



## CASE REPORT

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| 1. Complaint reference number | 574/09  |
| 2. Advertiser                 | Nestle  |
| 3. Product                    | Food & beverage   |
| 4. Type of advertisement      | TV  |
| 5. Nature of complaint        | Food and Beverage Code – untruthful/dishonest<br>Food and Beverage Code – misleading health comparisons |
| 6. Date of determination      | Wednesday, 9 December 2009  |
| 7. DETERMINATION              | Dismissed   |

## DESCRIPTION OF THE ADVERTISEMENT

This television advertisement depicts an animated scene whereby a banana, barley and other items are shown whirling around. The advertisement cuts to a woman Sally Evans who is shown with the words Food Focus in the background. She says: "did you know that Milo is made from a range of nutritious ingredients like malted barley that helps give active bodies the energy they need. Milo is nutritious and good for the whole family ... so for a nourishing drink that is good for the whole family ... goodness to go. The advertisement shows young children at home, in the kitchen with their mother who is serving Milo in milk.

## THE COMPLAINT

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

*The advertisement specifically refers to Milo as "a healthy snack" made from "nutritious ingredients". Anyone with half a brain can read the Milo label and realise that it is 31.8 percent sugar, and the rest is simple carbohydrates. The new B Smart Milo contains trace amounts of B vitamins, whose levels aren't even worthy of feeding to a comatose patient, let alone a fully functioning human being with high nutritional needs.*

*This ad suggested that Milo was actually a wise choice to be making for giving to children as a snack. We all know that coco pops now advertises itself as a "treat" rather than a nutritious product, Milo should be doing the same.*

*The Australian public (I should sincerely hope) are not idiots, and just because some bimbo says that Milo is "a nutritious snack" doesn't make it so.*

*This ad is HIGHLY misleading, and impressionable people will take this advertisement as an open invitation to consume Milo in excess, which could have seriously detrimental long term effects.*

*I briefly draw your attention to AANA Food and Beverage Advertising and Marketing Communication Code. (Taken directly from your website)*

*"2.4 Advertising or Marketing Communications for Food or Beverage Products which include nutritional or health-related comparisons shall be represented in a non-misleading and non-deceptive manner clearly understandable by an Average Consumer."*

*It is my opinion that this advertisement has violated this particular code as the nutritional benefits of Milo described in the ad are misleading and deceptive. The ad implies that Milo is a nutritious snack, yet a quick glance at the label confirms otherwise.*

*I am not against Milo - I love the stuff, but the ad makes out that it is a healthy product. It states*

*that there are many healthy products in Milo, but only names malted barley as one of these healthy products. It does not try and name any other of the 'Many' healthy products contained in Milo, and when I checked the ingredients list, I can't find any others. In fact it doesn't have 'Malted Barley' in it - only 'Extract of malted barley' The other ingredients are sugar & other products in small quantities. I believe that they are trying to pass Milo off as a health food, when it clearly isn't.*

## **THE ADVERTISER'S RESPONSE**

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

*In making its submission, Nestle has considered the AANA Advertiser Code of Ethics, the AANA Code for Advertising and Marketing Communications to Children and the AANA Food and Beverages Marketing and Communications Code (Food Code ) (Codes). Although the Advertisement is an infomercial -style promotion and is not directed at children, Nestle considers that the Advertisement complies in all respects with the letter and spirit of these Codes.*

### **The Complaints**

*Complaint that MILO is represented as a "healthy product"*

*At a broad level, both complaints allege that the Advertisement is untruthful and misleading in that MILO is represented as a "healthy product" or a "healthy snack" when, in the complainant's view, it is not.*

*In this respect, the Advertisement makes the following claims:*

- *MILO is made from a range of nutritious ingredients like malted barley that helps to give active bodies energy.*
- *MILO is nutritious and it's good for the whole family.*
- *MILO is a nourishing drink that everyone can enjoy.*

*These claims can be seen in their full context in the attached Advertisement and script. Nestle notes that the actual claims made in the Advertisement differ in a number of respects from the claims attributed to the Advertisement in the Complaints.*

