

COMPLAINT NUMBER	17/302
COMPLAINANT	Healthy Auckland Together
ADVERTISER	Frucor, Pepsi Max
ADVERTISEMENT	Frucor, Pepsi Max, Out of Home
DATE OF MEETING	12 September 2017
OUTCOME	Settled

SUMMARY

The advertisement appeared on a bus shelter and showed cans of Pepsi Max which included 'emoji's' of three All Blacks; Charlie Faumuina, Dane Coles, and Joe Moody; on the packaging. The advertisement said Got the front row... Limited Edition pack in-store now. #maxbanter"

The Complainant was concerned the promotion was appealing to children and young people and created a sense of urgency to collect and consume the Pepsi Max product as the cans had a limited edition "PepsiMoji" designs which included All Blacks players' pictures.

The Advertiser removed the bus shelter advertising and committed to removing all other out of home advertising.

Noting the self-regulatory actions of the Advertiser in removing the advertisement and their undertaking to remove all out of home advertisements, the same action required if the complaint was Upheld, the Complaints Board ruled the complaint should be Settled.

The Complaints Board Settled the complaint.

[No further action required / Advertisement removed]

Please note this headnote does not form part of the Decision.

COMPLAINTS BOARD DECISION

The Chair directed the Complaints Board to consider the advertisement with reference to Principles 1 and Principle 3 and Guidelines 1(a), 1(g), 1(h), 1(i), 1(j), 1(l) 3(a) and 3(b) of Children and Young Peoples Advertising Codes.

Principle 1 of the Children and Young Peoples Code requires that advertisements targeted at children or young people must not contain anything that is likely to result in their physical, mental or moral harm and must observe a high standard of social responsibility. Rules 1(a), 1(g) and 1(h) required advertisements not urge children or young people to ask their parents, guardians or caregivers to buy particular products for them, that sales promotion schemes are conducted in a responsible manner and licensed or proprietary characters or celebrities, popular with children or young people, are used in a responsible manner. Rule 1(l) required

advertisements featuring a promotional offers of interest to children or young people which are linked to food and beverage products avoid creating a sense of urgency or encourage the purchase of an excessive quantity for irresponsible consumption.

Rules 1(i) and 1(j) required advertisements (including sponsorship advertisements) for occasional food or beverage products must not target children or be placed in any media where children are likely to be a significant proportion of the expected average audience and that a special duty of care must be applied to occasional food and beverage product advertising to young people.

Principle 3 of the Children and Young Peoples Code requires a special duty of care for Occasional Food and Beverage Product sponsorship advertising targeted to young people. Rule 3(a) Rule 3(b) require sponsorship advertisements must not show an occasional food or beverage product, or such product's packaging, or depict the consumption of an occasional food or beverage product and sponsorship advertisements must not imitate or use any parts of product advertisements for occasional food or beverage products from any media.

The Complaints Board ruled the complaint was Settled.

The Advertisement

The advertisement appeared on a bus shelter and showed cans of Pepsi Max, a no-sugar cola drink, which included 'emoji's' of three All Blacks; Charlie Faumuina, Dane Coles, and Joe Moody; on the packaging. The advertisement said Got the front row... Limited Edition pack in-store now. #maxbanter"

The complaint from Healthy Auckland Together

The Complainant was concerned the promotion was appealing to children and young people and created a sense of urgency to collect and consume the Pepsi Max product as the cans had a limited edition "PepsiMoji" designs which included All Blacks players' pictures.

The Complainant said the product was appealing to children as "collecting images of sporting stars (whether cans of soft drink or cards) is a childhood activity. This type of campaign can therefore be seen as a direct appeal to children. The designs reinforce this childhood targeting with their youthful appeal." The Complainant was also of the view "the association of occasional foods and beverages with sport or sporting heroes is not in the best interests of children."

The Complainant said the advertisement was exposed to children and young people as it appeared "on a bus shelter in close proximity to two primary schools" and "Facebook have admitted that their restriction on children under 13 using the platform is only 'lightly policed'."

The Complainant was about the 'limited edition' nature of the promotion stating, in part: "the term limited denotes a product that will not be available for an extended period... there are 20 players to collect so there is a sense of urgency created by the advertising to collect the full set. If all 20 are collected very a short period of time this constitutes 5000ml (5 litres) of drink." The Complainant referred to a recommendation from The Ministry of Health that "children only consume diet drinks occasionally and in small quantities. The 'limited' nature of this promotion is likely to cause frequent purchases of this product and once purchased it will, in all likelihood be consumed immediately".

The Complainant also noted that "Pepsi Max does not contain sugar however it does contain caffeine which is not recommended for children... Beverages containing caffeine are classified as occasional under the Ministry of Health Food and Beverage Classification System used by the ASA."

The Complainant also referenced a promotion ran by *Breakfast* where a set of 20 cans was given as a prize, where the recipient appeared to be a child.

Response from the Advertiser, Frucor

The Advertiser responded to the Complainant's concerns the advertisement was appealing to children and young people stating, in part: "every step possible has been taken in designing the Campaign to ensure that the target market for the product is similarly the market to which the Campaign (including the Advertisement) appeals. Put shortly, it would be counterproductive and ineffectual for the Pepsi Max Campaign to be in any way targeted to children or young persons."

The Advertiser said the Pepsi Max is a product which is appealing to adults stating, in part: "The target market for Pepsi Max no-sugar cola is adult consumers age 18-35. Consumer data supports that adult consumers age 18+ constitute more than 75% of the consumers of Pepsi Max. Recent data from the Australia Bureau of Statistics supports this fact as only 6% of children reported being consumers of no-sugar carbonated soft drinks."

The Advertiser said the execution of the advertisement, particularly the PepsiMoji All Black characters were appealing to adults, stating, in part: "Despite their appeal to a broad audience, emojis are primarily used by an adult audience with 75.9% of 25-29 year olds identifying as frequent users of emojis and 92% of the online population using emojis".

The Advertiser said the All Blacks players featured on the packaging and in the promotional materials "do not make any reference to consumption of the product, nor are they shown consuming the product. The Advertiser's view was that All Black emoji's which featured on the packaging of the product fell outside the jurisdiction of the Advertising Standards stating, in part: "The clear focus of the Campaign is around the on-package emoji execution (which falls outside the ambit of the Code), the age-gated App, and friendly fan banter that the App is intended to generate."

The Advertiser addressed the placement of the promotion on Facebook and its target audience, stating, in part "the Facebook Terms of Service require that users must be age 13+. As such, children clearly do not constitute the target market of the social media campaign and do not comprise a large proportion of the Facebook audience." The Advertiser said it restricted the sponsored advertisements in Facebook News Feeds to users aged over 18 years old according to their profile and the said the "Facebook Social Development Kit data identifies that the majority of participants who are engaging in the social media aspect of the Campaign are individuals aged 25 to 34, followed by individuals aged 18 to 24, and thirdly by individuals aged 34 to 44."

Further, the Advertiser said the App, where consumers can download and use the All Black emoji's, "is age-gated to users age 18+ in the Google Play Store and age 17+ in the Apple Store (the highest age gating offered by each system)." The Advertiser said the audience data coupled with the age limits implemented "would suggest that the Campaign is effectively reaching its target adult audience."

