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| <b>COMPLAINT NUMBER</b>       | 21/396  |
| <b>COMPLAINT ON BEHALF OF</b> | Healthy Auckland Together   |
| <b>ADVERTISER</b>             | BurgerFuel  |
| <b>ADVERTISEMENT</b>          | BurgerFuel Player of the Day Award                                |
| <b>DATE OF MEETING</b>        | 23 November 2021  |
| <b>OUTCOME</b>                | Upheld in Part, Not Upheld in Part<br>Advertisement to be Removed |

### **Summary of the Complaints Board Decision**

The Complaints Board upheld in part a complaint about a BurgerFuel ‘Player of the Day’ award given to children after a sports game. The Complaints Board said the advertisement was in breach of the Children and Young People’s Code for targeting minors with an advertisement for an ‘occasional food’.

### **Advertisement**

The BurgerFuel “Player of the Day” award is a rectangular piece of card with the heading “Congratulations you have scored yourself a free kid’s meal” across the top. Below this is a cartoon of a person with a burger for a head holding a trophy. The text “Player of the day” is written beneath. There is space for the name of the player, the expiry date and the location of the BurgerFuel shop. The BurgerFuel logo is across the bottom of the advertisement. The award is designed to be folded into a trophy.

### **Summary of the Complaint**

The Complainant was concerned the advertisement promotes the consumption of occasional food as a reward for physical activity. This directly contradicts the positive actions by children to help reduce their risk of obesity and live a healthy lifestyle.

This advertisement also directly targets areas where children are likely to gather and will be the primary audience. The images in this advertisement are particularly engaging for children with their use of cartoon characters.

### **Issues Raised:**

- Social responsibility
- Health and well-being
- Targeting children

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

The Advertiser acknowledged the product being promoted is an ‘occasional food’. The Advertiser said the awards are not part of an advertising campaign or their nationwide marketing activities.

The Advertiser said the intended audience/recipients for the award are children and teenager sports players aged 8 – 15 who participate in sports teams or events. The audience composition for the awards could not be quantified.

The Advertiser said the content of the award would have significant appeal to children.

## Relevant ASA Codes of Practice

The Chair directed the Complaints Board to consider the complaint with reference to the following codes:

### ADVERTISING STANDARDS CODE

**Principle 1: Social Responsibility:** Advertisements must be prepared and placed with a due sense of social responsibility to consumers and to society.

**Rule 1(h) Health and well-being:** Advertisements must not undermine the health and well-being of individuals.

### CHILDREN AND YOUNG PEOPLE'S ADVERTISING CODE

**Principle 1: Social Responsibility:** 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(e) Body image:** Advertising must not provide an unrealistic sense of body image or promote an unhealthy lifestyle.

- **Guidelines:** This includes denigration of healthy diets or lifestyles.

**Rule 1(i) Targeting children:** 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.

#### Definitions

“Children” means all persons below the age of 14 years.

“Occasional Food and Beverage Products” are those food and beverage products which are high in fat, salt or sugar and classified under the Food and Beverage Classification System (FBCS) as being intended for occasional consumption. If a particular product is not classified under the FBCS but is comparable or equivalent to a product which is classified, then it shall be deemed to have the same classification. If a particular product is not classified under the FBCS and is not comparable or equivalent to a product which is classified, then it shall be deemed to be an “Occasional food and beverage product” if it has less than 3.5 stars under the Health Star Rating System.

#### Guidelines:

- Advertisers need to demonstrate that care is taken when evaluating the expected average audience composition prior to the placement of occasional food or beverage advertisements to ensure they are not targeted at children
- Measures to determine if children are likely to be a ‘significant proportion’ of the expected average audience may include one, or a combination of, the following:
  - Where accurate data exists 25% or more of the expected average audience will be children.
  - Child viewing time zones.

- Content with significant appeal to children such as programmes, artists, playlists, video, movies and magazines.
- Locations where children gather (eg schools, school grounds, pre-school centres, playgrounds, family and child clinics and paediatric services and during any children’s sporting and cultural events).

