

<b>COMPLAINT NUMBER</b>	20/525
<b>AWAP</b>	20/004
<b>COMPLAINANT</b>	McDonald's Restaurants (NZ) Ltd
<b>ADVERTISER</b>	Antares Restaurant Group Limited
<b>ADVERTISEMENTS</b>	Burger King Television and Digital Marketing
<b>DATE OF MEETING</b>	6 November 2020
<b>OUTCOME</b>	Not Upheld No further action required

## ADVERTISING STANDARDS AUTHORITY (ASA) COMPETITOR COMPLAINT

### SUMMARY OF DECISION

#### Description of the Advertisements

There were four advertisements relevant to this complaint:

**1**

#### **Burger King website ad**

This advertisement had a photo of the Big King XL with the text:

“A CLASSIC, MADE BETTER\* BY BK\*\* - THE BIG KING XL – Remove middle bun – more secret sauce – Bigger/flame-grilled”. Below this photo was the text: “\*In our humble opinion\*\* TM & © 2020 Burger King Corporation. Used under licence. All rights reserved. Available for a limited time. McDonalds is not associated with this campaign and all trademarks belong to their respective owners.”

**2**

#### **Burger King Facebook post 1**

This advertisement included the same video as that in advertisement 4 (see below).

To the right side of the video was the text: “BREAKING BURGER NEWS: We’ve made a big mmmimprovement.\* Introducing the Big King XL. A classic, made better\* by BK.\*\*

\*In our humble opinion.

**3**

#### **Burger King Facebook post 2**

This advertisement included a video with close-up images of the Big King XL burger, with the voiceover: “We’ve taken the classic and beefed it up, ditched the middle bun, added more secret sauce and flame-grilled it to perfection. A classic, made better by BK. Try the new Big King XL.” At the end of the advertisement was the text: “\*In our humble opinion\*\* TM & © 2020 Burger King Corporation. Used under licence. All rights reserved. Available for a limited time. McDonalds is not associated with this campaign and all trademarks belong to their respective owners.”

## 4

### **Burger King TVC**

This television advertisement featured Burger King employees leaving a restaurant, having purchased various products. The name of the restaurant and the products were pixelated. The employees were shown examining those products, alongside the words: “make it bigger”, “more secret sauce”, “lose middle bun”, “flame grill”. At the end of the advertisement the voiceover said “a classic, made better by BK. Try the new flame-grilled Big King XL and the asterisked disclaimer “\*In our humble opinion ...” appeared on screen.

### **Summary of the Written Complaint**

The Complainant, McDonald’s Restaurants (NZ) Ltd, said the advertisements in the Burger King comparative advertising campaign were misleading. The Complainant said “The overall impression of the campaign is that the “Big King XL” burger, when compared to a Big Mac is an improvement over the original product, e.g. contains more sauce and that the Big Mac is an inferior product.” The Complainant said the comparison is misleading because it is not “like for like”, there is no mention of price and that it denigrates the Big Mac.

### **Summary of the Advertiser’s Written Response**

The Advertiser, Antares Restaurant Group Limited, defended the advertisements and said they are not misleading, they draw factual comparisons with a competing “like” product, and they do not denigrate the Big Mac. In the advertiser’s view it is clear what features of the products are being compared and price/value does not form any part of the comparative claim.

### **Summary of the Agency’s Written Response**

The Agency, Pitchblack Partners, defended the advertisements and said they are not misleading and did not denigrate the Big Mac. The Agency said the Big King XL and the Big Mac are not identical products so price should not be compared.

The full versions of the Complaint, the Advertiser’s Response and the Agency’s Response can be found in the Appendices to this document.

### **Summary of the Panel Ruling**

The Panel ruled the complaint was Not Upheld.  
The Panel said the advertisements were not misleading and did not denigrate a competitor.

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

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## **PANEL HEARING**

### **PROCEDURE**

At the request of the Complainant, and with agreement from the Advertiser, the Chair decided this competitor complaint would be determined by way of adjudication without the attendance of parties, on the basis of written submissions provided by the parties.

A Panel was appointed pursuant to Rule 3 of the Complaints Procedures of the Advertising Standards Complaints Board.

## THE PANEL

Chair – R Anderson, Chair, Advertising Standards Complaints Board.

Co-Panelists – C Magee (Public Member of the Advertising Standards Complaints Board) and N Keats (Industry Member of the Advertising Standards Complaints Appeal Board).

## THE PARTIES

**The Complainant**, McDonald’s Restaurants (NZ) Ltd

**The Advertiser**, Antares Restaurant Group Limited

**The Agency**, Pitchblack Partners

### Relevant Precedent Decisions

In considering this complaint the Complaints Board referred to three precedent decisions, 08/128 AWAP 08/006, which was Upheld, 09/753 AWAP 09/033, which was Upheld (in part), and 19/036 which was Not Upheld.