The Advertiser disagreed with the Complainant's assertion the advertisement and promotion encouraged excessive consumption due to its limited edition packaging and promotion length stating that: "The mere fact that a product is Limited Edition in nature does not inherently mean that there is a sense of urgency to purchase it – this will depend upon a range of factors including, in particular, the language used in the promotional materials and the duration of availability."

The Advertiser said "the promotional materials for the Campaign focus on the single serve can product size (the smallest size can produced); there are no references to, or depictions

of, consuming Pepsi Max in the promotional materials; Pepsi Max has a 'best before' date of 6 months following production. This means that consumers have a significant period of time during which they can choose to consume the product; due to the 6 month shelf-life in conjunction with the 'best before' date, consumers could have the benefits of both the collectability of the full range of all 20 emojis and the actual product consumption, all while consuming as little as 0.8 250ml cans per week (i.e. less than one single serve per week); and there is no requirement to make multiple chance purchases in order to achieve a full collection (i.e. if they in fact wish to obtain the full collection, consumers can purchase only the 20 cans they require as the featured All Black is visible prior to purchase). This is not a promotion in which multiple purchases are required with a chance of obtaining a desired item."

The Advertiser also said "there is no expectation or requirement that the product be opened or consumed to obtain any collectable element. Because the player emoji is printed on the outside of the can/bottle, consumers can also make deliberate pre-purchase decisions with regards to collectability. Consumers are able to select which player emoji they wish to obtain on a product prior to the point of purchase and accordingly do not need to purchase more than 20 products across the 3 month Campaign period if they in fact wish to collect all 20 versions of the product. The collectability of the product packaging is likely to decrease actual consumption (as collectability decreases if the product packaging is opened)."

The Advertiser also responded to the Complainant's concerns about the promotion on *Breakfast* and their concerns that the full set of cans was won by a child. The Advertiser said "Frucor provided selected media outlets with one promotional set of product for media purposes. TVNZ Breakfast apparently utilized the product set for a giveaway conducted on their program (without Frucor's prior knowledge or agreement). We understand that the set of promotional product was awarded by TVNZ Breakfast to an adult. That adult happened to choose to pass the prize on to her son."

Out of Home advertising

The Advertiser addressed the bus shelter advertising stating, in part: "Frucor activated OOH Advertising in bus stations and other areas of public transport to target adult consumers while out and about in the moment of shopping occasion Recent data provided by Roy Morgan has identified that the strongest audience yield of OOH advertising is typically among consumers aged between 24 and 54. This is because most OOH advertisements are focused in central business districts, and other areas that are predominantly frequented by the target adult audience. Accordingly, OOH advertisements have a higher propensity to reach working adults, rather than children."

The Advertiser said it "took deliberate steps to ensure that OOH Advertising did not appear in places where children gather, such as near schools, churches or other areas predominantly frequented by young people. Frucor provided clear instructions to placement agencies not to place OOH Advertising in proximity to any school... We accordingly submit that by ensuring that OOH advertisements were displayed in a manner and in locations that predominantly targeted adult consumers during their moments of shopping, there is no element of context, medium, audience or product which would point towards children or young persons being targeted by the OOH Advertising, including the Advertisement."

The Advertiser then addressed the complaint relating to a particular bus shelter which the Complainant indicted was close to two primary schools., stating, "We understand from Adshel that the placement referred to in Complaint 17/302 was in fact more than 300 metres from any school and therefore disagree with the assertion that it breached the Code. Out of an abundance of caution, we nevertheless took immediate steps to ensure that Adshel took the Advertisement down and we confirm that the Advertisement has been removed..."

Further, the remainder of the OOH Advertising will be removed from all locations by 17 September 2017.”

Response from the Media, Adshel

The Media, Adshel, said it “through the review process for the Children and Young People’s Advertising Code we identified the ability for us to restrict placement of Occasional Food advertising with the distance agreed as 300m from schools, in fact all sites within 300m distance from Schools are set up as “Prohibited” in our system so they won’t even appear in the availability list when campaigns are planned...I can confirm that for this campaign no advertisements were placed with 300m of a school. There was however one site that, although it fell outside the 300m it sat on a main arterial route to the school. This site, although sitting outside the agreed 300m parameter, has now also been added to the list of ‘prohibitive’ sites so that it will not be considered for any future Occasional Food campaign.”

Complaints Board Discussion

The Complaints Board noted the advertisement subject to complaint has been removed and the intent of the Advertiser to remove all other out of home the advertising.

The Complaints Board said as the advertisement had been removed it served no further purpose to consider whether the advertisement was targeting children or young people and therefore whether the Children and Young People’s Advertising Code applied. However, the Complaints Board cautioned that out of home mediums were particularly high risk for Advertisers who have an intention to target a specific audience due to their unrestricted nature. The Complaints Board said it was particularly important to consider the placement of advertisements where either the product or its presentation in an advertisement were likely to have any general or principle appeal to children.

Noting the self-regulatory actions of the Advertiser in removing the advertisement and their undertaking to remove all out of home advertisements, the same action required if the complaint was Upheld, the Complaints Board ruled the complaint should be Settled.

Accordingly, the Complaints Board Settled the complaint.

Decision: Complaint **Settled**

DESCRIPTION OF ADVERTISEMENT

The advertisement appeared on a bus shelter and showed cans of Pepsi Max which included ‘emoji’s’ of three All Blacks; Charlie Faumuina, Dane Coles, and Joe Moody; on the packaging. The advertisement said Got the front row... Limited Edition pack in-store now. #maxbanter”

COMPLAINT FROM HEALTHY AUCKLAND TOGETHER

Re Pepsi Max All Blacks PepsiMoji advertising

This complaint is made by the members of the Healthy Auckland Together coalition, listed in Appendix A.

The listed members believe that the Pepsi Max All Blacks PepsiMoji promotional campaign breaches the Children and Young People’s Advertising Code.

The code principles and rules that we believe have been breached are:

Principle 1: Advertisements targeted at children or young people must not contain anything that is likely to result in their physical, mental or moral harm and must observe a high standard of social responsibility.

Rule 1(g)

Use of sales promotion schemes must be undertaken in a responsible manner.

Rule 1(h)

When licensed and proprietary characters and celebrities popular with children or young people are used in advertisements, they must be used in a responsible manner.

Rule 1(i)

Advertisements (including sponsorship advertisements) for occasional food or beverage products must not target children or be placed in any media where children are likely to be a significant proportion of the expected average audience.

Rule 1(j)

A special duty of care must be applied to occasional food and beverage product advertising to young people.

Rule 1(l)

Advertisements featuring a promotional offer of interest to children or young people which is linked to food and beverage products must avoid creating a sense of urgency or encouraging the purchase of an excessive quantity for irresponsible consumption.

Principle 3: A special duty of care must be exercised for Occasional Food and Beverage Product sponsorship advertising targeted to young people.

Rule 3(a)

Sponsorship advertisements must not show an occasional food or beverage product, or such product's packaging, or depict the consumption of an occasional food or beverage product.

Rule 3(b)

Sponsorship advertisements must not imitate or use any parts of product advertisements for occasional food or beverage products from any media.

