



CASE REPORT

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| 1. Complaint reference number | 573/09 |
| 2. Advertiser | Hungry Jacks |
| 3. Product | Food & beverage |
| 4. Type of advertisement | TV |
| 5. Nature of complaint | QSR – Advertising and Marketing Message |
| 6. Date of determination | Wednesday, 9 December 2009 |
| 7. DETERMINATION | Upheld – discontinued or modified |

DESCRIPTION OF THE ADVERTISEMENT

This television advertisement says "Ahoy kids! Sponge Bob square pants and his bikini bottom friends, Patrick, Sandy and Squidworth are celebrating their 10th anniversary at Hungry Jacks. Buy a Hungry Jacks Kids club meal with three chicken nuggets and a Mount Franklin spring water and get an action swimming or floating SpongeBob squarepants toy ... there are four to collect. The advertisement depicts SpongeBob Squarepants coming through a door of a pineapple and then shows his friends, Patrick, Sandy and Squidworth. They are all depicted underwater and have happy smiles on their face (celebrating). The advertisement shows the Kids club meal and an image of three chicken nuggets and the spring water and then cuts to the toys floating and playing about in the water.

THE COMPLAINT

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

Advertisements in breach of the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children.

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

We are writing to complain about one of Hungry Jack's advertisement that we consider to be in breach of the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children (Initiative). The relevant advertisement, broadcast on television in September 2009, is identified as follows:

1. Hungry Jack's Kids Club Meal (Sponge Bob Square Pants 10th Anniversary)

We are of the view that:

- 1. The advertisement breaches clause 4.1 of the Initiative.*
- 2. The advertisement breaches clause 4.2 of the Initiative.*
- 3. The advertisement breach clause 4.6 of the Initiative.*

1 Overview of advertisements

1.1 Hungry Jack's Kids Club Meal (Sponge Bob Square Pants 10th anniversary).

This advertisement depicts the cartoon characters Sponge Bob Square Pants, Patrick, Sandy and Squigword celebrating their 10th anniversary. The voice over states "Ahoy kids. Sponge Bob Square Pants and his bikini bottom friends, Patrick, Sandy and Squigword are celebrating their

10th anniversary at Hungry Jack 's. Buy a Kids Club Meal with three chicken nuggets and a Mount Franklin Spring Water [these foods are depicted] and get an action swimming or floating Sponge Bob Square Pants Toy. Arrrrghhh. There are four to collect so dive into Hungry Jack's to grab yours today". The four different toys are depicted swimming and floating.

2 Breaches of the Initiative

2.1 Clauses 4.1 of the Initiative- Advertising and Marketing Messaging

In our view, the above advertisement breaches clause 4.1 of the Initiative. As you know, clause 4.1 states:

'Advertising or Marketing Communications to Children for food and/or beverages must:

(a) Represent healthier choices, as determined by a defined set of Nutrition Criteria for assessing children's meals (See Appendix 1); and/or

(b) Represent a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages:

(i) healthier choices, as determined by a defined set of Nutrition Criteria for assessing children's meals (see Appendix 1); and

(ii) physical activity.

We believe that the above advertisement breaches clause 4.1 as they are 'Advertising or Marketing Communications to Children for food and/or beverage products', yet they do not meet the 'Nutrition Criteria for assessing children's meals' outlined in Appendix I to the Initiative (Nutrition Criteria).

Advertising or Marketing Communications to Children

'Advertising or Marketing Communications to Children' is defined in clause 7 of the Initiative to mean such communications which, 'having regard to the theme, visuals and language used, are directed primarily to Children and are for food and/or beverage products'. Children are defined as meaning persons under 14 years of age.

In our view, the advertisement is clearly Advertising or Marketing Communications to Children within the meaning of the Initiative as they feature children's themes (children's toys, programs and activities), visuals (cartoons and animated images) and language (tones that would attract children and words targeted at children). In particular:

- Hungry Jack's Kids Club Meal (Sponge Bob Square Pants 10th Anniversary). This cartoon based advertisement features popular characters from the popular children's television program Sponge Bob Square Pants. It features a fun voice over targeted at children inviting them into Hungry Jack's (" .. dive into Hungry Jack's to grab yours [toy] today"). It also promotes fun toys for children to collect.*

Nutrition Criteria for assessing children's meals (Appendix I to the Initiative)

The Nutrition Criteria for assessing children's meals is outlined in Appendix I to the Initiative. Only meals that meet this Nutrition Criteria may be featured in Advertising or Marketing Communications to Children.