### Relevant precedent decisions

In considering this complaint the Complaints Board referred to two precedent decisions, Decision 20/234, which was Not Upheld and Decision 19229, which was Upheld in Part.

The full versions of these decisions can be found on the ASA website:

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

**Decision 20/234** concerned complaints about four Hell Reading Challenge website, poster, Facebook and merchandise advertisements, which offered a free 333 Hell Pizza when children had read seven books. The Complaints Board did not uphold the complaints. The Board said while the advertisement was targeting children, the recommended portion size of two servings per pizza made it a ‘sometimes’ food. The Board said the imagery in the advertisement creative of children sharing a pizza supported this.

**Decision 19/229** concerned a complaint about a bus shelter and website advertisement for Tiny Teddy biscuits, which the Complaint said promoted the regular consumption of a sometimes food. A majority of the Complaints Board said the advertisement promoted an unhealthy lifestyle. The Complaints Board upheld the bus shelter advertisement because it gave the misleading impression that a packet of Tiny Teddy biscuits is an everyday food and part of a balanced school lunch.

### Complaints Board Discussion

The Chair noted that the Complaints Board’s role was to consider whether there had been a breach of the Advertising Standards Code or the Children and Young Persons Code. In deciding whether the Code has been breached the Complaints Board has regard to all relevant matters including:

- Generally prevailing community standards
- Previous decisions
- The consumer takeout of the advertisement, and
- The context, medium, audience and the product or service being advertised, which in this case is:
  - Context: Player of the day award for a member of a children’s sports team
  - Medium: Hand out provided by BurgerFuel and handed to children at sports events
  - Audience: Children aged 8-15 years old
  - Product: Voucher for a free kids meal at BurgerFuel

#### *Is the Player of the Day award an advertisement?*

The Complaints Board firstly considered whether the BurgerFuel award was an advertisement for the purpose of the Advertising Standards Codes of Practice. The Board discussed the application of the definition of an “advertisement” which states:

“Advertising and advertisement(s) are any message, the content of which is controlled directly or indirectly by the advertiser, expressed in any language and communicated in any medium with the intent to influence the choice, opinion or behaviour of those to whom it is addressed.”

The Complaints Board noted the Advertiser had stated in its response in part. “These certificates are not part of an advertising campaign, but are part of our suite of Local Store Marketing flyer collateral that are available for BurgerFuel stores to order to engage with their community in the area of grass roots weekend sport.”

The Complaints Board agreed the award did meet the definition of an advertisement given that there was an intent to influence the choice or behaviour of consumers. The Board said the branded award encouraged consumers to visit BurgerFuel and was a stand-alone advertisement even if it was not associated with a wider advertising campaign.

#### *Consumer Takeout*

The Complaints Board agreed the likely consumer takeout of the advertisement was that BurgerFuel is offering to reward a sports team’s player of the day with a free kids meal.

#### *Is the advertisement promoting an Occasional Food?*

The Complaints Board noted the definition of ‘occasional food.’

The Complaints Board agreed the kids meal offered as a giveaway in the advertisement was classified as an occasional food under the Food and Beverage Classification System. The Board noted the Advertiser has stated in its response that “it was aware that our product is considered an occasional food.”

#### **Children and Young People’s Advertising Code**

Given that the Complaints Board ruled the advertisement promoted an occasional food, it then considered whether the advertisement targeted children, which for the purposes of the Code are defined as below the age of 14 years.

#### *Does the advertisement target children?*

#### *How is targeting assessed?*

‘Targeting’ is determined by the context of the advertisement and the relationship between the following three criteria:

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

#### *Product*

The Complaints Board agreed the kids meal being given away has high appeal to children. This is because the product is specifically referred to as a “kid’s” meal, contains ingredients designed to appeal to children, and is a small size.

#### *Presentation*

The Complaints Board agreed the execution of the advertisement presented in the form of a standing trophy-style creative with a cartoon figure with a burger for a head was likely to have high appeal to children.