Supporting Evidence for breach of Principle 1 and rules 1(g) 1(l)

Pepsi Max is advertising a limited edition "PepsiMojito" designs which include All Blacks players' pictures.¹ The term limited denotes a product that will not be available for an extended period. As Pepsi responded to a comment of Facebook:

They are a limited release, so this is only while stocks last.

There are 20 players to collect so there is a sense of urgency created by the advertising to collect the full set. If all 20 are collected very a short period of time this constitutes 5000ml (5 litres) of drink.

The Ministry of Health recommend that children only consume diet drinks occasionally and in small quantities.² The 'limited' nature of this promotion is likely to cause frequent purchases of this product and once purchased it will, in all likelihood be consumed immediately.

¹ Pepsi New Zealand (n.d.). In Facebook [Fan page]. Retrieved August 21 2017, from <https://www.facebook.com/pepsinewzealand>

² Ministry of Health. 2012. Food and Nutrition Guidelines for Healthy Children and Young People (Aged 2–18 years): A background paper – Revised February 2015. Wellington: Ministry of Health. Retrieved August 21 2017,

Supporting Evidence for breach of Principle 1 and rule 1(h)

The cartoon representations of the All Blacks are described as “emojis...specially-commissioned and proprietary-designed” artwork...illustrations of select players will be featured on both collectable, limited-edition Pepsi products.”³

*“The designs are meant to replicate the emoji cartoons as used on messaging platforms on smart phones”.*⁴

Collecting images of sporting stars (whether cans of soft drink or cards) is a childhood activity. This type of campaign can therefore be seen as a direct appeal to children. The designs reinforce this childhood targeting with their youthful appeal. Indeed, in recognition of the appeal of emoji characters to children, there is an upcoming kids “Emoji” feature film (rated for general audiences).⁵

The above rules of the code recognise that the association of occasional foods and beverages with sport or sporting heroes is not in the best interests of children.⁶

Supporting Evidence for breach of Principle 1 and rule 1(i) and rule (j)

The World Health Organization recommends that children’s settings be free of marketing of unhealthy foods.⁷

Settings include both the online environment where children and young people spend over 3 hours a day⁸ and the physical environment that children live in. The illustration attached in Appendix B shows the Pepsi Max promotion on a bus shelter in close proximity to two primary schools.

The online platform used for this promotion is used extensively by young people. Facebook have admitted that their restriction on children under 13 using the platform is only ‘lightly policed’.⁹

The promotion was used on TV1 Breakfast as a prize (see Appendix C). The prize was given to a child.¹⁰

Supporting Evidence for breach of Principle 1 rule (j) and Principle 3 and rules 3(a) 3(b)

from <http://www.health.govt.nz/publication/food-and-nutrition-guidelines-healthy-children-and-young-people-aged-2-18-years-background-paper>

³ Supermarket News (2017, August 10). Liquor and beverage news. Retrieved August 21 2017, from <http://supermarketnews.co.nz/new-pepsimoji-designs-from-pepsi-max/>

⁴ 1 News Now, 10 August 2017 <https://www.tvnz.co.nz/one-news/sport/rugby/hes-been-cut-all-blacks-but-julian-savea-makes-into-pepsi-maxs-abs-emoji-collection>

⁵ IMDb (2017, August 21). The emoji movie. Retrieved August 21 2017, from <http://www.imdb.com/title/tt4877122/>

⁶ Smith M, Jenkin G, Signal L, McLean R. Consuming calories and creating cavities: beverages NZ children associate with sport. *Appetite* 2014;81:209-17

⁷ WHO (2010). Set of recommendations on the marketing of foods and non-alcoholic beverages to children. Retrieved August 21 2017, from <http://www.who.int/dietphysicalactivity/publications/recsmarketing/en/>

⁸ Ministry of Health (2013). Activity levels in New Zealand. Retrieved August 21 2017, from <http://www.health.govt.nz/your-health/healthy-living/food-and-physical-activity/physical-activity/activity-levels-new-zealand>

⁹The Guardian. (2013) Facebook admits it is powerless to stop young users setting up profiles. Retrieved August 28 2017, from <https://www.theguardian.com/technology/2013/jan/23/facebook-admits-powerless-young-users>

¹⁰ TV 1 Breakfast (2017 August 24). Retrieved August 28 2017, from <https://www.facebook.com/Breakfaston1/videos/10155556524127719/>

The Pepsi Max does not contain sugar however it does contain caffeine which is not recommended for children.

*Children and young people should limit their intake of foods and drinks containing caffeine.*²

Beverages containing caffeine are classified as occasional under the Ministry of Health Food and Beverage Classification System used by the ASA.¹¹

Summary

By including the review of the voluntary advertising code in its Childhood Obesity Plan, the Ministry of Health recognised the important role marketing to children plays in either supporting or undermining healthy choices for children and young people. It is imperative that the new strengthened code plays its part in restricting the advertising of occasional foods and beverages.

In the guidance notes for rule (i) the ASA states:

‘For the avoidance of doubt there shall be no promotional offers for occasional food and beverage products to children’.

And as noted on the Ministry website:

*‘Advertising of occasional food and beverages must not target children’.*¹²

¹¹ Advertising Standards Authority (2017). NEW: Children and Young People’s Advertising Code. Retrieved August 21 2017, from <http://www.asa.co.nz/codes/codes/new-children-young-peoples-advertising-code/>

¹² Ministry of Health (2015). Childhood obesity plan. Retrieved August 21 2017, from <http://www.health.govt.nz/our-work/diseases-and-conditions/obesity/childhood-obesity-plan>

Appendix A: Healthy Auckland Together signatories

Healthy Auckland Together is a coalition of organisations within the Auckland region that aims to: improve nutrition, increase physical activity and halt rising rates of obesity among Aucklanders. A priority focus within these aims is equitable outcomes for Maori, Pacific and lower-socioeconomic communities. With a broad range of coalition partners - including health, local government, sport, iwi, transport and non-government organisations - Healthy Auckland Together's aim is to encourage change in the regional environment so it contributes to Aucklanders' health and does not impede it.

Healthy Auckland Together made a submission to the review of the Children's Code for Advertising Food and the code for Advertising to Children. Our submission drew attention to the issue of sponsorship.

Overall Healthy Auckland Together is concerned about the use of sponsorship as a marketing strategy by food manufacturers to imply to children that their 'occasional' products are foundational ingredients of success in elite sport.

This complaint is made by the following members of the Healthy Auckland Together coalition.

- Auckland District Health Board
- Auckland Regional Public Health Service
- Counties Manukau Health Alliance
- Disability interest groups
- Hapai te Hauora Tapui
- Healthy Families Manukau, Manurewa-Papakura
- Healthy Families Waitakere
- Heart Foundation
- Mana Whenua i Tamaki Makaurau
- National Institute for Health Innovation
- Pacific Heartbeat
- Primary Health Organisations
- The Asian Network
- Toi Tangata
- University of Auckland - School of Population Health
- Waitemata District Health Board.

