

## Case Report

<b>1. Case Number :</b>	<b>0152-23</b>
<b>2. Advertiser :</b>	<b>Guzman y Gomez</b>
<b>3. Product :</b>	<b>Food/Beverages</b>
<b>4. Type of Advertisement/Media :</b>	<b>Internet - Social - Facebook</b>
<b>5. Date of Decision:</b>	<b>9-Aug-2023</b>
<b>6. Decision:</b>	<b>Dismissed</b>

### ISSUES RAISED

AANA Food and Beverages Code\2.1 Not misleading or deceptive  
AANA Food and Beverages Code\3.1 Must not target children

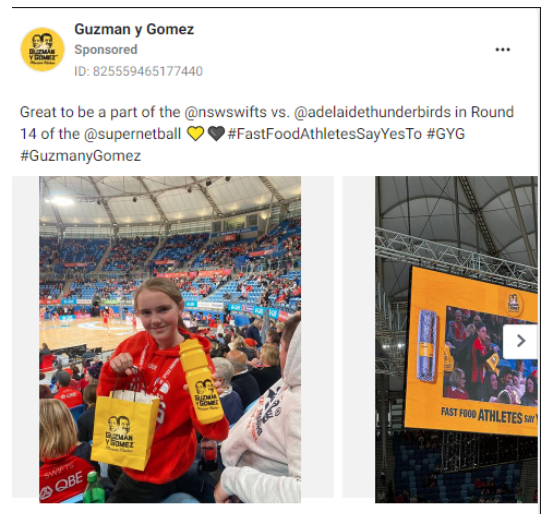
### DESCRIPTION OF ADVERTISEMENT

This sponsored Facebook advertisement features the caption, 'Great to be a part of the @nswswifts vs. @adelaidethunderbirds in Round 14 of the @supernetball.

#FastFoodAthletesSayYesTo #GYG

#GuzmanyGomez' and contains three photos:

- a teenage girl holding a Guzman y Gomez branded drink bottle and bag;
- the live screen at Ken Rosewall Arena, which features a woman holding a Guzman y Gomez bag, with a border featuring the Guzman y Gomez logo, Guzman y Gomez wrapped burritos and the expression, 'Fast Food Athletes Say Yes To'
- a sign stating "Fast Food Athletes Say Yes To" bordering the netball court at Ken Rosewall Arena.



### THE COMPLAINT

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

*On 17 June 2023, Guzman Y Gomez posted an advertisement on its Facebook page with a caption claiming that Guzman Y Gomez is the fast-food "athletes say yes to". This is potentially misleading as children and parents in seeing the post may assume that athletes endorse and consume Guzman Y Gomez.*

*The above example violates the AANA Food and Beverage Code Section 2.1 which states: Advertising for Food or Beverage Products must not be misleading or deceptive or likely to mislead or deceive.*

*Under the Facebook caption there is a photo of a child in attendance of the match between the NSW Swifts and the Adelaide Thunderbirds. Displaying children in advertisements with statements claiming that Guzman Y Gomez is the “fast-food athletes say yes to” violates the AANA Food and Beverage Code 3.1 that stipulates: Advertising (including sponsorship advertising) of occasional food or beverage must not target children.*

## **THE ADVERTISER’S RESPONSE**

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

*We write in response to your letter dated 20 July 2023 in relation to Complaint 0152-20 (the “Complaint”) made in respect of an online Facebook advertisement for the Guzman y Gomez brand (the “Advertisement”). The Advertisement has been published on the Guzman y Gomez Facebook and Instagram pages.*

*Thank you for providing Guzman y Gomez the opportunity to respond to the Complaint. Guzman y Gomez confirms its support for the Ad Standards Community Panel and its commitment to ensuring that the marketing and advertising of Guzman y Gomez products complies with relevant laws, industry codes and initiatives.*

### *Description of Complaint*

*The complainant has raised an issue that falls within the Australian Association of National Advertisers (AANA) Food and Beverages Advertising Code (“Food and Beverages Code”). The complainant has asserted that:*

- (1) the Expression in the Advertisement, “is potentially misleading as children and parents in seeing the post may assume that athletes endorse and consume Guzman Y Gomez”, and breaches section 2.1 of the Food and Beverages Code; and*
- (2) “Displaying children in advertisements with statements claiming that Guzman Y Gomez is the “fast-food athletes say yes to” breaches section 3.1 of the Food and Beverages Code.*