#### *Placement*

The Complaints Board noted that Advertisers need to demonstrate care is taken when evaluating the expected average audience composition prior to the placement of occasional food or beverage advertisements to ensure they are not targeted at children.

The Complaints Board noted the measures to determine if children are likely to be a 'significant proportion' of the expected average audience may include one or a combination of the following;

1. Where accurate data exists, 25% or more of the expected audience will be children.
2. Child viewing time zones.
3. Content with significant appeal to children such as programmes, artists, playlists, video, movies, and magazines.
4. Locations where children gather (e.g. schools, school grounds, pre-school centres, playgrounds, family and child clinics and paediatric services and during any children's sporting and cultural events).

The Complaints Board noted the placement of the advertisement was in the form of a 'player of the day' award, available for BurgerFuel stores to download and distribute to sports organisations. These awards would then be handed out to children by the team coach. The Board noted under the Children and Young People's Advertising Code, the Advertiser was required to consider the expected average audience likely where the advertisement appeared. The Complaints Board said the execution and placement of the advertisement meant that children were a significant proportion of the audience.

The Complaints Board also noted the Advertiser had stated in its response that "the intended audience/recipients is children and teenager sports players aged 8-15 who participate in sports teams or events."

The Complaints Board noted that Rule 1(i) of the Children and Young People's Advertising Code states 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.

The Complaints Board ruled the advertisement was directly targeting children, given the high appeal of the product, presentation and placement and was in breach of Rule 1(i) of the Children and Young People's Advertising Code.

*Does the advertisement promote an unhealthy lifestyle?*

The Complaints Board said the advertisement did not promote an unhealthy lifestyle. The Board said that within in context of children engaging in sporting activities and receiving an award for a kid's BurgerFuel meal as a reward once or twice a season, the advertisement did not reach the threshold to promote an unhealthy lifestyle.

The Complaints Board said the advertisement did not reach the threshold to breach Rule 1(e) of the Children and Young People's Advertising Code.

*Has the advertisement been placed with a high standard of social responsibility?*

The Complaints Board said the advertisement had not been placed with a high standard of social responsibility. This is because advertisements for occasional food must not be targeted at children.

The Complaints Board ruled the advertisement was breach of Principle 1 of the Children and Young People's Advertising Code.

## Advertising Standard Code

### *Does the advertisement undermine the health and wellbeing of individuals?*

The Complaints Board said the advertisement was unlikely to undermine the health and wellbeing of individuals. The Board said that within the context of children engaging in sporting activities and receiving an award for a kids BurgerFuel meal as a reward once or twice a season, the advertisement did not reach the threshold to undermine the health and wellbeing of individuals.

The Complaints Board ruled the advertisement was not in breach of 1(h) of the Advertising Standards Code.

### *Has the advertisement been prepared and placed with a due sense of social responsibility?*

The Complaints Board noted the Advertising Standards Code requires a lower standard to the Children and Young People's Code. The Complaints Board said the infrequency of the product on offer, together with children engaging in physical activity, meant the Board considered the advertisement had been prepared and placed with a due sense of social responsibility.

The Complaints Board ruled the advertisement had not met the threshold to breach Principle 1 of the Advertising Standards Code.

## In Summary

The advertisement was Upheld under Principle 1 and Rule 1(i) and Not Upheld under Rule 1(e) of the Children and Young People's Code.

The advertisement was Not Upheld under Principle 1 or Rule 1(h) of the Advertising Standards Code.

## Outcome

The Complaints Board ruled the complaint was **Upheld in Part, Not Upheld in Part**

Advertisement to be removed.

## APPEAL INFORMATION

According to the procedures of the Advertising Standards Complaints Board, all decisions are able to be appealed by any party to the complaint. Information on our Appeal process is on our website, [www.asa.co.nz](http://www.asa.co.nz). Appeals must be made in writing with notification of the intent to appeal lodged within 14 calendar days of receipt of the written decision. The substantive appeal application must be lodged with the ASA within 21 calendar days of receipt of the written decision.