The full version of decision 19/036 can be found on the Advertising Standards Authority (ASA) website:

<https://www.asa.co.nz/decisions/>

The full versions of decisions 08/128 AWAP 08/006 and 09/753 AWAP 09/033 are available on request from the ASA.

**Decision 08/128 AWAP 08/006** concerned a complaint about the Nufarm NZ website and brochure advertisements for Roundup Transorb, which included the claims: “Roundup Transorb delivers more to the roots than a leading imitator” and “Roundup Transorb is up to 30% more effective than imitators”. The Panel ruled that the advertisements denigrated an identifiable and competing product by use of the word “imitator”, GForce® Max. The Panel also ruled the claims were of a generalised nature which, by implication, were likely to mislead the consumer and exploit the lack of knowledge of the consumer.

**Decision 09/753 AWAP 09/033** concerned a complaint about an advertisement which appeared in two Telecom brochures which included the text: “When you make a call on Telecom One Rate Prepaid, after the first minute you’ll only be charged for the exact number of seconds your call lasts. Both Vodafone Supa Prepay\* and 2 Degrees\*\* round up to the next minute which means you may be paying a lot more for calls than you think, now that doesn’t seem fair.”

In the Panel’s view, the statement in the advertisement did not meet the requirements of the Code guidelines applicable at that time, which required that comparative advertising should be factual and informative and should offer a product or service on its positive merits. The statement “now that doesn’t seem fair” introduced a negative tone about a competing service and discredited and disparaged it. In the Panel’s view this was exacerbated by the fact that it was acknowledged that 2degrees’ overall pricing structure was cheaper than Vodafone and Telecom. The omission of any reference to 2degrees in the comparative price text box resulted in the claim with regard to pricing being likely to mislead or deceive the consumer.

**Decision 19/036** concerned a television advertisement for Optislim which said in part: “Optislim or Optifast – The names are similar, the ingredients are similar, so which one should you chose?” The advertisement compared price and where the ingredients are sourced.

The Complainant was concerned it was not correct to compare the Optislim product to Optifast, given that Optislim contains wheat and is therefore not gluten-free like the Optifast product.

The Complaints Board said the products featured in the advertisement were sufficiently alike to make the comparison between the two meaningful. The Complaints Board agreed the Advertiser did not make a claim that the Optislim product is suitable for consumers with gluten intolerance and the advertisement does not target the product at any specific group of consumers. The Complaints Board agreed that consumers who did have specific dietary restrictions are likely to be well versed in verifying ingredients at the point of purchase and are therefore unlikely to be misled or deceived by the claims made in the advertisement.

## **PANEL DISCUSSION**

The Chair of the Panel confirmed the four advertisements to be considered.

## **RELEVANT CODES OF PRACTICE**

The Chair directed the Panel to consider the advertisements with reference to the following codes:

### **ADVERTISING STANDARDS CODE**

**Principle 2: Truthful Presentation:** Advertisements must be truthful, balanced and not misleading.

**Rule 2(b) Truthful Presentation:** Advertisements must not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust or exploit their lack of knowledge. This includes by implication, inaccuracy, ambiguity, exaggeration, unrealistic claim, omission, false representation or otherwise. Obvious hyperbole identifiable as such is not considered to be misleading.

**Rule 2(d) Comparative Advertising:** Comparative advertisements, or advertising that identifies a competing product or service, must be factual, accurate, make clear the nature of the comparison, must not denigrate competitors and must be of 'like' products or services available in the same market.

### **Guidelines**

Competitor businesses, products and services must be fairly and properly identified and must not be discredited or denigrated in any way. They must not be used to 'upgrade by association' or for 'passing off' purposes or to take unfair advantage of the goodwill associated with them. This includes through the use of trademarks, trade names or other distinguishing identifiers

An advertisement must not appear to look like another as this is likely to mislead or cause confusion.

Advertisements that do not identify a specific competitor can still be considered a comparative advertisement, e.g. if a comparison is made against all competition within an industry or with specific aspects of an unnamed competitor product or service.

Comparative advertisements must only compare "like with like". The basis of selection for a comparison must be clear and the elements compared must not be selected in a way that gives the advertiser an artificial or unfair advantage. Only

identical products should be compared if price is the only comparative claim used in the advertisement.

The basis for any claim that any product or service is superior to others, for example, “number one”, “leading”, “largest”, “best value”, “cheapest” or similar, must be made clear in the advertisement.

### **Advertising self-regulation**

The Chair noted that the ASA was a self-regulatory organisation funded by industry to set standards and support responsible advertising. This includes codes of practice which set out standards in addition to the requirements set out in relevant legislation. The ASA Codes of Practice contain the basic principles by which advertisements are judged. In interpreting the Codes, emphasis is placed on the spirit and intention of the Codes.

