



## CASE REPORT

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|-------------------------------|--|
| 1. Complaint reference number | 55/10  |
| 2. Advertiser                 | Retail Food Group (Aust) Donut King's 'Ice age 3 combo' internet |
| 3. Product                    | Food & Beverages   |
| 4. Type of advertisement      | Internet   |
| 5. Nature of complaint        | Advertising to Children Code – Price – section 2.4               |
| 6. Date of determination      | Wednesday, 10 March 2010   |
| 7. DETERMINATION              | Upheld – discontinued or modified                                |

## DESCRIPTION OF THE ADVERTISEMENT

Front page of the Donut King website features (in right hand top corner) a picture of the four toys, the image of two characters from the Ice Age 3 movie with one of the characters holding an iced donut. There is also an image of the fruit freeze drink. Text accompanying the images says "Free Ice Age 3 Toys with any iced cake donut and mini fruit freeze combo. Collect a new toy each week. Only \$4.95." The following page features images of the toys, characters from the movie and the text: Get into Donut King today for Free Ice Age 3 Toys with any iced cake donut and mini fruit freeze combo. Only \$4.95. Help us celebrate the launch of Ice Age 3 on DVD and BlueRay with our Ice Age 3 Combo. For only \$4.95 you will receive a Delicious Cake Donut, a new mini fruit freeze and a free Ice Age 3 wind up toy. Collect a new toy each week.'

## THE COMPLAINT

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

*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.*

### **... 2 The website**

*The webpage for the Ice Age 3 combo promotion on the Donut King website is: [http://www.donutking.com.au/index.php?option=com\\_content&view=article&id=92&Itemid=69](http://www.donutking.com.au/index.php?option=com_content&view=article&id=92&Itemid=69). Viewers of the website are encouraged to "Get into Donut King today for Ice Age 3 toys". They are invited to "Help us celebrate the launch of Ice Age 3 on DVD and Blu-Ray, with our Ice-Age 3 combo". It states, "For only \$4.95 you will receive a DELICIOUS CAKE DONUT, A NEW MINI FRUIT FREEZE AND A FREE WIND UP ICE-AGE TOY! The characters from the movie are depicted, together with the food and beverage products and wind-up toys. The webpage also has a link to the television commercial and Ice Age 3 video games.*

### **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 Ice Age 3 characters and free toys are also clearly the dominant feature of the webpage. The toys and associated characters comprise more than 50% of the webpage, whereas depictions of the Iced Cake Donut and Mini Fruit Freeze comprise no more than 5% of the webpage. Children’s attention would clearly be attracted to the toys and movie characters over and above the food, and children would perceive the webpage as being predominantly about the offer of free toys.*

*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 refers to the Donut King website with particular reference to the webpage promoting the Ice Age 3 promotion. The relevant promotion ceased before the complaint was received and the material is no longer on the Donut King website.*

*We note that Advertisement Complaint Reference 55/10 was received together with Advertisement Complaint Reference 54/10 (television advertisement). Given that consumers are unlikely to view the website at the same time as the television advertisement, the matter of Advertisement Complaint Reference 55/10 must be considered in isolation from the matter of Advertisement Complaint Reference 54/10.*

### **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 Webpage and the Product Advertised**

*We have provided a screenshot of the relevant webpage and a screenshot of the main page of the Donut King website with a link to the relevant page. We note that there was no banner advertising*

linking to this webpage from any third party website. The Ice Age 3 toy is available as a separate purchase for \$2. The particular iced donut shown on the webpage was developed solely for the purposes of this promotion and is not generally available. Regular iced donuts are available for sale for \$2 each. 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”.

We note that the Complainant appears to assess the contents of the webpage based on the same standards as the television commercial of 54/10.

The ASB noted in Case Report 29/09 (Domino’s Pizza website): “The Board also considered that the website has a more restricted viewing audience than television ...”

The webpage content must therefore be assessed in the context of such content appearing on a webpage and cannot be assessed on the same basis as a television commercial.

Particular to website advertising is the fact that it is a form of “pull marketing”. A customer must visit [www.donutking.com.au](http://www.donutking.com.au) in order to see the materials on the webpage. Unlike television advertising or even banner advertising on third party websites, readers are not given the information without the reader first making a request for such information.

