



Ad Standards Community Panel
PO Box 5110, Braddon ACT 2612
P (02) 6173 1500 | F (02) 6262 9833

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Ad Standards Limited
ACN 084 452 666

Case Report

1. Case Number :	0086-22
2. Advertiser :	Heart Attacks Diner
3. Product :	Food/Bev Venue
4. Type of Advertisement/Media :	Internet
5. Date of Determination	27-Apr-2022
6. DETERMINATION :	Upheld - Modified or Discontinued

ISSUES RAISED

AANA Food and Beverages Code\2.1 Not misleading or deceptive
AANA Food and Beverages Code\2.2 Healthy Lifestyle/Excess Consumption
AANA Food and Beverages Code\2.3 Health/Nutrition Claims

DESCRIPTION OF ADVERTISEMENT

This website advertisement features an image of a large stacked burger and the text, "We are a new franchise Diner that serves up Monster burgers, country fried chicken, heartburn wings, cholesterol dogs, breakfast burgers, loaded fries, shakes, thickshakes, crazy shakes, and diabetic desserts."

Additional TikTok videos and images are displayed under the text.

THE COMPLAINT

Comments which the complainant/s made regarding this advertisement included the following:

Subject: false / misleading advertisement material featured on the Heart Attack's Diner website

For your reference, the following information has been gathered from Diabetes Australia and pertains to advertisement published on the Heart Attack's Diner website: Diabetes is a serious complex condition which can affect the entire body. Diabetes requires daily self care and if complications develop, diabetes can have a significant impact on quality of life and can reduce life expectancy.



There are different types of diabetes; all types are complex and serious. The three main types of diabetes are type 1, type 2 and gestational diabetes.

Type 1 diabetes is an autoimmune condition in which the immune system is activated to destroy the cells in the pancreas which produce insulin. We do not know what causes this autoimmune reaction. Type 1 diabetes is not linked to modifiable lifestyle factors. There is no cure and it cannot be prevented.

Type 2 diabetes is a condition in which the body becomes resistant to the normal effects of insulin and gradually loses the capacity to produce enough insulin in the pancreas. The condition has strong genetic and family-related (non-modifiable) risk factors and is also often associated with modifiable lifestyle risk factors.

Gestational diabetes mellitus is a form of diabetes that occurs during pregnancy. Most women will no longer have diabetes after the baby is born. However, some women will continue to have high blood glucose levels after delivery. It is diagnosed when higher than normal blood glucose levels first appear during pregnancy.

As such, Heart Attack's Diner's advertisement of "diabetic desserts" is highly confusing and offensive.

Given that diabetes is a medical condition, it is unclear whether the advertisement is:
- Suggesting that the desserts are formulated for people suffering from diabetes. I believe this violates Section 2.3 of the Australian Association of National Advertisers Food and Beverages Code.

- Suggesting that the dessert will induce Type 1 diabetes. Given the information provided above, this is both factually incorrect and insensitive. I believe this violates Section 2.1 of the Australian Association of National Advertisers Food and Beverage Code.

- Suggesting that the dessert will induce Type 2 diabetes. I believe this violates Section 2.2 of the Australian Association of National Advertisers Food and Beverage Code.

- Suggesting that the dessert will induce gestational diabetes. I believe this violates Section 2.1 and 2.2 of the Australian Association of National Advertisers Food and Beverages Code.

I also believe the ethos of the business and associated advertisement does not align with Section 2.2 of the Australian Association of National Advertisers Food and Beverages Code.

THE ADVERTISER'S RESPONSE

Comments which the advertiser made in response to the complainant/s regarding this advertisement include the following:

Advertiser did not provide a response.



THE DETERMINATION

The Ad Standards Community Panel (the Panel) considered whether this advertisement breaches the AANA Food and Beverages Advertising and Marketing Communications Code (the Food Code).

The Panel noted the complainant's concerns that the advertisement is unclear and potentially misleading regarding the "diabetic desserts" listed.

The Panel viewed the advertisement and noted the advertiser did not provide a response.

Is the advertisement for a food or beverage product?

The Panel noted that the Food Code defines food or beverage product as: "any food or beverage products other than alcoholic beverages as defined in and subject to regulation by the Alcohol Beverages Advertising Code."

The Panel noted that this advertisement was for a food venue and the food available there and that the Food Code did apply to the advertisement.

Section 2.1 Advertising for Food or Beverage Products must not be misleading or deceptive or likely to mislead or deceive.

The Panel Noted the Practice Note to this section of the Food Code which includes:

"In determining whether advertising for food or beverage products is misleading or deceptive or likely to mislead or deceive, the Community Panel will consider the likely audience for the advertising, including whether the advertisement is directed at the public at large or a more targeted audience. The Community Panel will consider whether or not an Average Consumer within the target audience would have been misled or deceived or likely to be misled or deceived by the advertisement."

The Panel noted the complainant's concern that the advertisement was misleading by not defining what "diabetic desserts" referred to. For example, the advertisement may mean that the desserts will induce Type 1 diabetes or gestational diabetes, or may mean that the desserts are safe for people diagnosed with diabetes to consume.

The Panel noted that the advertisement referred to "desserts" broadly, and that specific menu items were not identified.

The Panel noted the description of "monster burgers...heartburn wings, cholesterol dogs...crazy shakes". The Panel noted the name of the business, Heart Attack Diner. The Panel considered that most viewers of the advertisement would interpret the



advertisement as being highly exaggerated and not intended to be taken seriously, and would not find that the advertiser is making a health statement or suggesting that a single meal at its establishment will cause a disease.

The Panel considered that any person who does have a health condition such as diabetes would likely be aware of their own limitations and would be highly unlikely to think that a business advertising such products also has diabetes-friendly dessert options.