### **Role of the Panel**

The Chair noted the Panel had read all the relevant correspondence regarding the complaint and viewed copies of the advertisements. The Chair noted the Complainant’s view that the Advertiser had made misleading and unfair claims in its advertising, which is prohibited by the Code.

The Chair confirmed the Panel’s role was to consider the advertisements, and the claims made, from the perspective of their likely audience. It then had to consider whether the comparative claims in the advertisements were in breach of the Code, including whether the information provided to it, when taken at face value, went far enough to substantiate any comparative claims made in the advertisement. The Panel noted the onus to substantiate any claims in the advertisement fell on the Advertiser.

## **PANEL DECISION**

The Panel considered the advertisements, according to the relevant Code, and made the following rulings:

### *What is the consumer takeout?*

The Panel said the likely consumer takeout of the four advertisements was: Burger King believes its Big King XL is better than a McDonald’s Big Mac. They believe this because it’s bigger, the middle bun has been removed, it has more secret sauce and the meat patty is flame-grilled. The Panel noted the Advertiser’s view that the advertising campaign was “clearly a tongue-in-cheek, humorous play on the similarities between the Big King XL and the Big Mac, and the well-known competitive relationship between McDonald’s and Burger King.”

### **Rule 2(d) – Comparative advertising**

#### *Did the advertisements identify a competing product?*

The Panel said although the advertisements did not mention McDonald’s or the Big Mac by name, the average consumer would have been able to identify the Big Mac as the competing product.

The Panel referred to the acknowledgement in the Advertiser’s response which says: “While consumers are likely to deduce that the Big Mac is the “classic” burger referred to in the Campaign, the Campaign does not include an explicit reference to McDonald’s or the Big Mac...”

The Panel confirmed a comparison did not require an “explicit reference” to the competing product and it was clear from the advertisement that Burger King was referring to the Big Mac.  
*Were the advertisements of ‘like’ products available in the same market?*

The Panel agreed the advertisements were of “like” products available in the same market. Both the Big Mac and the Big King XL are beef burgers which are available for purchase at quick service restaurants, although there are some differences between the two products, some of which the advertisements draw attention to.

The Panel referred to precedent decision 19/036 regarding the advertisement for Optislim. In that case the Complaints Board said the products featured in the advertisement, though different in some ways, were sufficiently alike to make the comparison between the two meaningful. The Panel said it is not necessary for a comparative advertisement to include comparisons about every aspect of the product being compared, and this includes ingredients and price.

*Were the advertisements factual, accurate and did they make clear the nature of the comparison?*

The Panel agreed the advertisements were factual and accurate and did make clear the nature of the comparison being made. In particular, the Panel noted the different sizes of the burgers, included in the reference to the Big King XL. They also noted the specific references to the burger ingredients. The Panel said the advertisements did not contain any statements that were inaccurate or unclear.

*Did the advertisements denigrate a competitor?*

The Panel agreed the advertisements did not denigrate a competitor, McDonalds, or the Big Mac. The Panel said the advertisements acknowledge the Big Mac as a “classic” burger. A “classic” is something which has been judged over a period of time to be of high quality and is loved by a large number of people. In the context of these advertisements, to describe the Big Mac as a “classic” does not in itself have negative connotations. While the advertisements put forward the view that the Burger King XL is even better than a Big Mac, the Panel did not consider this meant they are denigrating or unfairly criticising the Big Mac.

The Panel also noted the tone of the advertisements was tongue-in-cheek with the inclusion of the “raid” and the reference to “\* in our humble opinion”.

The Panel compared this decision to a precedent decision, 09/753 AWAP 09/033, regarding an advertisement for Telecom New Zealand Limited, and said that precedent provided an example of an Advertiser making an unfavourable comparison about a competitor. The Panel said that advertisement introduced a negative tone about a competing service and disparaged it with the text: “... Both Vodafone Supa Prepay\* and 2 Degrees\*\* round up to the next minute which means you may be paying a lot more for calls than you think, now that doesn’t seem fair.”

The Panel also referred to precedent 08/128 AWAP 08/006 regarding an advertisement for Roundup Transorb which said “Roundup Transorb delivers more to the roots than a leading imitator” and is “up to 30% more effective”. The use of the word “imitator” in this context was said to imply a negative view of the competitor in breach of the Code.

The Panel said the Burger King advertisements did not go as far as these precedents in making unfavourable or disparaging comparisons about a competitor.

## **Principle 2 - Rule 2(b)**

*Were the advertisements misleading?*

The Panel agreed the advertisements were not misleading. The Panel said the advertisements were promoting the Burger King XL product, with specific reference to its size, its ingredients and the way it is cooked.

The Panel said the advertisements were clear about the nature of the comparison being made and did not include any implication of a comparison of the price or value of the Burger King XL to the Big Mac. The Panel noted the comment from the Complainant that it “concedes that the Burger King XL is bigger than a Big Mac”.

The Panel said a reasonable consumer might expect that if the Burger King XL is bigger than a Big Mac, and has different ingredients, the price might be different. The Panel noted the Burger King XL costs more than a Big Mac.