Relevantly, for a meal to meet the Nutrition Criteria, clause 3 of Appendix I requires that the meal must not exceed maximum limits of saturated fat (OAg per IOOKJ), sugar (1.8g per IOOKJ) and sodium (650mg per serve).

While the Initiative requires Hungry Jack's (as a participant in the Initiative) to develop a Company Action Plan, it does not appear to have done so to date. 2

We believe that the meal depicted in the relevant advertisement fails to meet the Nutrition Criteria for the following reasons.

- *Hungry Jack's Kids Club Meal (Sponge Bob Square Pants 10th Anniversary).*

The meal featured in this advertisement comprises three chicken nuggets and a Mount Franklin Spring Water. According to our calculations, based upon Nutrition Information obtained from the Hungry Jack's website 3, this meal does not comply with the Nutrition Criteria as its saturated fat content is 0.62g per 100KJ. The maximum saturated fat content under the Nutrition Criteria is 0.4g per 100KJ.

Under Clause 4.1 of the Initiative, advertising to children for food and/or beverages is only permitted if the meal depicted meets the Nutrition Criteria for assessing children's meals (Appendix 1). In other words, if it cannot be determined that the food and/or beverages depicted meet the Nutrition Criteria, the advertisement cannot be determined to meet the requirements of clause 4.1.

For all of the reasons given above, we are of the view that each of the advertisement constitute Advertising or Marketing Communications to Children, for food and/or beverages that fail to meet the Nutrition Criteria, in breach of clause 4.1 of the Initiative.

2.2 Clause 4.2 of the Initiative - Popular Personalities and Licensed Characters.

In our view, the Hungry Jack's advertisement breaches clause 4.2 of the Initiative. As you know, clause 4.2 states:

'Popular Personalities or Licensed Characters must not be used in Advertising or Marketing Communications to Children/or/for food and l or beverage products, unless such Advertising Marketing Communications complies with the messaging options set out in Article 4.1 and the specific requirements of Section 22 (Promotions and Endorsements by Program Characters) of the Children's Television Standards 2005. 'Popular personalities and licensed characters' are defined under the Initiative to mean "a personality or character from a C or P program, a popular program or movie character, a non-proprietary cartoon, animated or computer generated character'.

The Hungry Jack's advertisement features "popular program" characters from Sponge Bob Square Pants. The Sponge Bob Square Pants television program is extremely popular with children in Australia and throughout the world.⁴ It is regularly broadcast on free to air television (Channel 10) and on subscription television (on the dedicated children's channel 'Nickelodeon') in Australia. Children know and love "Spongy" and his friends and are very familiar with their underwater world. The popularity of the program characters has been enhanced by the availability of program related games, toys, DVD's and other merchandise. Its popularity was also enhanced by the 'Sponge Bob Square Pants Movie' (also causing the characters to be popular movie characters within the meaning of clause 4.2 of the Initiative).

As discussed above, we believe that the advertisement constitutes an Advertising or Marketing Communication to Children and that it does not comply with the messaging options set out in Article 4. 1. As such, we are of the view that this advertisement features Popular Personalities or Licensed Characters in breach of clause 4.2 .

2,3 Clause 4,6 of the Initiative - Premium Offers

In our view, the Hungry Jack's advertisement breach clause 4,6 of the Initiative, As you know, clause 4,6 states:

'Participants must not advertise Premium Offers in any Medium directed primarily) to Children unless the reference to the Premium is merely incidental to the food and/or beverage product being advertised in accordance with the AANA Codes and Section 20 (Disclaimers and Premium Offers) of the Children's Television Standards 2005'

'Premium' is defined under the Initiative to mean anything offered free or at a reduced price and which is conditional upon the purchase of regular Children's Food or Beverage Product.

We recognise that this definition reflects the definition of a premium under the AANA Food and Beverages Code and the AANA Code for Advertising and Marketing Communications to Children, We are aware that the ASB has found that the definition of a 'premium' under these AANA Codes does not include toys in fast food meals such as Hungry Jack's Kids Club Meals,⁵ We understand

that this is based upon on the ASB's view that these toys comprise a usual part or 'integral element' of such meals as the content of these meals always includes the meal and a toy." The ASB has found that the toy is merely varied to introduce variety and provide for tie-ins to movies, In Case Report 103/05 (against Hungry Jack's) it was also considered relevant by the ASB that the toys were not available to be sold separately and had no value in themselves.

We would, however, urge the ASB to reconsider the meaning of a premium in the context of this Initiative, If, in this Initiative, the definition of premium does not include toys in children's meals clause 4,6 would appear to have no application and be superfluous, By including clause 4,6 in the Initiative, it must be presumed that it is intended to have some application and effect.