*Nestle submits that the claims made in the Advertisement are true, and are an entirely reasonable representation to make about Milo given its ingredients and the nutritional benefits a glass of MILO can bring to all consumers. MILO is a nutritious, nourishing drink categorised as a 'formulated supplementary food' under the Food Standards Code. More specifically:*

- *A glass of MILO provides a nourishing source of low GI energy. The energy in MILO comes predominantly from carbohydrates derived from a range of ingredients including malted barley. The fact that MILO is a source of energy and that this is one of the product's nutritional benefits is specifically referenced in the Advertisement.*
- *MILO also contains 6 essential vitamins and minerals: that assist the body to unlock energy, including B vitamins; Vitamin C that also assists with iron absorption; iron that assists with the carrying of oxygen around the body; and calcium and magnesium important for strong bones and teeth. MILO also contains vitamin A which assists in maintaining healthy eyesight.*
- *In relation to Vitamins B1, C, calcium and iron, a glass of MILO with reduced fat or skim milk provides 50% of the recommended daily intake (RDI). In relation to Vitamin A a glass of MILO with reduced fat milk provides 18% of the RDI of that vitamin, 19% of the RDI for magnesium, and 39% of the RDI for Vitamin B2.*
- *A glass of MILO is rich in protein providing 21% of the daily intake (based on an average adult diet and reduced fat milk), which assists muscle growth and development. In addition, the health and nutritional benefits of dairy consumption are well recognised, particularly for children and the elderly. Dairy intake (which includes milk) is in fact essential for healthy development, and Nestle considers that MILO is a good and nutritious way of assisting children to have a proportion of their recommended dairy intake.*

*Nestle also notes that in the 2007 Australian National Children's Nutrition and Physical Activity*

Survey (prepared by Commonwealth Scientific Industrial Research Organisation (CSIRO) Preventive Health National Research Flagship, and the University of South Australia), the dietary intake of two micro nutrients that were shown to be inadequate were magnesium and calcium. As set out above, MILO contains significant quantities of both of these micro nutrients and on this basis alone provides a valuable contribution to the diet of its predominant consumer group, namely adolescent children.

To put this in context, Nestle has conducted its own internal comparison of the nutrient value of two different products often added to milk: MILO and a banana (often used to make a banana smoothie). Nestle is not for one moment advocating that MILO should be consumed in place of fruit such as a banana; MILO is a processed product and therefore does not contain certain benefits available in natural whole food (such as phytochemicals), nor does it provide for example the dietary fibre that a banana provides. Nestle is careful not to provide such comparative information to consumers lest it be misinterpreted as an attempt to favour a Nestle product over a piece of fresh fruit. However by providing a frame of reference for a nutrient comparison, it assists in illustrating the nutritional benefits that MILO can in fact provide as part of a balanced diet.

The comparison is set out in the table below, using a 100g banana and nutrient calculations from the FSANZ Nutritional Database (NUTTAB 2006), and a standard serve size of MILO powder without milk.

<b>Banana (100g)</b>	<b>MILO 20g serve</b>
378kJ (90 Cal)	350kJ (84Cal)
1.7g protein	2.4g protein
0.1g fat	2g fat
19.8g carbohydrates	12.9g carbohydrates
16.9g sugars	9.3g sugars
2.7g fibre	1.5g fibre
0.5mg calcium	6mg iron
5mg calcium	160mg calcium
23mg magnesium	36mg magnesium
11ug	110ug vitamin A
0.05mg vitamin B1	0.5mg vitamin B1
0.11mg vitamin B2	0.3mg vitamin B2
12mg vitamin C	19mg vitamin C

Again, Nestle's purpose in presenting this information is not to present MILO as comparative to, or a viable alternative to, a banana. The products and their place in a balanced diet are clearly different. Nestle presents the table simply to illustrate the type and quantity of nutrients in MILO compared to another food commonly regarded as nutritious, including in respect of a nutrient such as sugar which is highlighted in both complaints, to assist in an assessment of MILO's nutritional value.