The Panel referred to precedent decision 19/036, regarding Optislim and Optifast products. The Panel said this decision was relevant to the case before it because in that case the Panel had decided that it is not necessary for a comparative advertisement to include comparisons about every aspect of the product being compared. In that case the advertisement had not implied that the Optislim product was gluten-free, so the comparison of the products on other aspects was not misleading. In this case, the Burger King XL advertisements do not imply that their product is the same price as the Big Mac and it is therefore not misleading to fail to compare price.

The Panel also noted that the comparative claims, in particular the comparison as to size, have been sufficiently substantiated and therefore the advertisements are not misleading.

#### **In Summary**

The Panel agreed the four advertisements were not in breach of Principle 2, Rule 2(b) or Rule 2(d) of the Advertising Standards Code.

**Decision:** Complaint: Not Upheld – No further action required.

## APPENDICES

1. Description of the Advertisements
  2. Complaint from McDonald's Restaurants (NZ) Ltd
  3. Response from the Advertiser, Antares Restaurant Group Limited
  4. Response from Pitchblack Partners
  5. Response from the Commercial Approvals Bureau
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### Appendix 1

#### DESCRIPTION OF THE ADVERTISEMENTS

There were four advertisements relevant to this complaint:

**1**

##### **Burger King website ad**

This advertisement had a photo of the Big King XL with the text: "A CLASSIC, MADE BETTER\* BY BK\*\* - THE BIG KING XL – Remove middle bun – more secret sauce – Bigger/flame-grilled". Below this photo was the text: "\*In our humble opinion\*\* TM & © 2020 Burger King Corporation. Used under licence. All rights reserved. Available for a limited time. McDonalds is not associated with this campaign and all trademarks belong to their respective owners."

**2**

##### **Burger King Facebook post 1**

This advertisement included the same video as that in advertisement 4 (see below). To the right side of the video was the text: "BREAKING BURGER NEWS: We've made a big mmmimprovement.\* Introducing the Big King XL. A classic, made better\* by BK.\*\* \*In our humble opinion."

**3**

##### **Burger King Facebook post 2**

This advertisement included a video with close-up images of the Big King XL burger, with the voiceover: "We've taken the classic and beefed it up, ditched the middle bun, added more secret sauce and flame-grilled it to perfection. A classic, made better by BK. Try the new Big King XL." At the end of the advertisement was the text: "\*In our humble opinion\*\* TM & © 2020 Burger King Corporation. Used under licence. All rights reserved. Available for a limited time. McDonalds is not associated with this campaign and all trademarks belong to their respective owners."

**4**

##### **Burger King TVC**

This television advertisement featured Burger King employees leaving a restaurant, having purchased various products. The name of the restaurant and the products were pixelated. The employees were shown examining those products, alongside the words: "make it bigger", "more secret sauce", "lose middle bun", "flame grill". At the end of the advertisement the voiceover said "a classic, made better by BK. Try the new flame-grilled Big King XL and the asterisked disclaimer "\*In our humble opinion ..." appeared on screen."

## Appendix 2

### COMPLAINT FROM MCDONALD'S RESTAURANTS (NZ) LTD

#### Complaint – BURGER KING COMPARATIVE ADVERTISING

1. I am writing on behalf of McDonald's Restaurants (New Zealand) Limited ("McDonald's") regarding an extensive nationwide comparative advertising campaign being run currently by Burger King New Zealand ("Burger King") on TV and social media ("Campaign"), copies and links attached.
2. McDonald's considers that all of the advertisements which feature in the Campaign are misleading and deceptive and breach the Advertising Standards Authority's Advertising ("**ASA**") Codes of Practice ("**Codes**"). McDonald's wishes to make a complaint to the ASA regarding the Campaign. We set out details of the Campaign, the advertisements and the breaches of the Codes below and in the **enclosed** schedule.

#### **The Campaign**

3. Burger King have made a point of comparing a Big Mac with their new burger the "Big King XL". Burger King throughout the video ads do not hide the fact that they have visited McDonald's, bought several Big Macs and taken them apart to try and make them better.
4. The overall impression of the campaign is that the "Big King XL" burger, when compared to a Big Mac is an improvement over the original product, eg. Contains more sauce and that the Big Mac is an inferior product.
5. We set out below why the Campaign and each of the advertisements are unfair and misleading, however, in summary:
  - a) The comparison is unfair as it does not compare "like for like" products.
  - b) The comparison is misleading because there is no mention of price.
  - c) The Big King XL is deliberately made to look like a Big Mac, with two meat patties, sesame seed bun, lettuce cheese and special sauce so that customers are likely to believe the products have a similar price point. This is also evident in the use of the word "Big".
  - d) The Big King XL ads denigrate the goodwill associated with the Big Mac.

