



**Ad Standards** Community Panel  
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**AdStandards.com.au**

Advertising Standards Bureau Limited  
ACN 084 452 666

# Case Report

1	<b>Case Number</b>	<b>0006/19</b>
2	<b>Advertiser</b>	<b>Ferrero Australia Pty Ltd</b>
3	<b>Product</b>	<b>Food and Beverages</b>
4	<b>Type of Advertisement / media</b>	<b>App</b>
5	<b>Date of Determination</b>	<b>23/01/2019</b>
6	<b>DETERMINATION</b>	<b>Dismissed</b>

## ISSUES RAISED

Food and Beverage Code (Children) 3.5 pester power  
Advertising to Children Code 2.07 Parental Authority  
RCMI 1.1 - Advertising Message AFGC - Advertising Message  
RCMI 1.3 - Products in Interactive Games AFGC - Products in Interactive Games

## DESCRIPTION OF THE ADVERTISEMENT

This advertisement is an app called "Magic Kinder" available to download on mobile devices.

## THE COMPLAINT

A sample of comments which the complainant/s made regarding this advertisement included the following:

1. *The advertisement breaches the RCMI*

*The Obesity Policy Coalition (OPC) submits that this advertisement breaches the Responsible Children's Marketing Initiative (RCMI). As a signatory to the RCMI, Ferrero has committed not to advertise its products to children under 12 years in media unless those products represent healthier dietary choices, consistent with established scientific or Australian government standards.*



*In our submission the advertisement breaches clause s1.1 of the RCMI because: -*

- 1. It is a communication directed primarily to children;*
- 2. Kinder products do not represent a healthier dietary choice consistent with established scientific or Australian government standards; and*
- 3. It does not promote healthy dietary habits or physical activity.*

*We also consider that the app breaches clause s1.3 of the RCMI because the app is an interactive game directed primarily to children that includes Ferrero's food products and is not consistent with s1.1.*

*The advertisement is a marketing communication directed primarily to Children*

#### *Advertising or Marketing Communication*

*The RCMI applies to material that is published or broadcast on television, radio, print, cinema and internet sites. This advertisement is an app and an interactive game. The app requires internet connection for download and new content, and this means it should be considered an internet site within the meaning of the RCMI.*

*The Advertising Standards Community Panel (previously the Advertising Standards Board) has found the app Snapchat to be covered by the code applying to the Quick Service Restaurant Industry, the Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children (QSRI). The OPC made a complaint about a KFC Snapchat lens in 2017 (Reference 0102/17) and the Advertising Standards Board accepted that it was covered by the definition of medium within the QSRI (defined as television, radio, newspaper, magazines, outdoor billboards and posters, emails, interactive games, cinema and internet sites). We argue that the Magic Kinder app is also covered by the RCMI's definition of medium.*

*The Magic Kinder app is clearly an advertising or marketing communication within the meaning of the RCMI, as it is material published by, or on behalf of, Ferrero, over which it has a reasonable degree of control and that draws the attention of the public in a manner calculated to promote its product or the organisation.*

*Magic Kinder is clearly designed to promote Kinder Surprise to children and create brand awareness. The app is called 'Magic Kinder' and the logo features the Kinder logo displayed on all Kinder products. This logo appears clearly to children when the app is launched and is displayed prominently on the home screen as children toggle through menu options. The app uses the same blue, red and white colour scheme used on Kinder products, and these colours scroll across the screen when activities are loading.*

*The app prominently features 'surprises', creating a clear link between the app and the Kinder Surprise product. The surprises are incorporated into the app, representing the*



*child player and his or her engagement with some games. The app includes a call to action for children to 'Get your daily surprise', allowing them to unlock one surprise each day, similar to how the Kinder Surprise eggs operate. There is the option to scan a QR Code, and this allows children to scan a Kinder Surprise to unlock additional surprises.*

*The Magic Kinder app is clearly designed to draw public attention to promote Kinder and its products, the Kinder Surprise in particular.*

*Directed primarily to children*

*Based on its themes and visuals, the app is clearly directed primarily to children. The app uses child focused, simple animation and messaging to present a range of children's games and activities.*