*Section 2.1 of the Food and Beverages Code states that:*

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

*The practice note related to section 2.1 specifically states:*

*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.*

*Section 3.1 of the Food and Beverages Code states that:*

*3.1 Advertising (including sponsorship advertising) of Occasional Food or Beverage Products must not target Children.*

*Section 1 of the Food and Beverages Code states:*

*A. Under the Definitions section:*

*Target Children is determined by the context of the advertisement and the following three criteria:*

- 1. Nature and intended purpose of the product being promoted is principally or significantly appealing to Children;*
- 2. Presentation of the advertisement content (e.g. theme, images, colours, wording, music and language used) is principally appealing to Children;*
- 3. Expected average audience at the time or place the advertisement appears includes a significant proportion of Children.*

*B. Under the Interpretation section:*

- 1. All three criteria will be considered by the Community Panel in determining whether or not advertising targets Children. The weighting given by the Community Panel to each of the three criteria will be determined on a case-by-case basis.*
- 2. In relation to the third criteria, measures to determine if Children are likely to be a 'significant proportion' of the expected average audience may include one or a combination of the following:*
  - a. Where data exists, 25% or more of the predicted audience will be Children. In relation to outdoor advertising, if across a campaign the data shows a predicted audience with less than 25% Children, and there is a Children's event or concert that is incidental to the ad placement, the audience of that incidental Children's concert or event will not be captured.*
  - b. C&P programmes.*
  - c. Programs, artists, playlists, video, movies, magazines or other content with significant appeal to Children (e.g. featuring personalities or characters popular with Children).*
  - d. Compliance with the Outdoor Media Association Placement Policy and Health & Wellbeing Policy which regulate the placement of advertising at primary and secondary schools which are locations where Children regularly and predictably gather.*
- 3. Where accurate program audience data is not available, the Community Panel may have regard to other factors listed above such as the program*

*content, the time or the location where the advertisement is being shown (in line with the above provision).*

*Guzman y Gomez also understands that the Community Panel will assess the Advertisement against section 2 of the AANA Code of Ethics. Guzman y Gomez have considered both the Food and Beverages Code and section 2 of the AANA Code of Ethics below.*

*In brief, Guzman y Gomez maintains that the Advertisement is not misleading or deceptive as there are a number of active sponsorship arrangements currently in place which supports the endorsement raised by the complainant, and therefore this endorsement is genuine and accurately represented. Further, while the Guzman y Gomez menu contains a broad range of products (both Occasional Food Products and non-Occasional Food Products) which appeal to a wide range of ages, Guzman y Gomez maintains that the Advertisement does not target children under the age of 15 (“Children”) – the products being promoted are not principally or significantly appealing to Children, the Advertisement is not presented in a way that is principally appealing to Children and the Advertisement is not broadcast in any media in which Children are a significant proportion of the expected average audience. These elements have been intentionally reflected in the Advertisement to ensure it is appropriate for our target audience, being adults and specifically for this advertisement, netball match attendees. On this basis, Guzman y Gomez asserts that the Advertisement does not breach section 3 of the Food and Beverages Code, nor the AANA Code of Ethics, as discussed in more depth below.*

#### *Response to Complaint*

##### *Advertisement is not misleading or deceptive*

*Guzman y Gomez is committed to complying with the Food and Beverages Code (and all other AANA Codes) and denies that the Advertisement breaches Section 2 of the Food and Beverages Code (including its subsections), primarily because the Expression is not misleading or deceptive. Guzman y Gomez are an Associate Partner of the 2023 Suncorp Super Netball Season and is also a sponsor of Netball Australia and the Origin Australian Diamonds (the Australian national netball team) – an official announcement of the partnership can be found on the Netball Australia website (<https://netball.com.au/news/guzman-y-gomez-partners-netball-australia>). The Advertisement posted to Facebook is clearly identified as a sponsorship advertisement by the use of the ‘Sponsored’ text as part of Facebook’s sponsorship feature, and the Advertisement posted to Instagram clearly tags the Super Netball Instagram account and shows the ‘live screen’ featuring the Guzman y Gomez logo which clearly indicates a sponsorship arrangement and that this is an advertisement related to the sponsorship arrangement with Super Netball.*