### **Further detail**

6. The Campaign's key message is that the Big King XL is larger than a Big Mac. While McDonald's concedes that the Big King XL is bigger the comparison is not a "like for like" comparison and therefore breaches Rule 2(d) of the Advertising Standards Code.
7. The average price of a Big Mac is \$6.65, the average price of a Big king XL is \$12.90. It is misleading to compare two products based on size where one product is nearly twice as expensive. This is akin to comparing a small fry serving at McDonald's with a large fry serving at Burger King and asserting one was bigger/better than the other, but disregarding a price differential.
8. While we do not consider that the two products are similar enough to be compared, if a comparison were to be made, price must be disclosed to enable consumers to make an accurate assessment of the similarities.
9. A more accurate comparison might be to compare two Big Mac (\$13.30), or our Double Quarter Pounder (\$9.20) or our Boss burger at (\$9.50).
10. The Big Mac is recognisable world wide and is synonymous with McDonald's. McDonald's has been making Big Mac's since 1967. Economists have even used it as a reference point for comparing the cost of living in different countries –*the Big Mac index*– as it is so widely available and is comparable across markets.
11. McDonald's believes the Campaign unfairly denigrates the Big Mac, the implication being that the Big Mac is an inferior product, this is highlighted in the tag line a "A classic made better".

### **Breaches of the Codes**

12. We consider the Campaign breaches following provisions of the Codes:
  - (a) Advertising Standards Code - Rule 2 (a) – Truthful presentation;
  - (b) Advertising Standards Code – Rule 2(d)- Comparative advertising

### **Conclusion**

13. For the reasons set out above McDonald's believes the Campaign is misleading, unfair and denigrating.
14. McDonald's requests that the ASA considers its complaint in relation to the Campaign.
15. McDonald's is happy for the ASA to determine the matter based on the written evidence provided by the parties without the need for oral submissions.
16. If the ASA has any questions or requires clarification on any of the above, please do not hesitate to contact the writer in the first instance.

Appendix:

Link to social media and TV ad

<https://www.facebook.com/BurgerKingNZ/videos/684765482391005/?vh=e&extid=0>

McDonald's Restaurants (New Zealand) Limited

## Appendix 3

### RESPONSE FROM THE ADVERTISER, ANTARES RESTAURANT GROUP LIMITED

#### Complaint 20/525 AWAP 20/004 - Burger King Television and Digital Marketing Advertisement – Submission from Antares Restaurant Group Limited

We refer to your letter of 20 October 2020 regarding the complaint received from McDonald's Restaurants (New Zealand) Limited (**McDonald's**) in relation to the television and digital advertising campaign for the Big King XL (the **Campaign**) published by Antares Restaurant Group Limited t/as Burger King (**Burger King**).

You have referred to the following principles and rules in the Advertising Standards Code as being applicable:

Principle 2: Truthful Presentation: Advertisements must be truthful, balanced and not misleading.

Principle 2, Rule 2(b): Truthful Presentation: Advertisements must not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust or exploit their lack of knowledge. This includes by implication, inaccuracy, ambiguity, exaggeration, unrealistic claim, omission, false representation or otherwise. Obvious hyperbole identified as such is not considered to be misleading.

Principle 2, Rule 2(d): Comparative Advertising: Comparative advertisements, or advertising that identifies a competing product or service, must be factual, accurate, make clear the nature of the comparison, must not denigrate competitors and must be of 'like' products or services available in the same market.

We believe the Campaign truthfully represents the nature of the Big King XL, is not misleading or likely to mislead, deceive or confuse consumers as to any aspect of the Big King XL, draws factual comparisons with a competing 'like' product, and does not denigrate McDonald's in breach of the Codes.

#### 1 The Complaint

1.1 The essence of the complaint appears to be that the Big King XL Campaign:

- (a) misleads and deceives consumers as to the price of the Big King XL compared with the price of the McDonald's Big Mac;
- (b) unfairly compares the Big King XL with the Big Mac because (McDonald's asserts) that the two burgers are not 'like' products; and
- (c) denigrates the goodwill associated with the Big Mac.

#### 2. Key Features of the Campaign

2.1 On its website, Burger King describes the Big King XL as follows:

"A classic, made better\* by BK\*\*

\*In our humble opinion.

\*\*TM © Burger King Corporation. Used under license. All rights reserved. Available for a limited time. McDonalds is not associated with this campaign and all trademarks belong to their respective owners.”

“The Big King XL is like that classic ‘big’ burger, but bigger, beefier, flame-grilled, and loaded with more secret sauce. Doesn’t that sound better? We reckon anyway. Try it for yourself and let us know.”