*The information provided by Kinder in the 'About' section of the app that is targeted to parents says that it provides '...a safe space for your kids to have fun and learn'. The app website says 'Its fantastic range of engaging videos, stories, games and activities are for children aged 3-10 years to enjoy in a safe environment'. The nature of the games and activities would not be appealing to older teenagers or to adults.*

*There is no doubt that the app is directed primarily to children.*

*Kinder Surprise does not represent a healthier dietary choice*

*Kinder Surprise, and other Kinder chocolate products, are chocolate confectionery products and can in no way be considered a healthier dietary choice. The Australian Guide to Healthy Eating shows chocolate as one of the foods that should be consumed only sometimes and in small amounts. This is supported by the Australian Dietary Guidelines, which recommend that foods containing saturated fat, added sugar and added salt should be limited. The World Health Organization (WHO) also supports the limited intake of sugar, with guidelines regarding the health impacts of sugar consumption and recommending daily sugar intake be reduced to 10% of daily dietary intake and ideally, for the best health outcomes, to 5%.(Reference: World Health Organization 'Guideline: Sugars intake for adults and children'. Geneva, 2015).*

*Kinder Surprise is more than 50% sugar and approximately 22% saturated fat. It is not a healthy food choice for children, and does not represent a healthier dietary choice consistent with prevailing government standards. All of the products made by the Kinder brand are discretionary chocolate and confectionery products. Consumption of energy dense, high-sugar products such as Kinder chocolate can contribute to weight gain and obesity in children. It is not appropriate to promote a product so high in sugar and fat to children for consumption, particularly at a time when 27.4% of Australian children ages 5-17 are overweight or obese (Reference: Australian Bureau*



*of Statistics, Australian Health Survey: First Results, 2014-2015).*

*Ferrero's RCMI Company Action Plan says it will not advertise to media audiences with a majority of children under the age of 12, except for products that fulfill particular nutrition criteria, consistent with established scientific evidence and/or applicable national and international dietary guidelines. The plan says that the applicable nutrition criteria will eventually be defined and published at a later stage. We are unable to locate any nutrition criteria published by Ferrero that relate specifically to the RCMI, and Ferrero's general marketing plan on its website lists several different criteria and it is unclear how all of these various criteria would apply. We argue that regardless of how Ferrero categorises chocolate or confectionery within its own nutritional guidelines, it cannot demonstrate that chocolate is a healthier dietary choice consistent with established scientific or Australian government standards.*

*The advertisement does not promote good dietary habits or physical activity*

*Even in the case of a product that represents a healthy dietary choice, the RCMI provides that signatories may only advertise the product to children if the advertising and/or marketing communication activities reference, or are in the context of, a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages:*

- 1. Good dietary habits, consistent with established scientific or government criteria; and*
- 2. Physical activity.*

*The Magic Kinder app does not meet these requirements. The app does not appear to include any references to healthy eating. The Advertising Standards Board has previously noted, in its decision 0454/11, that merely omitting any references to unhealthy eating choices is not sufficient to discharge this obligation. It is quite clear that the advertiser is required to positively encourage good dietary habits and physical activity, which Ferrero has failed to do in this advertisement. In fact, the app displays unhealthy eating choices, including recipes such as Christmas cake pops and brownies.*

*We also submit that the app does not positively encourage physical activity. The only reference to physical activity we found was some videos about soccer and yoga. In our view, this is insufficient. The app has a lot of content, and children would only come across these videos if they happened to select that part of the app and then choose those videos. It is likely that many, or even most, users would not see them. There is no overall messaging encouraging physical activity to all users.*

*There are themes of 'adventure' in some games, however the Advertising Standards Board has previously found that mere suggestion of "adventure" in advertising does "not amount to an implication or encouragement of physical activity" (decision*



0454/11). Consistent with that approach, we submit that although the app contains games and activities including elements of 'adventure', it does not meet the test of positively promoting physical activity.