*The complainant’s assertion that the Expression “is potentially misleading as children and parents in seeing the post may assume that athletes endorse and consume*

*Guzman Y Gomez” is incorrect, as athletes do, in fact, endorse and consume Guzman y Gomez product, given the various netball partnerships currently in effect. The official announcement (as linked above) shows an image of three Australian netball players eating Guzman y Gomez products. On this basis, it is a verifiable fact that athletes do endorse and consume Guzman y Gomez products.*

*Advertisement does not target Children*

*Guzman y Gomez denies that the Advertisement breaches Section 3.1 of the Food Code, primarily because the Advertisement does not target children.*

*Is the nature and intended purpose of the product principally or significantly appealing to children?*

*The nature and intended purpose of Guzman y Gomez products is not principally appealing to children. Guzman y Gomez products may be appealing to some children, however, would be equally if not more appealing to adults, especially given that a wide range of the Guzman y Gomez menu contains food items are spicy, and spicy foods are more generally enjoyed by adults rather than young children. Further, the Guzman y Gomez menu contains a broad range of products (both Occasional Food Products and non-Occasional Food Products). The menu predominantly consists of Mexican-style dishes containing meat and only contains two dessert items (none of which are featured in the Advertisement). Accordingly, the overwhelming majority of Guzman y Gomez products are not items which generally have significant appeal to children. Instead, Guzman y Gomez products appeal to a wide range of ages but are generally more appealing to adults than children. We raise in this regard a conclusion by the Ad Standards Community Panel for complaint case number 0309-21 ([https://adstandards.com.au/sites/default/files/reports/0309-21\\_0.pdf](https://adstandards.com.au/sites/default/files/reports/0309-21_0.pdf)) and case number 0006-22 ([https://adstandards.com.au/sites/default/files/reports/0006-22\\_0.pdf](https://adstandards.com.au/sites/default/files/reports/0006-22_0.pdf)) in which it was determined that the promotion of a free McDonald’s Big Mac and KFC chicken respectively (both of which are fast food items) are products of appeal to both adults and children alike, and not products with principal or significant appeal to children.*

*Further to the above, we were unable to determine the age of the girl in the first photo, however, regardless of the age of the girl in the photo, the presence of a child under the age of 15 does not automatically mean that an advertisement is targeting children. We note that previous Ad Standards Community Panel findings are consistent with this principle. In the Advertisement, the girl is almost entirely surrounded by adults indicating that netball match attendees fall within our target audience, being adults. Additionally, the second photo also features a woman (who is over the age of 15) carrying a Guzman y Gomez bag surrounded by several adults, clearly highlighting that Guzman y Gomez products are intended for individuals of all ages but predominantly adults. We maintain that the product is not principally or significantly appealing to children.*

*Is the presentation of the Advertisement content principally appealing to Children?*

*We assert that the presentation of the advertisement content is not principally appealing to children. The Advertisement does not feature cartoon imagery or childlike characters, nor does it display any toys, the language used in the caption and the Expression are not child-oriented, the colours featured are not used in a way that is intended to be principally appealing to children, and the majority of individuals in the photos in the Advertisement are adults. The Advertisement content is aimed at a broad audience and is of broad appeal, given the references to a professional live sporting event performed by adult athletes and the context within a large sporting stadium filled with a predominantly adult audience. We maintain that the content of the Advertisement is not principally appealing to Children.*

*Does the expected average audience of the Advertisement include a significant proportion of children?*

*The Advertisement was published on Facebook and Instagram, both of which require users to be aged 13 or above, with the overwhelming majority (more than 75%) of Facebook and Instagram users being aged 15 years or above. Accordingly, the Advertisement was only published in media where the expected audience contained less than 25% Children. The Guzman y Gomez Facebook and Instagram accounts are managed and expected to be predominantly viewed by adults and do not feature content that has significant appeal to Children. Accordingly, the expected average audience of the Advertisement did not include a significant proportion of Children.*

*Is the Advertisement otherwise in breach of the Code of Ethics or Food and Beverages Code?*