Appendix B



Appendix C

The screenshot shows a Facebook video player. The video features a woman in a white shirt sitting at a desk, holding up a large black display board filled with various Pepsi-Moji prizes. The video player includes a progress bar at the bottom showing 0:56. Below the video, the post is from 'Breakfast' and dated '24 August at 15:09'. The caption reads: 'Our Pepsi-Moji prize pack went to the lovely Kingston yesterday, who is so well mannered that he showed his appreciation in style.' The post has 10k Views, 73 Likes, and 8 Comments. The Facebook interface includes a 'Sign Up' button, a 'Log In' button, and a 'Forgotten account?' link. The language menu is set to English (UK).

The screenshot shows a Facebook video player. The video features a young boy standing in a room, wearing a colorful, patterned outfit. The video player includes a progress bar at the bottom showing 0:25. Below the video, the post is from 'Breakfast' and dated '24 August at 15:09'. The caption reads: 'Our Pepsi-Moji prize pack went to the lovely Kingston yesterday, who is so well mannered that he showed his appreciation in style.' The post has 10k Views, 73 Likes, and 8 Comments. The Facebook interface includes a 'Sign Up' button, a 'Log In' button, and a 'Forgotten account?' link. The language menu is set to English (UK).

CHILDREN AND YOUNG PEOPLE'S ADVERTISING CODE

Principle: 1 Advertisements targeted at children or young people must not contain anything that is likely to result in their physical, mental or moral harm and must observe a high standard of social responsibility.

Rule 1 (g): Use of sales promotion schemes must be undertaken in a responsible manner.

Rule 1(h): When licensed and proprietary characters and celebrities popular with children or young people are used in advertisements, they must be used in a responsible manner.

Rule 1(i): Advertisements (including sponsorship advertisements) for occasional food or beverage products must not target children or be placed in any media where children are likely to be a significant proportion of the expected average audience.

Rule 1(j): A special duty of care must be applied to occasional food and beverage product advertising to young people.

Rule 1(l): Advertisements featuring a promotional offer of interest to children or young people which is linked to food and beverage products must avoid creating a sense of urgency or encouraging the purchase of an excessive quantity for irresponsible consumption.

Principle 3: A special duty of care must be exercised for Occasional Food and Beverage Product sponsorship advertising targeted to young people.

Rule 3(a): Sponsorship advertisements must not show an occasional food or beverage product, or such product's packaging, or depict the consumption of an occasional food or beverage product.

Rule 3(b): Sponsorship advertisements must not imitate or use any parts of product advertisements for occasional food or beverage products from any media.

RESPONSE FROM ADVERTISER, FRUCOR

Frucor Suntory New Zealand Ltd – Pepsi Max MAXBANTER Advertising Campaign - Complaint 17/286 and Complaint 17/302

We write in response to your letters of 21 August 2017 and 1 September 2017 regarding the complaints received in relation to Frucor Suntory's ("Frucor's") MAXBANTER promotional packaging and advertising campaign for Pepsi Max no-sugar cola.

Thank you for the opportunity to respond to Complaint 17/286 and Complaint 17/302 (hereafter the "Complaints").

We are committed to adhering to, and promoting advocacy of, the Children and Young People's Advertising Code (the "Code"). We agree that advertisers must act with a high level of social responsibility towards consumers and children.

The MAXBANTER Campaign

By way of background, the MAXBANTER campaign (the "Campaign") is comprised of three components in conjunction with Pepsi Max no-sugar cola:

- 1) Product packaging featuring specially designed caricatures of 20 different All Blacks players (colloquially known as "emojis", although note that these caricatures are different from what is traditionally understood as comprising emojis for communications purposes) (hereafter the "Packaging").
- 2) An age restricted keyboard App for smart mobile devices containing various specially commissioned Pepsi Max emojis, including the All Blacks player caricatures and various other rugby insignia ("App"). The App is designed to encourage adult, smart mobile device users to engage in playful rugby-related dialogue with friends and family. The App is age-gated to users 18+ in the Google Play Store and to users 17+ in the Apple Store (reflecting the highest possible age restriction for apps on each platform).

- 3) The Campaign promotional materials are conducted on Facebook (no other social media presence), digital banner advertising on mainstream media news websites, POS, and out-of-home advertising (“OOH Advertising”). Each forum having been chosen to coincide with a predominantly adult audience. The Campaign promotional materials feature the on-package execution referred to above and do not depict or reference consumption of the product.

The Campaign is scheduled to run for a three month period, commencing at the beginning of August 2017 and finishing following anticipated market sell-through at the end of October 2017.

Notwithstanding our view that the Advertisement and Campaign in all respects comply with all relevant aspects of the Code, we instructed our advertising agency to remove the Advertisement and confirm that this has been removed. Further, the remainder of the OOH Advertising will be removed from all locations by 17 September 2017 (i.e. by the end of next week).

On this basis we invite the ASCB to find that the Complaints (as far as they relate to the Advertisement) have been voluntarily settled.

Code does not apply to the Packaging

In accordance with the Application of Code section of the Introduction to the Code, the Code does not apply to product packaging. Any complaint or aspect of the Complaints regarding the on-pack imagery included as part of the Campaign falls outside the ambit of the Code and should be dismissed.

We accordingly request that the ASCB dismiss Complaint 17/286 (as far as it relates to the imagery on the Packaging) as falling outside the ambit of the Code.

Campaign is Targeted to Adult Consumers

In order for the Code to apply to the Campaign, the Advertising Standards Complaints Board (“ASCB”) would need to first find that the Campaign:

“...targets children or young people”.

We understand that in determining whether the Campaign promotional materials are targeted to children or young people, the ASCB will consider:

- a) context of the advertisement;
- b) medium;
- c) audience (i.e. likely audience);
- d) product; and
- e) the relationship between the following factors:
 - a. Nature and intended purpose of the product being promoted is principally or generally appealing to children or young people.

- b. Presentation of the advertisement content (e.g. theme, images, colours, wording music and language used) is appealing to children or young people.
- c. Expected average audience at the time or place the advertisement appears includes a significant proportion of children or young people.

As explained more fully below, the Campaign promotional materials are targeted to adult consumers and are specifically and deliberately not targeted to children or young persons. The context of the Campaign is designed with an adult audience in mind, each medium used in the Campaign and location has been selected with a view to ensuring the minimum amount of exposure to children possible, the product's target and actual consumption audience is adult and there is nothing which suggests the Campaign promotional materials are (in respect of theme, images, colours, wording, music and language used) appealing to children or young persons. It is submitted that the use of caricatures of All Blacks on the Packaging cannot, in and of itself, be sufficient (against all other elements) to render the Campaign one which targets children or young persons.

Because the Campaign is not targeted to children or young persons, it falls outside the scope of the Code and the Complaints should be dismissed.

We set out below our explanation of the various respects in which the various elements of the the Campaign were expressly and deliberately designed to avoid appeal to children and young persons.

Social Media Activation is Targeted to Adult Consumers

It is important background to the Campaign, and to understand the advertising materials in their context, to understand that the social media activation is clearly targeted to, and to the extent possible actively restricted to, adult consumers. It follows that it is not targeted to children or young persons and the ASCB should:

- i. find that the social media content in the Campaign promotional materials fall outside the scope of the Code; and
- ii. dismiss any aspect of the Complaints it perceives may relate to social media content.