### *Clause s1.3*

*Clause s1.3 of the RCMI provides that signatories must ensure that any interactive game directed primarily to children that includes the signatory's food and beverage products must be consistent with s1.1.*

*We have outlined above why the app is directed primarily to children and is not consistent with s1.1. The app is clearly an interactive game, as it requires children to engage and interact in order to select and participate in chosen games or activities.*

*In our view the app includes Ferrero's food product, being the Kinder Surprise. The app does not depict the egg itself, however the 'surprises' (toys) that are inside Kinder Surprise eggs are a central feature of the app. The child can unlock a daily surprise and surprises are incorporated into the app, representing the child player and his or her engagement with some games.*

*The app also includes a call to action for children to 'Get your daily surprise', allowing them to unlock one surprise each day, similar to how the Kinder Surprise eggs operate. There is the option to scan a QR Code, and this allows children to scan a Kinder Surprise to unlock additional surprises.*

*The Magic Kinder app breaches clause 1.3 of the RCMI.*

### *Request for action*

*For the above reasons, the OPC asks Ad Standards to request that Ferrero withdraw the Magic Kinder app immediately on the basis that it breaches the RCMI.*

## *2. The advertisement breaches the Code for Advertising & Marketing Communications to Children*

*The OPC submits that this advertisement breaches clause 2.7(b) of the Code for Advertising & Marketing Communications to Children (Children's Code) because:*

- 1. It is an advertising or marketing communication to children, and*
- 2. It contains an appeal to Children to urge their parents, carers or another person to buy a product for them.*

*The advertisement is an advertising or marketing communication to children*



*The Children's Code applies to material that is published or broadcast on any medium whatsoever, including without limitation the internet, telecommunications and new and emerging technologies (among others). This advertisement was published on an app, Magic Kinder, which can be characterised as new and emerging technology.*

*The material must be undertaken by, or on behalf of, an advertiser or marketer:*

- *Over which the advertiser or marketer has a reasonable degree of control, and*
- *That draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct.*

*The Magic Kinder app is clearly an advertising or marketing communication within the meaning of the Children's Code, as it is material undertaken by, or on behalf of, Ferrero, over which it has a reasonable degree of control and that draws the attention of the public in a manner calculated to promote its product or the organisation.*

*Magic Kinder is clearly designed to promote Kinder Surprise to children. The app is called 'Magic Kinder' and the logo features the Kinder logo displayed on all Kinder products. This logo appears clearly to children when the app is launched and is displayed prominently on the home screen as children toggle through menu options. The app uses the same blue, red and white colour scheme used on Kinder products, and these colours scroll across the screen when activities are loading.*

*The app prominently features 'surprises', creating a clear link between the app and the Kinder Surprise product. The surprises are incorporated into the app, representing the child player and his or her engagement with some games. The app includes a call to action for children to 'Get your daily surprise', allowing them to unlock one Surprise each day, similar to how the Kinder Surprise eggs operate. There is the option to scan a QR Code, and this allows children to scan a Kinder Surprise or other product to unlock additional content or surprises.*

*The Magic Kinder app is clearly designed to draw public attention to promote Kinder and its products, the Kinder Surprise in particular.*

*The Children's Code clearly applies.*

*Directed primarily to children*

*Based on its themes and visuals, the app is clearly directed primarily to children. The app uses child focused, simple animation and messaging to present a range of children's games and activities.*

*The information provided by Kinder in the 'About' section of the app that is targeted to parents says that it provides '...a safe space for your kids to have fun and learn'. The app website says 'Its fantastic range of engaging videos, stories, games and activities*



*are for children aged 3-10 years to enjoy in a safe environment'. The nature of the games and activities would not be appealing to older teenagers or to adults.*

*There is no doubt that the app is directed primarily to children.*

*The advertisement is also for a good, the Kinder Surprise, that is targeted towards, and has principal appeal to, children. Kinder Surprise is a child sized product including a children's toy. It is clear it is designed for and appeals principally to children.*

*The advertisement appeals to children to urge their parents to buy a product for them*

*The advertisement includes a call to action to children to 'get your daily surprise'. This section, as well as allowing users one surprise per day, includes the option to scan a QR Code. This will unlock additional surprises if a child has purchased a Kinder product. This is an implied appeal to children to urge their parents, carers or another person to buy a Kinder product for them, as children will be motivated by the additional content and are unable to buy a Kinder product without an adult who can pay for it.*

*Request for action*

*For the above reasons, the OPC asks Ad Standards to request that Ferrero withdraws its Magic Kinder app.*