2.2 Facebook Posts relating to the Big King XL (attached to the McDonald’s complaint) feature the following statements:

“We’ve made a big mmmprovement.\* Introducing the Big King XL. A classic, made better\* by BK.\*\*  
\*In our humble opinion”

“It’s bigger...it’s better\*...It’s secret saucier...and it’s out now!  
\*In our humble opinion”

2.3 The TV commercial features Burger King employees leaving a restaurant having purchased various products. There are then a number of cut scenes which show employees dissecting those products, alongside the words: “make it bigger”, “more secret sauce”, “lose middle bun”, “flame-grill”. At the conclusion of the commercial, the voice-over states “a classic, made better by BK. Try the new flame-grilled Big King XL”. The asterisked disclaimer “\*In our humble opinion” appears on-screen.

2.4 This commercial also appeared on Facebook, see “Facebook Advertisement 1” supplied by McDonald’s.

2.5 Facebook advertisement 2 features the following voice-over alongside images of the Big King XL:

“We’ve taken the classic and beefed it up, ditched the middle bun, added more secret sauce and flame-grilled it to perfection. A classic, made better by BK. Try the new Big King XL”,

The final frame of the advertisement features the asterisked disclaimer “\*In our humble opinion”.

- 2.6 The Big King XL has been part of the global Burger King menu for many years. Although it is new to the New Zealand market, the Big King XL has a global reputation as an exclusive Burger King product, which competes globally with McDonald's Big Mac. The nature of the Campaign is consistent with the nature of Big King XL advertising globally, which compares the Big Mac with the Big King XL in terms of key attributes of relevance to consumer taste, including in particular the patty size in the Big King XL.<sup>1</sup>
- 2.7 Neither McDonald's nor the Big Mac are mentioned by name in the Campaign. Any McDonald's trade mark which appears in the Campaign has been blurred so as to be unrecognisable. While consumers are likely to deduce that the Big Mac is the "classic" burger referred to in the Campaign, the Campaign does not include an explicit reference to McDonald's or the Big Mac and is thereby deliberately intended not to denigrate McDonald's or the Big Mac.
- 2.8 Wherever the claim "a classic, made better" appears, the asterisked disclaimer which states that this claim is Burger King's humble opinion also appears. The Campaign clearly and expressly states that the claim the Big King XL is "better" is the opinion of Burger King and conveys that the basis for that opinion are certain objective features of the Big King XL which are highlighted in the Campaign. These include the fact the Big King XL is bigger, contains more beef, contains more sauce, does not feature a middle bun, and is flame-grilled.
- 2.9 The overall impression created by the Campaign is a humorous take on the well-known competitive relationship between McDonald's and Burger King, centred on the tongue-in-cheek suggestion that Burger King (of course) *thinks* its Big King XL is "better" than the classic Big Mac.
3. **Campaign does not mislead consumers as to the price of the Big King XL vs the Big Mac**
- 3.1 The Campaign does not include any reference to the price of the Big King XL, or any suggestion that the Big King XL is sold at a better or similar price. There is nothing in the Campaign to suggest that the reference to the Big King XL being "better" is in any way a value related claim.
- 3.2 In terms of its size, the Big King XL is advertised as being a "beefed-up" and "bigger" version of a "classic". Those representations are in all respects accurate, and we do not understand McDonald's to dispute the accuracy of any of these representations.

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<sup>1</sup> See Business Wire article (published 17 January 2019) "[The New BIG KING XL Sandwich at BURGER KING® Restaurants Outsizes the Competition](#)" which outlines how the BIG KING XL was advertised in Miami, USA during January 2019.

- 3.3 Under Rule 2(d) of Principle 2, where advertising features claims of a comparative nature:
- (a) those claims must be factual and accurate; and
  - (b) the nature of the comparison must be clear.
- 3.4 The key features of the Campaign outlined above were developed by Burger King to ensure consumers viewing the Campaign would understand that the Campaign draws a comparison between *the taste and composition* of the Big King XL and the Big Mac. The claims in respect of the taste and composition of the Big King XL are both factual and accurate. In Burger King's view there is no doubt at all that the nature of the comparison is clear.
- 3.5 Burger King respectfully disagrees with McDonald's suggestion that "the Big King XL is deliberately made to look like a Big Mac...so that customers are likely to believe the products have a similar price point":
- (a) beef patties, sesame seed buns, lettuce, cheese and burger sauce are all common ingredients in burgers sold in the Quick Service Restaurant industry, and are not synonymous with the Big Mac alone;
  - (b) the presence of two meat patties, sesame seed bun, lettuce, cheese and burger sauce would not, of themselves, lead consumers to believe that two products which feature those ingredients would be sold at the same price point;
  - (c) the size, quality, derivation and brand will have an expected impact on the ultimate price point at which burgers of a similar composition are sold;
  - (d) the Campaign does not make any value or price point comparison or reference;
  - (e) the Campaign focuses on taste and size comparisons and features a number of factors which are more likely to lead consumers to believe the Big King XL and the Big Mac do not have a similar price point, such as highlighting that the Big King XL is bigger, features more beef, and has been flame-grilled; and
  - (f) if a better and bigger burger were available at the same price then consumers would anticipate an express reference to that fact to be incorporated into the Campaign.
- 3.6 It is not misleading to compare the size and flavour of two 'like' products, simply because the larger of those products is necessarily more expensive - in the same way that it cannot be misleading to compare the efficiency of two 'like' products simply because there is a realistic price difference. Not all legitimate comparisons require identical price points.
- 3.7 Burger King has not received any consumer complaint which suggests in any way that a consumer felt they were misled about the price of the Big King XL as a result of the Campaign.