Facebook Terms of Service Require Users be Age 13+

The Facebook Terms of Service require that users must be age 13+. ¹³ As such, children clearly do not constitute the target market of the social media campaign and do not comprise a large proportion of the Facebook audience. Although theoretically some under-age users may violate Facebook's Terms of Service and could potentially be exposed to the promotional materials for the Campaign, they would need to actively search for the Campaign promotion materials. This incidental exposure, particularly where it is generated in breach of the terms and conditions governing the use of Facebook, does not change the fact that the Campaign promotion materials have been appropriately targeted to users who satisfy Facebook's age restrictions.

We note that under the ASA Code for Advertising and Promotion of Alcohol, online retailers of alcoholic beverages are required to target their advertising to adults by requiring users to self-certify on their websites that they are aged over 18 (which is the same way in which Facebook users are asked to self-certify their age). ¹⁴

¹³ <https://www.facebook.com/legal/terms>

¹⁴ Principle 3(h), Code for Advertising and Promotion of Alcohol.

Targeted Advertisements Limited to Users Age 18+

The Campaign promotional material conducted via Facebook is not promoted or pushed to the general Facebook audience. Instead, the promotional posts for the Campaign are targeted to, and only appear in, users' news feeds where the user is aged 18+. Users are otherwise only able to view this promotional content by actively visiting the Pepsi Max Facebook page.

Available Facebook Social Development Kit data identifies that the majority of participants who are engaging in the social media aspect of the Campaign are individuals aged 25 to 34, followed by individuals aged 18 to 24, and thirdly by individuals aged 34 to 44. This evidence, coupled with the age limits provided for by Facebook's Terms of Service, would suggest that the Campaign is effectively reaching its target adult audience. It is clear that the expected average audience does not include any real proportion of children or young persons.

Eligibility to Participate in Promotional Competitions and Contests is Limited to Age 18+

Frucor denies that the Campaign is a sales promotion scheme, as there is no element of chance in relation to which product is purchased or obtained by the consumer. Accordingly, rule 1(g) of the Code does not apply to the Campaign.

In any event, all promotional competitions and contests being run as part of the Campaign have been conducted in a responsible manner, including that they have been age restricted to entrants age 18+.

Frucor provided selected media outlets with one promotional set of product for media purposes. TVNZ Breakfast apparently utilized the product set for a giveaway conducted on their program (without Frucor's prior knowledge or agreement). We understand that the set of promotional product was awarded by TVNZ Breakfast to an adult. That adult happened to choose to pass the prize on to her son.

Themes and Messaging Directed to Adults

The messaging, themes, images and wording have been designed specifically for an adult audience. In addition to the social media activation described above, Frucor has activated digital banner advertising on two news websites (nzherald.co.nz and stuff.co.nz), both of which are directed to an adult audience. Further, most of the advertising materials invite adult consumers to engage in banter regarding their favourite All Blacks players, and include a call to action for those consumers to download the App. As mentioned above, the App is age-gated to prevent access by children and young people.

OOH Advertising is Directed to Adult Consumers

As the out-of-home activation is clearly targeted to adult consumers, it follows that it is not targeted to children or young persons and the ASCB should:

- i. find that the Adshel Advertisement which is the subject of Complaint 17/302 ("the Advertisement") does not breach the Code; and
- ii. dismiss the Complaints relating to the Advertisement.

Target Market for Pepsi Max No-Sugar Cola is Adult Consumers

Pepsi Max is a product targeted to adults. The target market for Pepsi Max no-sugar cola is adult consumers age 18-35. Consumer data supports that adult consumers age 18+ constitute more than 75% of the consumers of Pepsi Max.¹⁵ Children and young people are not the target market for sugar-free cola (or full-sugar cola for that matter).

Recent data from the Australia Bureau of Statistics supports this fact as only 6% of children reported being consumers of no-sugar carbonated soft drinks.¹⁶

Every step possible has been taken in designing the Campaign to ensure that the target market for the product is similarly the market to which the Campaign (including the Advertisement) appeals. Put shortly, it would be counterproductive and ineffectual for the Pepsi Max Campaign to be in any way targeted to children or young persons.

Advertisement Targets Adult Consumers at Moment of Shopping Occasion

Frucor activated OOH Advertising in bus stations and other areas of public transport to target adult consumers while out and about in the moment of shopping occasion

Recent data provided by Roy Morgan has identified that the strongest audience yield of OOH advertising is typically among consumers aged between 24 and 54.¹⁷ This is because most OOH advertisements are focused in central business districts, and other areas that are predominantly frequented by the target adult audience. Accordingly, OOH advertisements have a higher propensity to reach working adults, rather than children.

Frucor also took deliberate steps to ensure that OOH Advertising did not appear in places where children gather, such as near schools, churches or other areas predominantly frequented by young people. Frucor provided clear instructions to placement agencies not to place OOH Advertising in proximity to any school.

We accordingly submit that by ensuring that OOH advertisements were displayed in a manner and in locations that predominantly targeted adult consumers during their moments of shopping, there is no element of context, medium, audience or product which would point towards children or young persons being targeted by the OOH Advertising, including the Advertisement.

We note, however, that notwithstanding our view that the Advertisement in all respects complies with all relevant aspects of the Code, we instructed our advertising agency to remove the Advertisement and confirm that this has been removed.

Further, the remainder of the OOH Advertising will be removed from all locations by 17 September 2017 (i.e. by the end of next week).

On this basis we invite the ASCB to find that the Complaints (as far as they relate to the Advertisement) have been voluntarily settled.

Frucor Has Exercised a Special Duty of Care and observed a high standard of social responsibility

Even if the ASCB were to determine that the advertising materials for the Campaign were targeted to children and young people – which is expressly denied – and that the Code

¹⁵ Nielsen CMI, Q2 2016 – Q1 2017.

¹⁶ Australian Bureau of Statistics, 'Australian Health Survey: Nutrition First Results – Food and Nutrients', 2011-2012, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4364.0.55.007main+features7102011-12>.

¹⁷ Roy Morgan Single Source, June 2017.

accordingly applies to the Campaign, Frucor has taken deliberate strategic steps to mitigate exposure to children and young people.

By taking the specific mitigation steps outlined herein, Frucor is extremely committed to responsible marketing practices, and has (in any event):

- i. exercised the special duty of care owed to children and young people; and
- ii. observed a high standard of social responsibility in executing the Campaign.

Frucor Specifically Targeted Adult Consumers through Limited Promotional Activation and Age-Gating

Frucor has taken deliberate steps to segment and target an adult audience by taking the specific steps outlined above in limiting promotional activation for the Campaign to age gated social media, adult focused digital and restricted OOH Advertising. There has not been, nor will there be, any television advertising for the Campaign. None of the advertising materials for the Campaign contain any messaging, themes, images or wording specifically targeted to, or specifically appealing to, children or young people.

The App is age-gated to users age 18+ in the Google Play Store and age 17+ in the Apple Store (the highest age gating offered by each system).

The incidental inclusion of caricatures of All Blacks on product packaging cannot in and of itself, and particularly when weighed against the steps taken deliberately to focus the Campaign to an adult audience, constitute a breach of any part of the Code. In particular, that factor alone cannot be said to give rise to likely physical, mental or moral harm or constitute a failure to observe a high standard of social responsibility.