In our view, while a toy may typically be included in children's meals the toy does vary (i.e, it is not the same product) and it is not necessary to the completeness of the meal. Hungry Jack's are fast food restaurant franchises, whose businesses are selling food not toys, There is no reason why non-food or beverage products should be considered to be integral to, or necessary to the completeness of, a children's food and/or beverage product. These toys are clearly aimed at increasing 'pester power' and encouraging repeat purchasing, It is highly likely that children are influenced to pester their parents to purchase the meal due to their desire to obtain the premium rather than the product itself.

We would also note that it is our understanding that the toys available are now ordinarily sold separately upon request. These products do have their own value, They may be purchased independently OR obtained for free on condition of a meal purchase.

For all of these reasons, there is no reason to exempt toys in fast food meals from the meaning of a 'premium' simply because the meals may always include a toy of some variety.

If it is accepted that the toys in Hungry Jack's Kids Club Meals meet the definition of a premium for the purpose of clause 4.6 of the Initiative, the advertisement will only constitute a breach of clause 4.6 if the advertisement for the premium offer is in a medium directed primarily to children, and the reference to the premium is more than merely incidental to the food and/or beverage product being advertised in accordance with the AANA Codes and CTS 20 (Disclaimers and Premium Offers).

In our view, the advertisements for the premiums are contained in mediums directed primarily to children. There can be no doubt that they are contained in a medium as the definition of 'medium' in the initiative includes television.

The advertisements were broadcast during peak children's viewing times throughout September 7. The Hungry Jacks advertisement was broadcast regularly on Fox 8 during The Simpsons (G), one of the most popular programs among children on Australian television.' A number of the The Simpson's programs containing the advertisement were broadcast during the peak children's viewing times of 6pm to 8pm on weekdays, as well as Sat morning between 10 am and 11 am. OzTAM data demonstrates that on subscription television, child viewers (aged 0 to 14 years) average 100,000 between 6pm and 8pm on weekdays, and 163,000 on Saturday mornings between 10 am and 11 am.

We also consider it relevant that, as discussed above, these advertisements featuring the premiums are directed primarily to children.

As discussed above, Hungry Jack's are yet to release a Company Action Plan.

We also believe that the premiums in the advertisement were featured in a manner more than incidental to the food and beverage product being advertised, in accordance with the AANA Codes and CTS 20 (now CTS 33 under the revised Code).

The CTS only restricts the advertising of premium offers if the advertising stimulates unreasonable expectations of the product, that is when the promotion of the premium offer causes a child to be confused about what is the main product advertised and what is the premium. 12 Under the AANA Food and Beverages Code Practice Note, only advertisements that give undue prominence to a premium, by way of making the premium the dominant feature or otherwise occupying half the advertisement, are prohibited.

We are of the view that the advertisements are featured in a manner more than incidental to the food and beverage products being advertised for the following reasons:

• *Hungry Jack's Kids Club Meal- Sponge Bob Square Pants 10th Anniversary*

In this advertisement the available toys (and the characters on which they are based) are clearly the dominant feature of the advertisement and occupy more than half the advertisement. Children are likely to be confused about whether the main product advertised is the free toys and associated Sponge Bob Square Pants 10th Anniversary or the food and beverage product. Children are likely to be significantly more attracted to the component of the advertisement promoting the toys than the component advertising the food and beverage products.

3 Action requested by the ASB

For all of the reasons identified above, we request that the ASB consider whether:

- 1. The advertisement identified above breach clause 4.1 of the Initiative;*
- 2. The advertisement breaches clause 4.2 of the Initiative;*
- 3. The advertisement breach 4.6 of the Initiative.*

THE ADVERTISER'S RESPONSE

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

Thank you for your letter detailing the complaint about one of our recent Television Commercials for the Spongebob Squarepants Kids Meal.

Hungry Jack's takes its corporate responsibilities very seriously, particularly when it comes to advertising to children.

We cannot deny that the meal promoted in this TVC did not fully comply with the Nutrition guidelines as stated in the Initiative, however as the initiative came into effect during the production of this activity we did make last minute changes to the meal advertised to make it the most appropriate we could at the time. The complaint details the Saturated Fat level of the meal at .64g/100Kj whereas the guidelines set a level of .4g/100Kj. The calculation is actually .56g/100Kj which is still over the limit. We also believe that the overall nutritional details of this meal demonstrates that the meal is in fact more than appropriate in terms of standard Recommended Daily Intake calculations.