*If the Panel were to assess whether the Advertisement breaches any subsection of section 2 of the Code of Ethics, Guzman y Gomez considers that the Panel would find that no such breach has occurred. Subsections of Section 2 of the Code of Ethics relate to: (2.1) discrimination or vilification of a person or section of the community on account of race, ethnicity, nationality, gender, age, sexual orientation, religion, disability, mental illness or political belief; (2.2) sexual appeal of minors or sexual appeal used in an exploitative/degrading manner; (2.3) the portrayal of violence; (2.4) sex, sexuality and nudity; (2.5) inappropriate language; (2.6) Prevailing Community Standards on health and safety; and (2.7) distinguishability as advertising. Subsections 2.1 to 2.6 are not represented in the Advertisement and the Advertisement is distinguishable as advertising as discussed further above. Guzman y Gomez confirms that, in its view, the Advertisement does not breach any of these subsections.*

*If the Panel were to assess whether the Advertisement breaches any other subsection of section 2 of the Food and Beverages Code, Guzman y Gomez considers that the Panel would find that no such breach has occurred. Other subsections of Section 2 of the Food and Beverages Code relate to: (2.2) undermining the importance of healthy*



*or active lifestyles and excessive consumption; (2.3) Health Claims or Nutrition Content Claims in line with the Australian Food Standards Code; (2.4) claims relating to material characteristics such as taste, size, content, nutrition and health benefits; and (2.5) portraying products not intended or suitable as substitutes for meals as such. The Advertisement is featured in tandem with physical activity (playing netball) and no other claims are made that relate to sections 2.3 to 2.5.*

### *Summary*

*In summary, Guzman y Gomez submits that the Advertisement does not breach section 2.1 (nor any other section) of the Food and Beverages Code, nor section 2 (or any other section) of the Code of Ethics. Specifically, in regard to section 2.1 of the Food and Beverages Code, no breach has occurred on the basis that there are active sponsorship/endorsement arrangements in place between Netball Australia and the Australian national netball team and Guzman y Gomez. Specifically in regard to section 3.1 of the Food and Beverages Code, no breach has occurred on the basis that the Advertisement does not target children under the age of 15.*

*Guzman y Gomez submits that the Complaint should be dismissed in its entirety and thanks the Panel for the opportunity to respond to the Complaint.*

### **THE DECISION**

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

The Panel noted the complainant's concerns that the advertisement is misleading and targets an occasional food to children.

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

#### **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 that the target audience for this advertisement would be food consumers who are aged over 13.

The Panel noted the advertiser's response that there are a number of active sponsorship arrangements in place, including with the 2023 Suncorp Super Netball Season. The Panel noted that the advertisement does not state that all athletes endorse Guzman y Gomez, and considered that the impression is that, while fast food is likely never the healthiest choice, it is one of the better options when considering fast food choices.

Overall the Panel considered that the advertisement was not 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 3.1 Advertising (including sponsorship advertising) of Occasional Food or Beverage Products must not target Children.**

#### **Does the advertisement target Children?**

The Panel noted that the Food Code defines "target children" as:

*"Target Children is determined by the context of the advertisement and the following three criteria:*

- *Nature and intended purpose of the product being promoted is principally or significantly appealing to Children;*
- *Presentation of the advertisement content (e.g. theme, images, colours, wording, music and language used) is principally appealing to Children;*
- *Expected average audience at the time or place the advertisement appears includes a significant proportion of Children."*

The Panel noted that the Practice Note provides guidance on the interpretation of "target children":

*"All three criteria will be considered by the Community Panel in determining whether or not advertising targets Children. The weighting given by the Community Panel to each of the three criteria will be determined on a case by case basis. In the event of a complaint being considered by the Community Panel, the advertiser should be in a position to provide details in terms of the nature and intended purpose of the product, the presentation of the advertisement content and the expected average audience at the time or place the advertisement appears.*



*“In relation to the third criteria, measures to determine if Children are likely to be a ‘significant proportion’ of the expected average audience may include one or a combination of the following:*