Overall the Panel considered that the advertisement was not designed to be misleading or deceptive and was communicated in a manner appropriate to the understanding of the target audience.

Section 2.1 Conclusion

The Panel determined that the advertisement did not breach Section 2.1 of the Food Code.

Section 2.2: Advertising or Marketing Communication for Food or Beverage Products shall not undermine the importance of healthy or active lifestyles nor the promotion of healthy balanced diets or encourage what would reasonably be considered as excess consumption through the representation of product/s or portion sizes disproportionate to the setting/s portrayed or by means otherwise regarded as contrary to Prevailing Community Standards.

The Panel noted the Practice Note for the Food Code states:

“In testing whether an advertising or marketing communication encourages excess consumption through representation of products or portion sizes disproportionate to the setting portrayed, or by any other means contrary to the Australian Dietary Guidelines, the Community Panel will consider whether members of the community in the target audience would most likely take a message encouraging excess consumption. The Community Panel will also consider the age of the person shown in association with the product, recognising for example, that a teenage male may often consume more than an older male or younger child and this may not be a representation that encourages excess consumption in the situation portrayed.”

The Panel noted the complainant’s concern that the ethos of the business and associated advertisement does not align with Section 2.2 of the Australian Association of National Advertisers Food and Beverages Code. The Panel noted that its role is to consider the content of individual advertisements against the provisions of the Code and that the values or principles of the business broadly are outside its remit.

The Panel noted that the image depicts a burger with approximately 8 beef patties and other fillings.



The Panel first considered who the target audience of the advertisement was. The Panel noted that the advertisement was part of a website promoting the business, and therefore the target audience would be past and potential future customers of the restaurant.

The minority of the Panel noted that customers of the venue would likely be familiar with the style of food sold by the business. The minority considered that the advertisement does not make any claims that the advertised meal is healthy, instead it is promoting an option for an exceptional eating experience which would be difficult for many people to complete.

The minority of the Panel considered that the burger is depicted by itself, without any people in the image. The minority considered that there is no suggestion that the burger is intended to be a single serve for a single person.

The minority of the Panel considered that the target audience would most likely understand the message that this is a once-off eating experience which is outside of normal dietary habits and would not see it as a message condoning excessive consumption in general.

The majority of the Panel considered that burgers are generally a meal consumed by a single person in one sitting.

The majority noted that there is no disclaimer on the image to suggest that the burger is intended for multiple people, or that the meal depicted is not recommended for regular consumption or is otherwise outside normal dietary habits.

The majority of the Panel considered that the promotion of a very large burger without any other messaging or disclaimer is encouraging excess consumption.

Section 2.2 conclusion

The Panel determined that the advertisement did encourage what would reasonably be considered as excess consumption through the representation of portion sizes disproportionate to the setting portrayed contrary to Prevailing Community Standards. On this basis, the Panel determined that the advertisement did breach Section 2.2 of the Food Code.

Section 2.3: Advertising for Food or Beverage Products that include what an Average Consumer might interpret as a Health Claim or Nutrition Content Claim must be supportable by appropriate scientific evidence meeting the requirements of the Australian Food Standards Code.

The AANA Food Code provides the following definitions:

- Average Consumer means a regular adult shopper
- Health Claim has the same meaning as defined in the Australian Food Standards Code.



- Nutrition Content Claim has the same meaning as defined in the Australian Food Standards Code.

The Australian Food Standards Code provides the following definitions:

- Health claim means a claim which states, suggests or implies that a food or a property of food has, or may have, a health effect.
- Health effect means an effect on the human body, including an effect on one or more of the following:
 - (a) a biochemical process or outcome;
 - (b) a physiological process or outcome;
 - (c) a functional process or outcome;
 - (d) growth and development;
 - (e) physical performance;
 - (f) mental performance;
 - (g) a disease, disorder or condition.
- Nutrition content claim means a claim that:
 - (a) is about:
 - (i) the presence or absence of any of the following:
 - (A) *biologically active substance;
 - (B) *dietary fibre;
 - (C) energy;
 - (D) minerals;
 - (E) potassium;
 - (F) protein;
 - (G) *carbohydrate;
 - (H) 'fat',
 - (I) the components of any one of protein, carbohydrate or ' fat',
 - (J) *salt;
 - (K) sodium;
 - (L) vitamins; or
 - (ii) *glycaemic index or glycaemic load; and
 - (b) does not refer to the presence or absence of alcohol; and
 - (c) is not a *health claim.

The Panel considered that the inclusion of “diabetic desserts” in the advertisement did not relate to a specific product and that a health claim or nutrition content claim cannot be made about “desserts” broadly.

The Panel noted that Section 1.2.7 of the Australian Food Standards Code states:

1.2.7—8 Claims not to be therapeutic in nature

A claim must not:

- (a) refer to the prevention, diagnosis, cure or alleviation of a disease, disorder or condition; or



- (b) compare a food with a good that is:
 - (i) represented in any way to be for therapeutic use; or
 - (ii) likely to be taken to be for therapeutic use, whether because of the way in which the good is presented or for any other reason.

The Panel noted that it had determined that the reference to “diabetic desserts” was not specific enough to be considered a claim. However, the Panel considered that advertisers should be aware that there are rules around referring to medical conditions and that, even if used in a humorous or satirical manner, such references are prohibited if considered to meet the definition of a health or nutrition claim.

Section 2.3 Conclusion

The Panel determined that the advertisement did not breach Section 2.3 of the Food Code.

Conclusion

Finding that the advertisement did breach Section 2.2 of the Food Code the Panel upheld the complaint.

THE ADVERTISER’S RESPONSE TO DETERMINATION

We have added a disclaimer to the image to indicate that the product is not intended for regular consumption.