For this reason, an assessment of whether or not the webpage content was “directed primarily at Children” must not only focus on the “theme, visuals and language” but also the motivation for readers to visit the website to begin with.

We believe that visitors of the [www.donutking.com.au](http://www.donutking.com.au) website primarily fall into three categories:

1. Existing Donut King Franchisees
2. Potential Donut King Franchisees
3. Customers interested in finding out more information about products sold at Donut King

We believe that the vast majority of [www.donutking.com.au](http://www.donutking.com.au) visitors in the above categories are aged over 14 (the threshold age for “children” under the Code). While there is a “kids corner” section on the [www.donutking.com.au](http://www.donutking.com.au) website, we note that the introduction of the “kids corner” page states: “Our stores, staff and products all live and breathe fun. Why not keep the child alive in you, by playing in our kids corner.” The kids corner section is designed for adults to print colouring pages and word search activities for their children.

We also note that the information was sent by email to “Donut King Club Members” – those who had registered to receive such information. Out of 3225 members who supplied birthday information (an optional field in the registration process), only 281 members (8.7%) would have been aged 14 or under as at 1 January 2010 (ie born on or after 1 January 1995).

We therefore submit that information on the [www.donutking.com.au](http://www.donutking.com.au) website is targeted at adults aged over 14 years old. The information about toys on the Donut King website only enables adults to make an informed decision about whether or not to purchase such products for their children.

In any event, given that the website is a form of “pull marketing”, information published on the [www.donutking.com.au](http://www.donutking.com.au) website was developed on the presumption that the majority of visitors to the website would already be interested in Donut King products. We therefore believe that website information does not have the same effect as television advertisements in creating an impulsive

*purchasing reaction.*

*For the above reasons, we do not agree that Section 3 of the Code applies to the website materials.*

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

***“Premium” offer – Clause 3.6 of the Code***

*We refer to our response to this issue in our response to Advertisement Complaint Reference 54/10.*

*We also note the rationale behind the prohibition against offering “Premiums” in food advertising to children which is the risk that children are likely to be more interested in the toy than the food product being advertised.*

*As mentioned above, the website is a form of “pull marketing”. Visitors to the website are most likely already interested in Donut King products, thereby reducing the risk that visitors will be disproportionately interested in the toy offer over the 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 webpage content not being targeted at children and dispute the Complainant’s assertions. We also refer to our response to Advertisement Complaint Reference 54/10.*

***“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.*

*We refer to our response to Advertisement Complaint Reference 54/10. 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 noted the complainant's request for clarification on the status of the AANA Food and Beverages Code Practice Note. The Board noted that the Practice Note does apply to the Board's consideration of matters under the Food and Beverages Code.

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 noted the advertiser's assertion that the website is not directed to children and would have a low rate of child visits. The Board considered the look and theme of the advertisement. The Board considered that the theme, visuals and language are all related to a movie that is directed to children, and that the website's images of toys and characters from that movie are attractive to and, in the Board's view, directed to children. Regardless of the number of children that may actually have seen the website, the Board considered that the website content around the Ice Age 3 promotion is directed to children.*

The Board then considered whether the advertised product is 'goods...which are targeted toward and

have principal appeal to children.' The Board considered that the donut, small drink and toy package is directed to children and would have principal appeal to children, even if some adults may also be interested in the product. 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 noted that the relevant criteria for the advertisement being considered under the Food and Beverages Code is slightly differently worded, and considered that, despite slight wording differences, the definition is the same.

As the advertising or marketing material is directed to children and is for products of principal appeal to children, the Board determined that the material is within the scope of the Children's Code and Part 3 of the Food and Beverages Code.

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 and sections 2.1, 2.2(a), 2.7 and 2.12 of the Children's 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 the Advertising or Marketing Communication with an accurate presentation of all information, including any references to nutritional values or health benefits."*

The Board noted the 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 or of section 2.2(a) of the Children's 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 and section 2.7(b) of the Children's 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 considered whether the advertisement depicted a premium. Under the Children's Code premium is defined as 'anything offered free or at a reduced price and which is conditional upon the purchase of a regular product.' The Board noted that the Food and Beverages Code provides a slightly different definition '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 considered that despite the slight wording difference the definition has the same effect.

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. The Board noted that in the Internet advertisement (in contrast to the television promotion) the toy is described as being 'FREE'. The Board noted that this offer meets the requirements of the first element of the definition of Premium.