- Where data exists, 25% or more of the predicted audience will be Children. In relation to outdoor advertising, if across a campaign the data shows a predicted audience with less than 25% Children, and there is a Children’s event or concert that is incidental to the ad placement, the audience of that incidental Children’s concert or event will not be captured.*
- C&P programmes.*
- Programs, artists, playlists, video, movies, magazines or other content with significant appeal to Children (e.g. featuring personalities or characters popular with Children).*
- Compliance with the Outdoor Media Association Placement Policy and Health & Wellbeing Policy which regulate the placement of advertising at primary and secondary schools which are locations where Children regularly and predictably gather. Where accurate program audience data is not available, the Community Panel may have regard to other factors listed above such as the program content, the time or the location where the advertisement is being shown (in line with the above provision).”*

The Panel further noted the Practice Note for this section of the Food Code which provides:

*“Advertisers must be able to demonstrate that they have evaluated or that care has been taken to evaluate the expected average audience composition before the placement of Occasional Food or Beverage advertisements to ensure they are not targeted at children. Where a meal deal is being advertised, each item in that meal deal must meet the Food Standards Australia Nutrient Profile Scoring Criterion, otherwise the advertisement will be considered to be for Occasional Food and Beverage Products.”*

**Point 1: Is the nature and intended purpose of the product principally or significantly appealing to children?**

The Panel considered that Guzman y Gomez is a long-established brand and product that is of appeal to both adults and children alike, however noted that many menu items are spicy and may be less appealing to children.

The Panel considered that while Guzman y Gomez may have products that children enjoy it is of equal or greater appeal to teenagers, adults and families and is not a product with principal or significant appeal to children.

**Point 2: Is the content of the advertisement principally appealing to children?**

The Panel noted that to fall within Section 3 of the Food Code the Panel must find that the advertisement is aimed in the first instance at children under 15.

Is the theme of the advertisement principally appealing to children?

The Panel noted that the first image features a child holding a Guzman y Gomez gift bag and drink bottle. The Panel considered while the theme of getting a gift bag would be appealing to children, the overall theme of promoting the food product brand would be unlikely to have principal appeal to children. The Panel considered that the overall theme of the advertisement would have principal appeal to adults.

The Panel noted that the second image was a photo of the big screen at a netball game with a scene of the audience, two wrapped food products and the text "Fast food athletes say yes to!". The Panel considered while the theme of appearing on the big screen would be appealing to children, the overall theme of promoting the food product brand would be unlikely to have principal appeal to children. The Panel considered that the overall theme of the advertisement would have principal appeal to adults.

Are the visuals of the advertisement principally appealing to children?

The Panel noted that the advertisement featured a child who was attending the event and considered that the use of the girl would attract the attention of children, however the setting and visuals would also be familiar to parents and caregivers who take their children to sporting events.

The Panel considered that the visuals in the advertisement were equally attractive to both adults and children and were not principally appealing to children under 15.

Is the language/wording/music of the advertisement principally appealing to children?

The Panel noted that the caption in the first image, "Great to be a part of the @nswswifts vs. @adelaidehunderbirds in Round 14 of the @supernetball. #FastFoodAthletesSayYesTo #GYG #GuzmanyGomez" and the indication that Guzman y Gomez is sponsoring the Netball.

The Panel considered that the language would not be principally appealing to children and would be of greater appeal to adult audiences.

Is the content of the advertisement overall principally appealing to children?

The Panel reiterated that it is essential that they consider all elements of the advertisement and to make a decision based on how all of the elements of the advertisement interact, and the overall impression that they make, in determining whether an advertisement is principally appealing to children.

The Panel considered that the overall advertisement would be equally attractive to children under 15, older teenagers and adults.

The Panel considered that the advertisement content was not principally appealing to children under 15.

**Point 3: Does the expected average audience of the advertisement include a significant proportion of children?**

The Panel noted the advertisement was on Facebook which requires users to be aged 13 or above and noted the advertiser's response that the overwhelming majority (more than 75%) of Facebook users are aged 15 years or above.

The Panel noted that the post was sponsored and viewed by a wider audience than those that follow the Guzman y Gomez page, however considered that the expected average audience of the of the advertisement would not include a significant proportion of children under 15.

**Targeting children conclusion**

The Panel determined that the advertisement did not target children and therefore Section 3.1 of the Food Code does not apply.

**Decision**

Finding that the advertisement did not breach any other section of the Food Code the Panel dismissed the complaint.