*3. The advertisement breaches the Food & Beverages Advertising & Marketing Communications Code*

*The OPC submits that this advertisement breaches clause 3.5 of the Food & Beverages Advertising & Marketing Communications Code (Food & Beverages Code) because:*

- 1. It is an advertising or marketing communication for a food and beverage product, and*
- 2. It includes an appeal to children to urge parents and/or other adults responsible for a child's welfare to buy particular children's food or beverage products for them.*

*It is clear that the advertisement is an advertising or marketing communication for a food and beverage product.*

*The Food & Beverages Code applies to material that is published or broadcast on any medium whatsoever, including without limitation the internet, telecommunications and new and emerging technologies (among others). This advertisement was published on an app, Magic Kinder, which can be characterised as new and emerging technology.*

*The material must be undertaken by, or on behalf of, an advertiser or marketer:*



- *Over which the advertiser or marketer has a reasonable degree of control, and*
- *That draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct.*

*The Magic Kinder app is clearly an advertising or marketing communication within the meaning of the Food & Beverages Code, as it is material undertaken by, or on behalf of, Ferrero, over which it has a reasonable degree of control and that draws the attention of the public in a manner calculated to promote its product or the organisation.*

*Magic Kinder is clearly designed to promote Kinder Surprise to children. The app is called 'Magic Kinder' and the logo features the Kinder logo the same as is displayed on Kinder products. This logo appears clearly to children when the app is launched and is displayed prominently on the home screen as children toggle through menu options. The app uses the same blue, red and white colour scheme used on Kinder products, and these colours scroll across the screen when activities are loading.*

*The app prominently features 'surprises', creating a clear link between the app and the Kinder Surprise product. The surprises are incorporated into the app, representing the child player and his or her engagement with some games. The app includes a call to action for children to 'Get your daily surprise', allowing them to unlock one Surprise each day, similar to how the Kinder Surprise eggs operate. There is the option to scan a QR Code, and this allows children to scan a Kinder Surprise or other product to unlock additional content or surprises.*

*The Magic Kinder app is clearly designed to draw public attention to promote Kinder and its products, the Kinder Surprise in particular.*

*The Food & Beverages Code clearly applies.*

*Directed primarily to children*

*Based on its themes and visuals, the app is clearly directed primarily to children. The app uses child focused, simple animation and messaging to present a range of children's games and activities.*

*The information provided by Kinder in the 'About' section of the app that is targeted to parents says that it provides '...a safe space for your kids to have fun and learn'. The app website says 'Its fantastic range of engaging videos, stories, games and activities are for children aged 3-10 years to enjoy in a safe environment'. The nature of the games and activities would not be appealing to older teenagers or to adults.*

*There is no doubt that the app is directed primarily to children.*



*The advertisement is also for a good, the Kinder Surprise, that is targeted towards, and has principal appeal to, children. Kinder Surprise is a child sized product including a children's toy. It is clear it is designed for and appeal principally to children.*

*The advertisement appeals to children to urge their parents to buy a product for them*

*The advertisement includes a call to action to children to 'get your daily surprise'. This section, as well as allowing users one surprise per day, includes the option to scan a QR Code. This will unlock additional surprises if a child has purchased a Kinder product. This is an implied appeal to children to urge their parents, carers or another person to buy a Kinder product for them, as children will be motivated by the additional content and are unable to buy a Kinder product without an adult who can pay for it.*

*Request for action*

*For the above reasons, the OPC asks Ad Standards to request that Ferrero withdraws its Magic Kinder app.*

## **THE ADVERTISER'S RESPONSE**

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

*Advertisement Description Magic Kinder is intended for the whole family and available as a mobile app for IOS and Android. Users can enjoy videos, activities, games and more – all of which aim to encourage family togetherness and help create moments of joy for the whole family.*

*Magic Kinder is designed to be used with the whole family; however, parents can rest assured that appropriate safeguards are in place to ensure that children can enjoy themselves securely:*