The Board noted that the second element of the definition of premium is that obtaining the free product must be conditional upon the purchase of a **regular** product. The Board noted the advertiser's assertion that the donut product and mini fruit freeze are not regular Children's products available for purchase at Donut King. The Board determined that the toy does not meet the second aspect of the 'premium' requirement because the products it is provided with are not products regularly available at Donut King. The Board determined 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.

However the Board considered, and wished it recorded, that were the promotion within the definition of a premium the toy would not be considered an integral element of the food and beverage product it is sold in conjunction with and that the prominence of the toy in the advertising would breach section 3.6 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.

The Board considered clause 2.8 of the Children's Code which requires that: 'Prices, if mentioned in advertising or marketing communications to children, must be accurately presented in a way which can be clearly understood by children and not minimised by words such as 'only' or 'just'. The Board noted that the advertisement clearly describes the price of the food as 'only \$4.95' in a number of places and that the use of 'only' in conjunction with the price is explicitly prohibited by the Children's Code. The Board determined that the advertisement breached section 2.8 of the Children's Code.

The Board noted that, when invited to respond to complaints, advertisers are asked to ensure that they address all issues raised by the Codes and not restrict themselves to the issues raised by complainants. The Board noted that the advertisement did not breach the Codes on any of the grounds put forward by the complainant.

Finding that the advertisement breached the Children's Code, the Board upheld the complaint.

## **ADVERTISERS'S RESPONSE TO THE DETERMINATION**

Comments which the advertiser made in response to the determination regarding this advertisement

included the following:

*We refer to your email of 12 March 2010 to Ms Tracey Catterall of our office with reference to Advertisement Complaint Reference 55/10 stating that the complaint had been upheld by the Advertising Standards Bureau (“ASB”).*

*We advise that the website advertisement in question was removed from the Donut King website on 31 January 2010. We note that all of the grounds upon which the Complaint was submitted by the Complainant were dismissed by the ASB. The Complaint was upheld only on the basis of Section 2.8 of the AANA Code for Advertising & Marketing Communications to Children (“Children’s Code”) in relation to the use of the word “only” in connection with the advertised price of the offer.*

*We accept the ASB’s decision in relation to the presentation of pricing in the advertisement.*

### **Definition of “Advertising or Marketing communications to children”**

*Notwithstanding the above, we feel that it is important to comment in relation to the ASB’s finding that the material does in fact constitute “Advertising or Marketing communications to children” under the Children’s Code, especially given that this decision represents the first instance in which the ASB has determined that materials on an Advertiser’s own website could in fact constitute “Advertising or Marketing communications to children”.*

*Without questioning the authority of the ASB or the process through which the current determination was reached, we note that the following comment by the ASB in the determination is of particular concern:*

*“Regardless of the number of children that may actually have seen the website, the Board considered that the website content around the Ice Age 3 promotion is directed to children.”*

*We submit for the ASB’s further consideration that in order for an advertisement to be “directed at children”, the media in which the advertisement is found is intrinsically relevant. Regardless of the “theme, visuals and language” of an advertisement, unless children are likely to actually see the advertisement, we do not believe it is reasonable to presume that the advertisement is directed at children.*

*Should the ASB’s position be maintained, there is a risk that the application of the Children’s Code is likely to go beyond the purpose for which it was originally designed and impose disproportionate restrictions on advertisers, particularly in instances where children’s products are advertised to parents or adult guardians.*

### **Changes to Donut King Advertising Policy**

*Notwithstanding the above comments, we again confirm that the website advertisement in question was removed on 31 January 2010 and will not be used again.*

*We reiterate our comments in our response to Complaint Reference 54/10 that Donut King and its parent company, Retail Food Group Limited (“RFG”), take its legal obligations and corporate responsibilities very seriously.*

*It was never the intention of Donut King or RFG to use its website as a means of distributing advertising materials to children. In fact, as evidenced by the ASB’s determination in Complaint Reference 54/10, Donut King and RFG are aware of and mindful of our obligations in relation to advertising to children. The content of the website materials were different to the content of our television advertisements for the simple reason that we did not intend for or believe that our website materials are targeted at children.*

*We respect the authority and determination of the ASB and note that all future website materials will be reviewed by our internal legal department for compliance with the Children’s Code on the basis that such materials could potentially be considered “Advertising or Marketing communications to children”.*