## APPENDICES

1. Complaint
  2. Response from Advertiser
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### Appendix 1

#### COMPLAINT

##### Complaint: BurgerFuel Kids Player of the Day advertising campaign

This complaint is made by the members of Healthy Auckland Together listed in Appendix B ('We'). We submit that the BurgerFuel Player of the Day advertising campaign breaches the Children and Young People's Advertising Code and the Advertising Standards Code.

A BurgerFuel sponsored advertisement was viewed in June 2021 at the Ponsonby Rugby Club.

We submit that the advertisements breach the following principles and rules of the Codes:

1. **Principle 1** of the Children and Young People's Advertising Code: this advertisement does not follow a high standard of social responsibility as it deliberately targets locations where children gather, thereby causing harm to them.
2. **Rule 1 (e)** of the Children and Young People's Advertising Code: the advertisement promotes an unhealthy lifestyle for children by promoting the consumption of occasional food as a reward for participating in sport, encouraging harmful eating routines.
3. **Rule 1 (i)** of the Children and Young People's Advertising Code: the advertisement targets locations where children gather. The advertisement was presented at a Rugby Club where children were competing. Therefore children make up a significant proportion of the expected audience at this venue. Furthermore, this advertisement has significant appeal to children as it targets school-aged sports players.
4. **Principle 1** of the Advertising Standards Code: advertisement does not provide a sense of social responsibility to the health and wellbeing of parents/caregivers or children. The consumption of a burger, fries and drink by children encourages unhealthy eating choices.
5. **Rule 1 (h)** of the Advertising Standards Code: the advertisement undermines the health and wellbeing of individuals through promoting an unhealthy diet. The advertisement promotes the consumption of occasional foods as an appropriate reward for participating in sport.

#### The Advertisement

The BurgerFuel advertisement was handed out to a child in June 2021 at the Ponsonby Rugby Club. The voucher has a picture of a person with a burger as a head; they are holding a trophy with “player of the day” at the bottom. There is a colourful and engaging colour scheme with white flashes that pop. The ad’s header states, “congratulations you have scored yourself a free kid’s meal”, with a specific branch and expiry date below. Also in the header is a cartoon illustration of a burger wearing sunglasses, a top hat and gloves.

*(Photo of certificate provided)*

## Breaches of the Child and Young People’s 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 (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.*

### Analysis

The Kid’s Ink Cheeseburger Meal includes a mini cheeseburger, small spud fries with aioli or tomato sauce and a small juice. In this advertisement, the burger, fries and juice are all occasional foods. Under the Food and Beverage Classification System, the burger on its own is classified as an occasional food.

| Kid’s Cheeseburger     |          |            |
|------------------------|----------|------------|
| Energy per 100g        | 1200kJ   | Sometimes  |
| Energy per serve       | 3270.6kJ | Occasional |
| Saturated fat per 100g | 5.8g     | Occasional |
| Sodium per 100g        | 290      | Everyday   |
| Sodium per serve       | 790.4    | Sometimes  |

Although we recognise that BurgerFuel has made an effort to improve their product’s nutritional value and quality, as described in the BurgerFuel nutritional information webpage (Appendix A). These burgers are still classified as occasional foods due to their high energy and saturated fat content. Primarily the issue is that these burgers are occasional foods, and must not be advertised to children.

This Kid’s Meal is primarily targeted to appeal to children and for children to consume. The product name is ‘kids meal’, and the advertisement was distributed at a children’s rugby game.



Therefore, this location is where children are likely to gather and therefore be the primary audience.

The advertisement's content has a significant appeal to children with the cartoon drawing of a person with a burger as a head holding a trophy. This cartoon drawing and bright colour scheme are likely to draw children in and make them engaged in the promotion. Furthermore, the advertisement states, "congratulations you have scored yourself a free kids meal" this implies that a child's hard work in rugby will be rewarded with this occasional food.