#### *Complaint that the Advertisement encourages excess consumption*

One complainant alleges that "impressionable people will take this advertisement as an open invitation to consume MILO in excess, which could have seriously detrimental long term effects". In Nestle's submission, this is not a reasonable interpretation of the Advertisement. The Advertisement simply states that MILO is a nourishing drink that everyone can enjoy, and shows a common consumption moment for the product for children after school. The nutritional value of food is about balance, moderation and variety. The over-consumption of any food, even water, has the potential to adversely affect the health of consumers, and in Nestle's view consumers are aware of this. There is nothing in the Advertisement which undermines this consumer understanding or which encourages consumers to over-consume MILO, and Nestle can see no basis for this aspect of the complaint.

#### **Summary**

Nestle prides itself on selling a product which is nutritious and contributes to a balanced diet. MILO has been fulfilling this function in Australia since 1934. Nestle strongly rejects the allegations made in the Complaints. In light of the information set out above, Nestle considers that

*the Advertisement is an honest , truthful and reasonable representation of the MILO product. MILO is nutritious as the Advertisement claims. MILO is made from a range of nutritious ingredient s, and provides a nourishing drink that everyone can enjoy. The Advertisement is not misleading, deceptive or untruthful in any way and is compliant with the Codes.*

## **THE DETERMINATION**

The Advertising Standards Board (“Board”) considered whether this advertisement breaches Section 2 of the Advertiser Code of Ethics (the “Code”) and the Food & Beverages Advertising & Marketing Communications Code ("the F & B Code").

The Board noted the complainant's concerns that the advertisement was misleading and implies that Milo is a nutritious snack.

The Board noted the advertiser's response and viewed the advertisement.

The Board considered whether the advertisement was in breach of section 2.1 of the F & B Code. Section 2.1 of the F & B 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 that 'prevailing community standards' means the community standards determined by the Advertising Standards Board as those prevailing at the relevant time, and based on research carried out on behalf of the Advertising Standards Board as it sees fit, in relation to the advertising or marketing of food or beverage products taking into account at a minimum the requirements of the Australia New Zealand Food Standards Code, the Australian Dietary Guidelines as defined by the National Health and Medical Research Council and the National Physical Activity Guidelines as published by the Federal Government of Australia.'

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

### Section 2.1

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

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

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

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

Some complaints made under this Code that the Board is better able to determine under the broader aspects of the AANA Code of Ethics will be considered under that Code e.g. complaints about matters such as ‘taste and decency’, language, sex and violence).

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

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

The Board noted the response from the Advertiser and the information provided about the nutritional profile and content of the product. The Board noted that the only statements made about the nutritional quality of the product are that the product is: nutritious, made from a range of nutritious ingredients, helps to give active bodies energy, good for the whole family, and goodness to go. The Board noted that 'nutritious' simply means that the product contains nutrients and technically, does not mean that a product is a health food. The Board considered that the implication in this advertisement is that the product contains a range of nutrients.

The Board considered that reasonable members of the community would consider that the message from the advertisement is that Milo is a product with nutrients that is suitable for all members of the family. The Board considered that the advertisement is not promoting excessive consumption of the product by referring to the product being suitable for consumption 'at any time of the day or night' and that it does depict consumption of the product at a time that it is commonly consumed - by children after school.

The Board noted that the product is labelled as a 'formulated supplementary food' and that such foods, under the Australia New Zealand Food Standards Code are: 'a food specifically designed as a supplement to a normal diet to address situations where intakes of energy and nutrients may not be adequate to meet an individual's requirements.'

The Board noted that the product is clearly a high energy product with nutrients.

The Board considered that the advertisement does not suggest that MILO should be chosen in favour of other foods but instead represents a snack suitable for all members of the family, in particular those with an active lifestyle.

On the basis of the information provided by the advertiser as to the composition of the product, and the Board's own assessment of the likely messages to be taken from the advertisement, the Board considered that the advertisement did not present any information in a manner that is not truthful or misleading. The Board agreed that the advertisement does not breach section 2.1 of the F & B code.

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