- Magic Kinder is totally free and does not contain any ads or in-app purchases;*
- The app is completely product free – no images or references to any of Ferrero products;*
- The app is COPPA+ compliant having gained certification from kidSAFE, a third party auditor on online children's safety;*
- The app includes a parental gate, providing adult only sections;*
- There are in-built tools to enable parent control e.g. time limits and verifications;*
- All Magic Kinder content is produced based on a 70/30 educational/entertainment principle;*
- Contents have been developed jointly with Oxford University. Ferrero Submission in response to Complaint 0006/19 We write in response to your letter dated 7 January 2019 in relation to Complaint 0006/19 (the Complaint) made in respect of the 'Magic*



*Kinder' app (App). Thank you for providing Ferrero the opportunity to respond to the Complaint. Ferrero confirms its support for the Advertising Standards Community Panel and its commitment to ensuring that the marketing and advertising of Ferrero products complies with the relevant laws, industry codes and initiatives. We have set out for your understanding an overview of the App followed by our overall position and our responses to the specific issues raised in the Complaint. A. The App – Magic Kinder*

*The App is a mobile application which enables families to play and learn together through engaging in activities that are designed with fun and learning in mind. The App is predominantly educational, with the ratio of 70% educational content to 30% entertainment content. The App was developed with expert input, including from the University of Oxford and other teaching professionals, to ensure that the content supported skill development. The App includes interactive and non-interactive stories, colouring in, games, quizzes and video tutorials on a range of subjects, from yoga to nature documentaries. The following core sections make up the App:*

- 'Play & Learn' – a game section which stimulates logical and strategic thinking containing features like fun facts and 'match-up games' where words are matched with images to train visual memory and word recognition;*
- 'Draw & Paint' – a creative section with activity sheets that can be coloured using a finger;*
- 'Videos' – a range of videos with both educational and entertainment value, for example, yoga lessons for kids, videos demonstrating magic tricks and craft projects, and Chinese language lessons; It includes interactive stories with audio and text to assist reading skills;*
- 'Discover the Planet' – an interactive globe with facts and quizzes providing educational material about the world;*
- 'Crazy Friends' – contains interactive stories tied to games like matching two sets of sorting cards to train memory, concentration and attention span;*
- 'Surprisery' – a game section which enables users to collect and play games with a virtual toy. This is supported by seasonal content. For example, there is currently a section in the App titled 'Chinese New Year' which sets out cultural facts and recipe tutorials related to the upcoming Chinese New Year. The App does not contain any product advertisements (i.e. no images of Ferrero food products or packaging and no advertisements for Ferrero brands) and the App does not contain any in-app purchases. The App is available for free and does not require a Ferrero product purchase in order to download the App or enjoy its content. The App is only available on a mobile device and is not operable via an Internet website. 'MAGIC KINDER' is the name of the App. 'MAGIC KINDER' is itself a standalone brand and trade mark representing the App in Australia and many other countries. 'MAGIC KINDER' is not registered for use on any food or beverage products. This is the global direction for this brand, that is, it is not connected with any food or beverage product. 'MAGIC KINDER' has been registered only in classes 9, 16, 18, 21, 25, 28 and 41 (Australian Trade Mark Registrations 1022436, 1095974, 1240475). Under the worldwide trade mark classification system, food and beverage products are registered in different classes which are classes 29, 30, 31, 32. The trade mark classes in which MAGIC KINDER*



registered is for the APP itself as a product for entertainment and fun. These trade mark classes encompass a range of goods and services including education, training, entertainment, sports and cultural activities. Copies of the 'MAGIC KINDER' trade mark registrations are annexed to the submissions for your reference. The mere use of the word 'KINDER' as part of the 'MAGIC KINDER' brand does not amount to any form of food advertising in itself. 'KINDER' is never used as a standalone expression in the App, only as part of the 'MAGIC KINDER' trade mark, which relates solely to the App.

Ferrero has clear internal governance rules that apply globally that direct that the App does not promote Ferrero products. The App complies with the IFBA Enhanced Global Policy on Marketing Communications to Children and with the EU pledge, a commitment made within the European Commission's "Platform for Action on Diet, Physical Activity and Health", in response to the calls made by EU institutions for the food industry to use commercial communications to support parents in making lifestyle choices for their children.