No Evidence that Children Are Likely to be a Significant Proportion of Average Audience

Frucor has taken deliberate steps to avoid advertising to children and young people as outlined above. Strict instructions were provided to Adshel, Phantom Billstickers and Shout! Media to ensure that no outdoor advertisements were placed near schools, churches or other areas predominantly frequented by young people. This included specifying to these agencies that that no OOH Advertising would be placed in proximity to any school.

We understand from Adshel that the placement referred to in Complaint 17/302 was in fact more than 300 metres from any school and therefore disagree with the assertion that it breached the Code. Out of an abundance of caution, we nevertheless took immediate steps to ensure that Adshel took the Advertisement down and we confirm that the Advertisement has been removed.

Even if the Advertisement were found to target children or young people – which Frucor expressly denies – Frucor has exercised a special duty of care and observed a high standard of social responsibility in executing the Advertisement. As such, and for all of the reasons set forth herein, we respectfully request that the ASCB dismiss the Complaints.

Incidental Exposure by Children or Young People Unlikely to Lead to Harm

There can be no real suggestion, and we do not understand the Complainants to have suggested, that incidental exposure to the Campaign is likely to result in physical, mental, or moral harm to children or young persons. The All Blacks have partnered with Pepsi Max particularly because Pepsi Max provides a sugar-free alternative for adult consumers. Frucor

deliberately activated the Campaign solely in connection with Pepsi Max no-sugar cola as opposed to full-sugar Pepsi cola.

The Campaign does not promote excessive consumption (in fact, it does not refer to or depict consumption of the Pepsi Max product at all), nor does it contradict the Ministry of Health guidelines advising that “Children and young people should limit their intake of foods and drinks containing caffeine.”

There is no evidence to suggest that the Campaign is likely to increase the intake of caffeine (or Pepsi-Max) by children or young people and no basis to find that the Campaign is likely to lead to the sort of harm contemplated by Principle 1 of the Code.

In our submission, the Campaign does not result, and is not likely to result, in the sort of harm contemplated by Principle 1 (or Rules 1(a) – (l)).

Campaign Does Not Promote Excessive Consumption

The Campaign does not encourage or promote excessive consumption of Pepsi Max no-sugar cola. In particular:

- the promotional materials for the Campaign focus on the single serve can product size (the smallest size can produced);
- there are no references to, or depictions of, consuming Pepsi Max in the promotional materials;
- Pepsi Max has a “best before” date of 6 months following production. This means that consumers have a significant period of time during which they can choose to consume the product;
- due to the 6 month shelf-life in conjunction with the “best before” date, consumers could have the benefits of both the collectability of the full range of all 20 emojis and the actual product consumption, all while consuming as little as 0.8 250ml cans per week (i.e. less than one single serve per week); and
- there is no requirement to make multiple chance purchases in order to achieve a full collection (i.e. if they in fact wish to obtain the full collection, consumers can purchase only the 20 cans they require as the featured All Black is visible prior to purchase). This is not a promotion in which multiple purchases are required with a chance of obtaining a desired item.

Collectable Elements of Campaign decrease likelihood of Consumption

There is no expectation or requirement that the product be opened or consumed to obtain any collectable element.¹⁸ Because the player emoji is printed on the outside of the can/bottle, consumers can also make deliberate pre-purchase decisions with regards to collectability. Consumers are able to select which player emoji they wish to obtain on a product prior to the point of purchase and accordingly do not need to purchase more than 20 products across the 3 month Campaign period if they in fact wish to collect all 20 versions of the product. The collectability of the product packaging is likely to decrease actual consumption (as collectability decreases if the product packaging is opened).

¹⁸ From a collectability standpoint, products in “mint” condition retain higher value and thus certain consumers who wish to obtain any perceived commercial value would do so without opening the Pepsi Max product containers (as any subsequent value of the collection would be reduced upon opening).

Campaign Does Not Create Sense of Urgency

The “Limited Edition” nature of the Packaging is not sufficient in and of itself to create a sense of urgency. In any event, as noted earlier, product packaging is outside the scope of the Code.

The mere fact that a product is Limited Edition in nature does not inherently mean that there is a sense of urgency to purchase it – this will depend upon a range of factors including, in particular, the language used in the promotional materials and the duration of availability.

With respect to the promotional materials for the Campaign, we have taken particular care to ensure that these did not include any language that urged consumers to purchase the product within a restricted amount of time (such as encouragements to “hurry” or purchase before stock “runs out”).

While the Advertisement did reference the Limited Edition nature of the product packaging, the messaging did not create an unreasonable sense of urgency, nor did it encourage a child or young person to request their parent or guardian purchase a Pepsi Max product. To the contrary, the messaging is factually accurate and did not contain any other call to action or other elements that would drive a heightened sense of urgency.

Campaign Did Not Encourage Children or Young People to Request their Parent or Guardian to Purchase a Product for them

The Campaign did not in any way suggest a child or young person should request their parent or guardian to purchase a Pepsi Max no-sugar cola product for them. As identified above, the Campaign was not directed towards children or young people.

The social media elements of the Campaign are restricted to adults, and Frucor has refrained from undertaking television advertising of any sort. Furthermore, the placement of the OOH Advertising (including the Advertisement) was targeted towards an adult audience, and Frucor has taken care to ensure that these were not placed in areas largely frequented by children or young people (such as in the immediate vicinity of schools and churches).

Frucor therefore respectfully submits that the Campaign does not encourage children or young people to request that their parents purchase for them any Pepsi Max no-sugar cola. If the Campaign is found to have breached Rule 1(a) then it is difficult to see how any standard advertising for any product could occur (ie as almost all advertising has an inherent time limitation component).

Broad Appeal of Emojis Does Not Change the Target Audience

Despite their appeal to a broad audience, emojis are primarily used by an adult audience with 75.9% of 25-29 year olds identifying as frequent users of emojis and 92% of the online population using emojis.¹⁹

The upcoming release of an animated film featuring emojis for a General Audience is irrelevant to the analysis required under the Code - given the differentiated context, themes, messaging, activation and manner in which the Campaign is executed here. In particular, a GA classification under the Films Videos and Publications Act 1993 merely signifies that a film is not “objectionable” (i.e. it does not “...describe, depict, express, or otherwise deal with

¹⁹ Hutchins, B, *The Emoji Infographic: Stats to Back Up Your Obsession*, 14 October 2015, <https://www.meltwater.com/blog/the-emoji-infographic-stats-to-back-up-your-obsession/>.

matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good” – section 3).

Collectability Does Not Change the Target Audience

Complainants allege that the collectable element of the packaging execution has direct appeal to children. Product packaging is, however, outside the scope of the Code.

In any event, products with a collectability element do not of themselves appeal to children – this depends on factors such as the audience to which they are targeted and the nature of the product. In this context:

- a) the social media activation related to the collectability is restricted to an adult audience;
- b) the only reference to collectability in the Advertisement is the words “Limited Edition”; and
- c) the context, themes, messaging, and Campaign generally is not targeted to children or young people.

As outlined above, the target market for Pepsi Max no-sugar cola is adults, and adults make up over 75% of actual consumers of the product. As such, the underlying appeal of the collectable packaging element is irrelevant to the Advertising Standards Complaints Board’s analysis as the Campaign materials are targeted to an adult audience.

