink and toy). The Board considered that the advertisement clearly depicted all elements of the product in a manner that a child would understand. The Board considered that the advertisement did not breach section 2.2(c)(i) of the Children's Code.

Finding that the advertisement did not breach the Food and Beverages Code or the Children's Code on any other grounds, the Board dismissed the complaint.