- 3.8 McDonald's suggests that, where like products are compared, the price must be disclosed to enable consumers to make an accurate assessment of the similarities. The Campaign was clearly designed to convey factual and accurate claims about the composition of the Big King XL, and how its composition compares to other burgers in the market, including the Big Mac specifically. There is nothing in the Campaign which seeks to compare the price of the Big King XL with the price of any other burger available in the market. No part of the comparison is value or price based.
- 3.9 For the above reasons, Burger King does not believe that the Campaign is misleading through not including the price of the Big King XL.

#### **4. Big King XL and Big Mac are 'like' products**

- 4.1 At paragraphs 6 and 7 of their complaint, McDonald's suggest that the Big King XL and the Big Mac are not 'like for like' as the Big King XL is bigger and more expensive than the Big Mac. Burger King respectfully disagrees as drawing distinctions between otherwise 'like' products is the essence of comparative advertising. If every feature of a 'like' product needed to be identical in order for a valid comparison to be drawn, there would be no validity or point in comparative advertising.
- 4.2 The Guidelines to Rule 2(d) state:
- “Comparative advertisements must only compare “like with like”. The basis of selection for a comparison must be clear and the elements compared must not be selected in a way that gives the advertiser an artificial or unfair advantage. Only identical products should be compared if price is the only comparative claim used in the advertisement”.
- 5.3 Notably, the only circumstance in which *identical* products must be featured is where price is the only comparative claim made in the advertisement. That is clearly not the case with this Campaign, in respect of which price/value does not form any part of the comparative claim.
- 5.4 Burger King submits that the Big Mac and Big King XL are clearly “like for like” products. They are both beef burger products sold by players in the Quick Service Restaurant Industry, which feature similar ingredients (including two patties, a sesame seed bun, lettuce, cheese, and special / secret sauce). By McDonald's own admission these features are such that the Big King XL “looks similar“ to the Big Mac.<sup>2</sup> These products clearly compete in the same market, for the same customer base, not only in New Zealand but globally. The Big King XL and the Big Mac are sufficiently alike to make the comparison as to size and taste meaningful to consumers.
- 5.5 That there are some differences between the Big Mac and the Big King XL (i.e. the fact they are not in all respects identical) does not mean Rule 2(d) has been breached. In

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<sup>2</sup> See paragraph 5(c) of McDonald's complaint.

Complaint 19/036, the Complaints Board considered an Optislim advertisement, which compared the price and the source of ingredients of Optislim and Optifast (a competing product). Despite differences between those products (being that only one of them was gluten-free), the Complaints Board was satisfied that the products were sufficiently alike to make the comparison between them meaningful. As the advertiser did not make a claim that Optislim was gluten-free and did not target the product at any specific group of consumers, the Complaints Board was satisfied the advertisement did not breach the Code.

- 5.6 In line with the Guideline to Rule 2(d) noted above, the basis of selection for the comparison is clear. The comparison between the two products is clearly expressed as being based on size and taste. Neither of those factors gives rise to an artificial or unfair advantage. Size and taste are valid and important factors of relevance to consumer preference in relation to burger products.
- 5.7 The fact the Big King XL is objectively larger than the Big Mac, and is therefore more expensive, does not override the fact that the compositional similarities between the products make them natural “like for like” competitors in respect of which size and taste are legitimate comparative measures.

## **6. The Campaign does not denigrate McDonald’s or the Big Mac**

- 5.1 Under Rule 2(d) of Principal 2, comparative advertisements, or advertising that identifies a competing product or service must not denigrate competitors. The Campaign does not make any negative statement in relation to McDonald’s or the Big Mac which could be interpreted as denigration.
- 5.2 The Campaign does not expressly refer to McDonald’s or the Big Mac. The Campaign describes the competing product as “a classic”, and goes on to suggest that *in Burger King’s humble opinion only*, the ways in which the Big King XL differs from the classic makes it a subjectively “better” burger.
- 5.3 As an example, Burger King’s website states:
- The Big King XL is like that classic ‘big’ burger, but bigger, beefier, flame-grilled, and loaded with more secret sauce. Doesn’t that sound better? We reckon anyway. Try it for yourself and let us know.”