	Energy	Protein	Fat	Saturated Fat	Carbohydrates	Sugar	Sodium
Measure	571Kj	8.8g	6.5g	3.2g	10.8g	.4g	357mg
Percentage RDI	6.60%	17.60%	9.30%	13.30%	3.50%	0.40%	17.50%

We are presently finalizing a new Kids Meal combination to test early in the new year that will meet the criteria set in the initiative.

Regarding the posting of a Company Action Plan, this has been completed and was submitted to AANA for inclusion on the website on the 27th October 2009.

As you would be aware, the Kids Meals have been a standard menu item at our restaurants for over 25 years. Whilst it has undergone modifications over the years, the general content of the meal has not changed, that is a burger, fries, drink and a toy. The toys themselves change over the year to introduce some variety and this sometimes includes tie-ins to various movies or TV programmes, however, a toy has always been an integral part of the Kids Meal. It is not an incidental item or "premium". These toys are not available to be sold separately and therefore have no value in themselves.

The Kids Meals are a standard menu item available all year round and always come with some sort of toy, irrespective of any TV advertising. Through most times of the year, we have no TV advertising for our Kids Meals at all and they only appear on our menu boards in store. In fact in an average year we have only 8 weeks of Kids Meal promotion, which hardly qualifies Hungry Jack's as targeting children or being promoters of 'pester power'.

When there is a tie-in to a movie or television programme, we sometimes make a TV commercial to promote the fact that the toy available during this period with the Kids Meal is a toy with a

relationship to the programme or movie. When we do, we generally have to take some time in the commercial to explain who the characters are and their role so they can be understood as toys in their own right, however the meal being offered is also clearly displayed.

We believe that there are many issues at play today in regards to obesity, exercise and active lifestyle being equally if not more important than diet alone, it is a matter of balance. If a parent allows a child one visit to Hungry Jack's on the four occasions a year that we advertise Kids Meals to children, we believe that would be considered a part of that overall balance.

We respectfully request that this complaint be dismissed on the above grounds. As you are also aware the Television Commercial in question has not been on air for the last 9 weeks.

THE DETERMINATION

The Advertising Standards Board ('the Board') considered whether this advertisement breaches Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children (the QSR Initiative).

The Board noted that this advertisement has not been broadcast for some time prior to the complaint being received. However as the complaint raises an important issue regarding a new, industry specific, self-regulatory initiative, the Board considered it important to consider the complaint.

The Board noted that the QSR Initiative is designed to ensure that when Quick Service Restaurants advertise to children, they must include food and beverages that represent healthier choices. The Board agreed that the advertisement is directed to children having regard to the broadcast times, the product and the themes and content of the advertisement. The Board considered that the QSR Initiative would apply to this advertisement.

The Board noted that, although it did not have a Company Action Plan available at the time that the QSR Initiative formally commenced, the advertiser does now have a Company Action plan relevant for the QSR Initiative which is publicly available.

The Board noted the complainant's concern that the advertisement breaches clause 4.1 of the QSR Initiative on the basis that the advertised product (the food which was depicted in the advertisement) does not meet the nutritional criteria set out in Appendix 1 of the QSR Initiative. The Board noted the advertiser's response (which indicates that the product does not meet the nutritional criteria in the QSR Initiative) and referred to the advice of Independent Arbitrator, Dr Bruce Neal, which states:

"... this HJ advertisement is in breach of section 4.1 of the QSR Initiative. The commercial depicted a meal that includes three chicken nuggets and a Mount Franklin Water. The nutrition content of the nuggets is as follows:

'4 Pieces Nuggets: Energy 571kj; Saturated Fat 3.2 gms (0.56g/100kj); Sugar (0.4) and Sodium (357). The Saturated fat content is 0.56g/100kj, above the [QSR Initiative criteria] of 0.4g/100kj, making this commercial in breach of section 4.1 of the Initiative.'

The Board determined that the advertisement does not meet the nutrition criteria set out in Appendix 1 of the QSR Initiative and therefore, does not meet section 4.1 of the QSR Initiative.

The Board noted the complainant's concern that the advertisement breaches section 4.6 of the QSR Initiative which provides that: 'Participants must not advertise Premium offers in any Medium directed primarily to Children unless the reference to the Premium is merely incidental to the food and/or beverage product being advertised in accordance with the AANA Codes and Section 20 of the Children's Television Standards.'