Sponsorship Advertisements Do Not Depict Consumption

Even if the ASCB concludes, notwithstanding the clear definition in the Code, that Pepsi Max is an “occasional food or beverage product” for the purposes of the Code and that Principle 3 therefore applies, the All Blacks players featured on the Packaging and in the promotional materials do not make any reference to consumption of the product, nor are they shown consuming the product. The clear focus of the Campaign is around the on-package emoji execution (which falls outside the ambit of the Code), the age-gated App, and friendly fan banter that the App is intended to generate.

In light of these factors, it is therefore evident that the Campaign has been carefully prepared and executed in collaboration with the New Zealand Rugby Union, and the All Blacks, in such a fashion that demonstrates the special duty of care that is owed to consumers.

Conclusion

In summary, as:

- a) the Code does not apply to product packaging, Complaint 17/286 (in so far as it relates to the on-package execution) should be dismissed;
- b) the Advertisement has been removed, Complaint 17/302 (in so far as it relates to the Advertisement) should be deemed voluntarily settled; and
- c) the Campaign is not targeted to children or young persons, all remaining aspects of the Complaints should be dismissed.

The Campaign is targeted to adult consumers and is actively and expressly restricted to the extent possible to an adult audience. It is certainly not targeted to a child or young adult audience. Even if the promotional materials were found to target children or young people – which Frucor expressly denies – Frucor has exercised the special duty of care required in

respect of children and young people and has observed a high standard of social responsibility in executing the Campaign. These efforts include, but are not limited to, focusing the promotional materials on the smallest (single serve) pack size, executing the Campaign solely in connection with Pepsi Max no-sugar cola, targeting digital activation to a social media audience aged 18+ and news websites targeted to adults, limiting traditional media activation where child engagement may be unsupervised, enabling deliberate choice with regard to any collectability, and restricting entry to related promotional contests to adult consumers aged 18+.

As such, and for all of the reasons set forth herein, we respectfully request that the ASCB dismiss the Complaints.

We are committed to adhering to and promoting advocacy of the various Advertising Standards Codes and agree that advertisers must act with a high level social responsibility towards consumers, our customers and to the public generally.

APPENDIX A

Summary of Response to Each Alleged Breach

Advertiser's Position Statement is separately set out in full in response to Complaint 17/286 and 17/302. Advertiser reiterates those positions as if fully set forth herein and provides the following summary for additional convenience. For all of the reasons provided herein, the Complaints should be dismissed in their entirety.

Complaint 17/286 in respect of limited edition pack designs

This complaint relates to the promotion of limited edition pack designs. The Code does not apply to product packaging and accordingly the complaint should be dismissed as falling outside the ambit of the Code.

If the ASCB nonetheless determines to consider the complaint, Frucor makes the following submissions (as if the complainant had identified an applicable advertising element):

Principle 1 states that advertisements targeted at children or young people must not contain anything that is likely to result in their physical, mental or moral harm and must observe a high standard of social responsibility.

Advertiser's Position: The MAXBANTER campaign is not targeted to children or young people and accordingly Principle 1 does not apply.

Even if the ASCB finds the MAXBANTER campaign is targeted at children or young people:

- a) nothing in the Campaign promotional materials is likely to result in the physical, mental or moral harm of young people; and
- b) the Campaign promotional materials and their execution observe a high standard of social responsibility.

Frucor has taken care to ensure MAXBANTER is only promoted in relation to sugar-free cola product, does not in any way encourage excessive consumption and is restricted to an adult audience to the extent possible such that Principle 1 is (if found to apply) complied with.

Rule 1(a) states that advertisements must not urge children or young people to ask their parents, guardians or caregivers to buy particular products for them.

Advertiser's Position: The MAXBANTER campaign is not targeted to children or young people and accordingly Rule 1(a) does not apply.

Even if the ASCB finds the MAXBANTER campaign is targeted at children or young people, nothing in the advertisement complained of suggests that children or young people should ask their parents to purchase Pepsi Max for them.

If the ASCB finds that Rule 1(a) applies to MAXBANTER, Rule 1(a) has been complied with.

Rule 1(g) states that use of sales promotion schemes must be undertaken in a responsible manner

Advertiser's Position: The MAXBANTER campaign is not targeted to children or young people and accordingly Rule 1(g) does not apply.

Even if the ASCB finds the MAXBANTER campaign is targeted at children or young people, the advertisement complained of is not a sales promotion scheme (ie it does not involve or

provide for attempts to win any money or prizes in accordance with the Gambling Act 2003)²⁰.

Rule 1(g) accordingly does not apply to the advertisement complained of.

Despite this, Frucor has taken great care to ensure that the campaign is executed in a responsible manner, by (eg) ensuring the campaign is targeted towards an adult audience and only promotes Pepsi Max no-sugar cola.

As MAXBANTER does not target children in any way, the advertisement complained of does not refer to or constitute a sales promotion scheme, and the Campaign has been undertaken in a responsible manner, Rule 1(g) either does not apply or has been complied with.

Rule 1(h) states that when licensed and proprietary characters and celebrities popular with children or young people are used in advertisements, they must be used in a responsible manner.

Advertiser's Position: The MAXBANTER campaign is not targeted to children or young people and accordingly Rule 1(h) does not apply.

²⁰ In accordance with the Gambling Act "sales promotion schemes" are forms of:

"...gambling that does not involve a gaming machine nor a prize restricted or prohibited under [section 17](#), used by a creator, distributor, or vendor of goods or services to promote the sale of those goods or services if:

(a) participation in the gambling requires a person to purchase the goods or services promoted for a price not exceeding the usual retail price; and

(b) the date or period on or over which the outcome of the gambling will be determined is clear to the participant at the time and place of sale; and

(c) the person is not required to pay direct or indirect consideration other than to purchase the goods or services promoted (except the cost, at the standard rate, incurred in submitting an entry into the promotion, for example, the cost of postage at the standard rate or sending a telecommunication by mobile telephone at the standard rate); and

(d) the outcome is determined—

(i) randomly or wholly by chance; or

(ii) partly by chance (whether chance plays the greater or lesser part) and partly by the application of some knowledge or skill."

"Gambling", in turn, means:

(a) means paying or staking consideration, directly or indirectly, on the outcome of something seeking to win money when the outcome depends wholly or partly on chance; and

(b) includes a sales promotion scheme...

Even if the ASCB finds the MAXBANTER campaign is targeted at children or young people, Frucor has used reference to the All Blacks personalities in an extremely responsible manner, by ensuring that no reference to encouraging consumption is identified, only a no-sugar cola alternative has been promoted, and to the extent possible all Campaign promotional materials are restricted to an adult only audience.

Frucor therefore submits that if Rule 1(h) of the Code applies, it is complied with.

Principle 3 states that a special duty of care must be exercised for occasional food and beverage product sponsorship advertising targeted to young people.

Advertiser's Position: The MAXBANTER campaign is not targeted to children or young people and accordingly Principle 3 does not apply.