This type of advertisement fails to uphold an adequate level of social responsibility. The promotion places pressure on parents/caregivers to redeem the voucher.. As this promotion is given directly to the child, it removes any control or choice the parent/caregiver has to decide whether they want to redeem it or not. This is likely to invite persistent requests by the child once exposed to this advertisement, making it extremely difficult for parents/caregivers not to redeem this voucher even if it doesn't align with the family's health values.

Secondly, the use of an expiry date creates a sense of urgency and fear of missing out. This can encourage children to prioritise occasional food over other healthier options, making them more likely to pester their parent/caregiver for unhealthy food. This sense of urgency can make the occasional food seem more valuable as it won't always be accessible, creating greater desirability for unhealthy foods.

#### **.Rule 1 (e)**

*Advertising must not provide an unrealistic sense of body image or promote an unhealthy lifestyle.*

#### **Analysis**

The campaign portrays the consumption of the burger, fries and drink as a reward for participating in sports. Using food as a reward for 'good' behaviour such as playing sports, can create an association in children that they will get a treat if they participate. However, using occasional foods such as burgers as a reward can undermine children's healthy eating behaviours. The use of occasional food can also mean that children over-consume foods high in saturated fat and energy. Therefore this advertisement is promoting unhealthy dietary behaviours and, therefore, an unhealthy lifestyle. These behaviours are a contributing factor in the rising rates of childhood obesity in New Zealand. This advertisement promotes and contributes to the unhealthy eating behaviours children are developing and therefore causing them harm

#### **Breaches of the Advertising Standards Code**

##### **Principle 1 - Social Responsibility**

*Advertisements must be prepared and placed with a due sense of social responsibility to consumers and to society.*

##### **Rule 1 (h)**

*Advertisements must not undermine the health and well-being of individuals.*

#### **Analysis**

This advertisement promotes an unhealthy lifestyle through the promotion of an unhealthy diet. It does not maintain a sense of social responsibility to parents/caregivers or children. The advertisement promotes the consumption of occasional food as a reward for participating in sport's activities. This is an ill-considered message directed at children and parents/caregivers and does not align with the values of the code.

Parents/caregivers are the sole providers of food for their children. This advertisement removed the ability for parents/caregivers to decide whether to redeem this voucher based on if it aligns with their health values. It is unacceptable to offer this to children as pressure is then placed on the parents/caregiver when the child asks them for this unhealthy food. The advertisement of occasional foods is a contributing factor to New Zealand's rising obesity rates. The main objective is to create food preferences for these unhealthy foods as a child, leading to lifelong unhealthy food preferences.

### **Summary**

We consider this advertisement to be in breach as it undermines the efforts that organisations have made to reduce the rates of obesity in New Zealand. This advertisement promotes the consumption of occasional food as a reward for physical activity by congratulating children on their efforts. This directly contradicts the positive actions by children to help reduce their risk of obesity and live a healthy lifestyle. This advertisement also directly targets areas where children are likely to gather and will be the primary audience.

The images in this advertisement are particularly engaging for children with their use of cartoon characters. Therefore, we believe that both the Advertising Standards Code and the Young Persons and Children's Advertising Code have been breached by BurgerFuel's advertisement.

### **Appendix 2**

#### **RESPONSE FROM ADVERTISER, BURGERFUEL**

##### **To the Advertising Standards Complaint Board Complaint: BurgerFuel Kids Player of the Day advertising campaign**

We wish to defend the complaint raised regarding the BurgerFuel Player of the Day Certificates. We are aware that our product is considered an occasional food and take our social responsibility seriously when it comes to our advertising and audience targeting.

These Certificates are not part of an advertising campaign, but are part of our suite of Local Store Marketing flyer collateral that are available for BurgerFuel stores to order to engage with their community in the area of grass roots weekend sport. This suite of collateral includes various Local Store Marketing flyers and digital assets for all kinds of marketing and partnership initiatives to suit different locations, audiences and needs of a store.

Due to the factors outlined in this response, the seasonality and frequency of weekend sport (once per week) or tournaments/sports events, combined with the fact that it is unlikely for a player to receive a Player of the Day Certificate more than once per month, we feel that this

occasion is infrequent enough to warrant a Player of the Day certificate as part of our local store marketing collateral for stores to utilise and distribute responsibly.