- 6.3 The Campaign does not make any statement which could be interpreted as derogatory or as denigration. Denigrate is commonly defined as “to attack the reputation of” or “to deny the importance or validity of”. Synonyms include to belittle, deprecate, disparage or derogate.<sup>3</sup> In a judicial context, New Zealand Courts have interpreted “denigrate” as meaning “to blacken, especially a reputation”.<sup>4</sup> In a previous decision, the ASA considered that words which carried negative implications were capable of denigrating competing products.<sup>5</sup>
- 6.4 The natural meaning of “denigrate” invokes a negative connotation i.e. an action taken or words spoken which make a negative assertion regarding a product or its reputation. This goes beyond a competitor claim that their product is subjectively (or, in their opinion) “better” than another product. This sort of claim is a positive comparative only, and does not have the effect of damaging or blackening the existing reputation of the competitor’s product through disparagement, depreciation or belittlement.
- 6.5 The suggestion that the Big King XL is better was intended as, and would be interpreted by consumer as, tongue in cheek puffery. This is a well-known and commonly used advertising tool, used by many businesses to market the attributes of their products, in part by suggesting their products are subjectively better than their competitors. Consumers are able to recognise this form of puffery, and will not interpret such statements as objective facts.
- 6.6 Notably, Rule 2(b) of the Advertising Standards Code expressly provides that obvious exaggeration, puffery or deliberate hyperbole that is unlikely to mislead is acceptable.
- 6.7 The consumer take-away from this sort of advertising is that, for the reasons clearly and expressly stated (being the size, extra beef, flame-grilled cook and additional sauce – all of which are objectively accurate), Burger King thinks the Big King XL is subjectively better than the classic burger. This sort of subjective taste comparison is a common advertising tactic, that is well understood and recognised by consumers.
- 6.8 The Campaign is clearly a tongue-in-cheek, humorous play on the similarities between the Big King XL and the Big Mac, and the well-known competitive relationship between McDonald’s and Burger King. The Campaign was in no way intended to, and does not, denigrate McDonald’s or their Big Mac in any way.
- 6.9 Burger King submits that the comparative advertising provisions of the Code should not be construed so as to discourage product improvement and innovation in the marketplace. To do so could have the effect of chilling innovation in terms of product development, and the ways in which innovative or improved products are advertised, in New Zealand. By its inherent nature, comparative advertising

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<sup>3</sup> “Denigrate.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/denigrate>. Accessed 26 Oct. 2020.

<sup>4</sup> See *Comptroller of Customers v Gordon & Gotch (NZ) Ltd* [1987] 2 NZLR 80.

<sup>5</sup> Complaint 08/128 AWAP 08/006

seeks to draw distinctions between otherwise like products and say that the advertiser's product is, by virtue of those distinctions, better in some way than the competing like product. The Campaign follows this structure explicitly and does not in any way offend against the expected and fair limits of traditionally accepted comparative advertising.

## **7. Conclusion**

6.1 Burger King is committed to doing our best to comply with the Advertising Standards Codes, and always attempts to act with a high level of social responsibility towards consumers, our customers, and our competitors.

6.2 Burger King confirms, subject to the date and time of the hearing being finalised, that we would like to attend the meeting via Zoom however understand no further submissions beyond this written submission can be presented at this time.

## Appendix 4

### RESPONSE FROM PITCHBLACK PARTNERS

#### **Complaint 20/525 AWAP 20/004 - Burger King Television and Digital Marketing Advertisement – Submission from Pitchblack Partners, Agency for Antares Restaurant Group Limited**

Suggested breaches of the advertising standards code;

##### Rule 2 (B) – Truthful presentation

It is the agency's view that the "Big King XL" campaign does not mislead, deceive or confuse the New Zealand consumer. Put simply, this piece of communication passes the "everyman / every woman" test, who if asked, would understand the differences between the two products. Both from the look of them and how they are cooked and constructed. There has been no identifiable hyperbole that can be considered as misleading.

Our position is confirmed with a closer look at the social platforms of both brands where there has been no brand or product misattribution or confusion.

##### Rule 2 (D) – Comparative advertising.

The "Big Mac" is a classic and our focus through the creative process was at no point should we present ideas that were denigrating to the product. It's a redundant direction, as it is a type of advertising that Kiwi audiences do not respond to.

We consider the "Big Mac" and "Big King XL" to be "like" products, they're burgers competing for the same kiwi customer. Yet there are key differences that our communication needed to make the kiwi customers aware of.

The "Big King XL" has been a burger offered by Burger King globally for many years and the communication of the differences between the two burgers has always been undeniably correct. It is bigger as it uses the larger Whopper patty, the patty is flame grilled (a Burger King USP), there is more sauce and there is no middle bun.

Considering these differences, they are not identical products and so price should not be compared. The burger loving Kiwi audience should be allowed to choose between what are two great burgers.

## Appendix 5

### RESPONSE FROM THE COMMERCIAL APPROVALS BUREAU

As this is a competitor complaint, we'll leave it to both parties to respond to respond with their respective cases, we've nothing particular to add to the proceedings.