The Board noted that premium is defined as 'anything offered free or at a reduced price and which is conditional upon the purchase of regular Children's Food or Beverage Product.' The Board noted that this definition is the same as the definition in the AANA Code for Advertising and Marketing to Children (the Children's Code). Consistent with previous decisions the Board considered that the toy in the Hungry Jack's Kids Meal is not a premium as a toy is an integral part of the product that is a Kids Meal. The Board noted the complainant's concern that if this approach is taken then section 4.6 of the QSR Initiative has no effect. The Board disagreed with this interpretation and noted that there are many promotions by companies where there is a product, toy or gift that is offered 'free or at a

reduced price and which is conditional upon the purchase of a regular' food product. The Board considered that section 4.6 does have effect but that it does not apply to the Kids Meal advertisement.

The Board noted that the advertisement features a licensed Character SpongeBob SquarePants. As the advertisement does not meet the requirements of Article 4.1 of the QSR Initiative, the Board determined that the advertisement also did not meet the requirements of Article 4.2 of the QSR Initiative.

The Board considered that there were no other provisions of the QSR Initiative which were relevant to this advertisement.

The Board then considered whether the advertisement complied with the Children's Code. To come within the Children's Code, the material being considered must be an "advertisement". The Children's Code defines an "Advertisement" as follows:

"matter which is published or broadcast other than via internet, direct mail, point of sale, packaging or direct distribution to individuals, in all of Australia or in a substantial section of Australia for payment or other valuable consideration and which draws the attention of the public or a segment of it to a product, service, person, organisation or line of conduct in a manner calculated to promote or oppose directly or indirectly the product, service, person, organisation or line of conduct".

The Board decided that the material in question was broadcast in all of Australia or a substantial section of Australia for valuable consideration, given that it was being broadcast on television in Australia .

The Board determined that the material draws the attention of the public or a segment of it to a "product" being a Hungry Jack's Kids Meal "in a manner calculated to promote...that product". Having concluded that the material is an "advertisement" as defined by the Children's Code, the Board then had to determine whether the advertisement is for a "Product". "Product" is defined in the Children's Code as meaning;

"goods, services and facilities which are targeted toward and have principal appeal to Children".

"Children" are defined in the Children's Code as being 14 years old or younger. The Board determined that the Hungry Jack's Kids Meal toy is a "good" targeted toward and having principal appeal to Children and accordingly is a Product.

The Board then needed to determine whether the advertisement is an "Advertisement to Children", which is defined in the Children's Code as meaning:

"Advertisements which, having regard to the theme, visuals and language used, are directed primarily to Children and are for Product".

The Board noted that having regard to the product, music, theme and visuals used, the advertisement was directed primarily towards children.

The Board noted the complainant's view that the advertisement breached clause 2.12 of the Children's Code. Clause 2.12 of the Children's Code provides that:

"Advertisements or Marketing Communications to Children which include or refer to or involve a premium

(a) should not create a false or misleading impression in the minds of children about the nature or content of the Product;

(b) should not create a false or misleading impression in the minds of children that the product advertised is the Premium rather than the Product;

(c) must make the terms of the offer clear as well as any conditions or limitations; and

(d) must not use premiums in a way that promotes irresponsible use or excessive consumption of the product."

As noted above 'Premium' is defined in section 1 of the Children's Code as: *“anything offered free or at a reduced price and which is conditional upon the purchase of a regular product.”*

The Board determined that the toys which come with the Hungry Jack's Kids Meal do not fall within the Children's Code definition of 'Premium' as they are part of the product – not something that is additional to the regular product.

The Board considered that the advertisement met all of the other requirements of the Children's Code.

The Board then considered whether this advertisement breaches section 2 of the Advertiser Code of Ethics (the "Code"). The Board considered that there were no issues under any of the sections of the Code that raised issues of concerns in relation to this advertisement.

Finding that the advertisement breached Article 4.1 and 4.2 of the QSR Initiative 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:

As indicated in the original documentation and the attached report the TVC in question has not been scheduled on air since the 15th October 2009, and will not be rescheduled at any stage in the future.

Hungry Jack's will not be requesting an independent review and we accept the Board's decision without reservation. I would like to make some comment however regarding the issue.

As we stated in our initial response we understand that the meal we promoted did not fully comply with the nutrition guidelines of the initiative however the meal did present a 'healthier choice' than meals previously included in Kids Meals and the 'healthiest' choice we had available at the time. A clear demonstration of self regulation in action.

As a reasonably large commercial enterprise, making significant changes to our products, suppliers and systems takes considerable time to develop and implement. Of paramount importance is the provision of menu items that are commercially viable and sustainable and this is proving a challenge for the entire QSR industry. We have almost completed a search of available options and researching of customer attitudes to provide meal components that will both satisfy the initiatives guidelines as well as satisfy the commercial realities of customer demands. An instore viability test will be implemented in mid January 2010 for two options that meet the requirements.