The Player of the Day certificates are not part of our nationwide marketing activities and there are rules and guidance provided for stores around activating the BurgerFuel Player of the Day certificates in their market, such as:

- a) To activate in the market, the franchisee or store management should be actively engaged with the specific sports organisation, club or event and we encourage them to be involved with any other activities the organisation or club host, such as supporting fundraising events or sponsorship of tournaments. This is to encourage the franchisee to establish an authentic relationship with the organisation and ensure they are making a meaningful contribution to the community through the relationship.
- b) Stores have limitations on how many of the certificates can be ordered and distributed.
- c) It is encouraged that the store franchisee or local store marketing representative be there at the event or game, to be an active participant in supporting the team, and personally awarding the Player of the Day certificate to the chosen player is also encouraged. We want to emphasise that the certificate is special and further embed that idea of meaningful contribution to the community with the store owner or local store marketing representative being present.

Please see attached print file of the BurgerFuel Player of the Day Certificates. The Certificate folds into a standing trophy-style creative, with the idea that this could be kept and displayed. It is printed on a high-quality print stock material, to drive the perception that it is a special reward, not given out to just anyone.

The certificate offers the player a free Kids Meal and is designed to bring the whole family into the local store to connect after the game, although no purchase is required upon redemption. The expiry date is a blank field and left up to the franchisee or local store marketing representatives discretion on how long the player would have to redeem the voucher portion of the certificate.

The Player of the Day Certificate is an ongoing Local Store Marketing flyer that is available year-round, for any store that wishes to utilise it for the sports season.

The Player of the Day Certificates are not promoted or advertised anywhere else, but on the Certificate themselves. There is no media support or promotional campaign around these Certificates. There are no other digital or social assets that are offered to the stores around the Player of the Day Certificate.

The certificates are offered to sports clubs and sports events (i.e one off tournaments or competitions) and the intended audience/recipients is children and teenager sports players aged 8 – 15 who participate in sports teams or events, for example, rugby, soccer or netball. We also have a Most Valuable Player certificate that is designed for 15+.

It is up to each store's discretion if they chose to utilise the BurgerFuel Player of the Day Certificates in their market. Out of the 58 stores nationwide, we only have a handful of stores that order this collateral for new season sports each year. The stores' franchisees that utilise these Player of the Day certificates generally have long-standing relationships with sports

organisations, such as the Taranaki Rugby Football union. The franchisee may have been a player themselves in the past or have members in their family that play or have played in the organisation, and the relationship and activities usually involve multiple teams and age groups.

I hope this information provided is satisfactory. Please let us know if you require any further clarification or would like us to provide any additional information.

#### **ADDITIONAL RESPONSE FROM ADVERTISER**

Please see additional response below:

1. *How do you evaluate the expected average audience composition for these certificates?*

This cannot be quantified. The franchisee or local store marketing representative can order the flyers from an online portal and are not required to provide information around what sporting event or activity they are involved in that would require the certificates. Therefore, we cannot evaluate the expected average audience composition for local events or activities where the certificates are being distributed.

2. *What percentage of the expected average audience is children (under 14 years)?*

This cannot be quantified. The franchisee or local store marketing representative can order the flyers from an online portal and are not required to provide information around what sporting event or activity they are involved in that would require the certificates. Therefore, we cannot evaluate the expected average audience age for local events or activities where the certificates are being distributed.

3. *What percentage of the expected average audience is young people (14-18)?*

This cannot be quantified. The franchisee or local store marketing representative can order the flyers from an online portal and are not required to provide information around what sporting event or activity they are involved in that would require the certificates. Therefore, we cannot evaluate the expected average audience age for local events or activities where the certificates are being distributed.

4. *Do you think the content of the certificate would have significant appeal to children?*

Yes, we would agree that the content of the certificate would have significant appeal to the child who receives it when being awarded for Player of the Day.