Even if the ASCB finds the MAXBANTER campaign is targeted to children or young people the Campaign promotional materials were executed using a special duty of care. The MAXBANTER campaign has been prepared in a manner consistent with the special duty of care owed to young people (ie Frucor has taken care to ensure MAXBANTER is only promoted in relation to sugar-free cola product, does not in any way encourage excessive consumption and is restricted to an adult audience to the extent possible). If the ASCB finds that Principle 3 applies, Principle 3 has (in any event) been complied with.

Rule 3(a) states that sponsorship advertisements must not show an occasional food or beverage product, or such product's packaging, or depict the consumption of an occasional food or beverage product.

Advertiser's Position: The MAXBANTER campaign is not targeted to children or young people and accordingly Rule 3(a) does not apply. No consumption of Pepsi Max is shown in the advertisement complained of. Rule 3(a) is accordingly not applicable, but if the ASCB nonetheless finds that it is, it has been complied with.

Rule 3(b) states that sponsorship advertisements must not imitate or use any parts of product advertisements for occasional food or beverage products from any media. The MAXBANTER campaign is not targeted to children or young people and accordingly Rule 3(b) does not apply.

If the ASCB nonetheless finds that rule 3(b) applies, it has been complied with in that the MAXBANTER Campaign promotional materials are stand alone materials produced solely for the MAXBANTER campaign and do not imitate or use any parts of product advertisements.

Complaint 17/302 in respect of Bus Adshel poster

Principle 1:
See above

Rule 1(g):
See above

Rule 1(h):
See above

Rule 1(i): Advertisements (including sponsorship advertisements) for occasional food or beverage products must not target children or be placed in any media where children are likely to be a significant proportion of the expected average audience.

Advertiser's Position: The MAXBANTER campaign is not targeted to children or young people and accordingly Rule 1(i) does not apply.

The Campaign promotional materials have not been placed in any media where children are likely to be a significant proportion of the expected average audience. In particular, Frucor has age restricted its Campaign promotional materials to the extent possible and avoided TVC exposure.

Even if the ASCB finds that Rule 1(i) is applicable, it has been complied with.

Rule 1(j): A special duty of care must be applied to occasional food and beverage product advertising to young people.

Advertiser's Position: The MAXBANTER campaign is not targeted to children or young people and accordingly Rule 1(j) does not apply.

In any event, the MAXBANTER campaign:

- a) is directed towards an adult audience, and is in no way advertising to young people; and
- b) the special duty of care has been applied (eg MAXBANTER only advertises Pepsi Max no-sugar cola, makes no reference to the *consumption* of Pepsi Max product and does not require multiple chance purchases.

Even if Rule 1(j) is found to apply, it has been complied with.

Rule 1(l): Advertisements featuring a promotional offer of interest to children or young people which is linked to food and beverage products must avoid creating a sense of urgency or encouraging the purchase of an excessive quantity for irresponsible consumption.

Advertiser's Position: The MAXBANTER campaign is not targeted to children or young people and accordingly Rule 1(l) does not apply. Similarly MAXBANTER is not a promotional offer to children.

In any event, the MAXBANTER campaign does not create a sense of urgency in any way. Consumers have three months in which to purchase their favourite collections, which are predominantly referred to in small quantities, and no extra purchases are required to achieve a full product set.

Even if Rule 1(l) is found to apply, it has been complied with.

Principle 3:
See above

Rule 3(a):
See above

Rule 3(b):
See above

APPENDIX B**Nutrition Information Panel 250mL Pepsi Max no sugar**

CANNED UNDER APPOINTMENT FROM PEPSICO INC., NY, USA. DISTRIBUTED BY FRUCOR SOFTDRINKS LTD., 86 PLUNKET AVENUE, WIRI, AUCKLAND, NZ. "PEPSI MAX", "PEPSI-COLA" AND THE PEPSI GLOBE ARE REGISTERED TRADEMARKS OF PEPSICO INC., NY, USA. CONTAINS: CARBONATED WATER, COLOUR (150d), SWEETENERS (951, 950), FOOD ACIDS (338, 330), PRESERVATIVE (211), CAFFEINE, FLAVOURS. MADE IN NEW ZEALAND FROM LOCAL AND IMPORTED INGREDIENTS. ALL BLACKS® AND THE SILVER FERN DEVICE ARE TRADEMARKS USED UNDER LICENCE FROM NEW ZEALAND RUGBY UNION. www.pepsimax.co.nz

LOW JOULE COLA. PHENYLKETONURICS: CONTAINS PHENYLALANINE. THIS PRODUCT CONTAINS CAFFEINE.

PEPSI COLA  **Please Recycle**

ard & join the conversation. www.pepsimax.co.nz/MAXBANTER.

NUTRITION INFORMATION			
SERVINGS PER PACK: 1		SERVING SIZE: 250mL	
	AVG QUANTITY PER SERVING	%DI* PER SERVING	AVG QUANTITY PER 100 mL
ENERGY	4.5 kJ	0.1 %	1.8 kJ
PROTEIN	0.2 g	0.3 %	<0.1 g
FAT, TOTAL	0 g	0 %	0 g
- SATURATED	0 g	0 %	0 g
CARBOHYDRATE	0.2 g	0.1 %	<1 g
- SUGARS	0 g	0 %	0 g
DIETARY FIBRE	0 g	0 %	0 g
SODIUM	17 mg	0.7 %	7.0 mg

*PERCENTAGE DAILY INTAKES ARE BASED ON AN AVERAGE ADULT DIET OF 8700kJ. YOUR DAILY INTAKES MAY BE HIGHER OR LOWER DEPENDING ON YOUR ENERGY NEEDS.

APPENDIX C**“Occasional” Nutritional Classification**

As Complaint 17/302 makes reference to the “Occasional” nutritional classification under “the Food and Beverage Classification (FBCS)” we note that under the listed criteria, Pepsi Max no-sugar cola is NOT

- high in fat, salt or sugar
- a full sugar or artificially sweetened energy drink
- a full sugar drink
- a beverage containing caffeine >56mg/serve

The caffeine content of Pepsi Max no-sugar is 12mg/100mL and 30mg/250mL can serving. Given all of the above, Pepsi Max is NOT an Occasional beverage

RESPONSE FROM MEDIA, ADSHEL

Our role in this campaign has been as one of multiple outdoor media companies selected to support the Pepsi Max MAX BANTER advertising campaign.

Adshel was selected as media channel to provide messaging proximity to the point of purchase enhancing relevance of the campaign and influencing the purchase decision.

Adshel also provided national coverage to our campaign, and the flexibility of site selection to ensure our message was placed in appropriate locations and environments, narrowing our targeting to minimise young audiences from being exposed to the campaign.

Adshel is committed to supporting ASA and the revised code in relation to Children.

Through the review process for the Children and Young People’s Advertising Code we identified the ability for us to restrict placement of Occasional Food advertising with the

distance agreed as 300m from schools, in fact all sites within 300m distance from Schools are set up as “Prohibited” in our system so they won’t even appear in the availability list when campaigns are planned.

I can confirm that for this campaign no advertisements were placed with 300m of a school.

There was however one site that, although it fell outside the 300m it sat on a main arterial route to the school. This site, although sitting outside the agreed 300m parameter, has now also been added to the list of “prohibitive” sites so that it will not be considered for any future Occasional Food campaign.