**B. Response to Complaint** The complainant has raised a number of issues that fall within the following Codes: - Australian Food and Grocery Council Responsible Children's Marketing Initiative (RCMI);

- AANA Code for Advertising and Marketing Communications to Children (Children's Code);

- AANA Food and Beverages Advertising and Marketing Communications Code (Food Code); and

- Australian Association of National Advertisers (AANA) Advertiser Code of Ethics (Code of Ethics) (together, the Codes). Set out below is our overarching response regarding the applicability of the Codes (in Part 1), together with our response on specific sections of the Codes raised by the Complaint (in Part 2): **Part 1: Is the App an 'Advertising or Marketing Communication'?** In order for the App to be bound by the Codes, it must firstly be considered an 'Advertising or Marketing Communication'.

The RCMI definition of 'Advertising or Marketing Communication' is as follows: "any material which is published or broadcast using any Medium which is undertaken by, or on behalf of a Signatory, and

- over which the Signatory has a reasonable degree of control, and

- that draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct..." The Children's Code and Food Code both contain a similar definition as follows: "any material which is published or broadcast using any Medium or any activity which is undertaken by, or on behalf of an advertiser or marketer,

- over which the advertiser or marketer has a reasonable degree of control; and

- that draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct..." The Codes further include separate definitions for 'Advertising or Marketing Communications to Children', which make it clear that the 'Advertising or Marketing Communication', must also be, "having regard to the theme, visuals and language used, directed primarily to Children" and be: - "for food and/or beverage products" (under the RCMI)

- "for Product" defined as "goods, services and/or facilities which are targeted towards

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*and have principal appeal to children” (under the Children’s Code);*

*- “for a Children’s Food or Beverage Product” defined as “any food or beverage product other than alcoholic beverages as defined in and subject to regulation by the Alcohol Beverages Advertising Code, which is targeted toward and has principal appeal to Children” (under the Food Code). Key to all of the above definitions for ‘Advertising or Marketing Communications to Children’ is that the communication must be for a product, meaning that there must be a product referenced or promoted within the communication. Specifically, under the RCMI and Food Code, this must be for a food or beverage product. Ferrero denies that the App is otherwise a ‘Advertising or Marketing Communication’ / ‘Advertising or Marketing Communication to Children’ within the above definitions. Firstly, the App does not contain material that is calculated to promote a product, service, person, organisation or line of conduct. The Ferrero organisation is not promoted in the App. The App does not include any images of or references to any Ferrero food or beverage products, nor does it contain any food or beverage logos or brands. There is no inducement, call to action, prompt or promotional message within the App to purchase any product. The content is not calculated to encourage people to purchase Ferrero products. There are no advertisements or advertising messages relating to any Ferrero products. There is a QR code scanner contained in the App (discussed in more detail in Part 2.2 below) however this simply involves an image of a QR code in the top left hand corner of the screen within the Surprisery section, this does not include any call to action or prompts to purchase Ferrero products or reminders to obtain a QR code. The QR code does not amount to any promotion of a product. To reiterate, the App contains a range of educational, activity-based and entertainment content only. The name ‘MAGIC KINDER’ is a separate and more general brand in itself, is not used or registered as a trade mark in connection with any food or beverage products as set out above in section A, and is not an advertisement or branding device for other products. The App is therefore not an ‘Advertising or Marketing Communication’ as defined in the Codes above. Secondly, Ferrero is committed to complying with the Codes and accordingly, the content of the App does not feature any materials that could reasonably be deemed to be product advertising to children. The App does not contain any food or beverage products, including no references, names, logos or imagery of any food or beverage products. This is intentional and in line with Ferrero’s own internal governance and directives to comply with the Codes. There is also no reference to any particular product or brand name. In the absence of any Ferrero products or brands (i.e. any food products), the App cannot be considered an ‘Advertising or Marketing Communication to Children’. Ferrero denies specifically that the ‘Surprisery’ section of the App (which delivers a daily virtual toy) amounts to a ‘Advertising or Marketing Communication to Children’. An animated virtual toy, unaccompanied by any brand or other promotional communication, is not an advertisement for a product or calculated to promote a product. Many interactive apps and games include functionality that operate in this manner, namely gifts or features that become available within the App upon certain achievements, which can be unlocked or opened in various ways within the App. This is a very common practice. The way the virtual surprise is given in the*



*App is also distinct from any Kinder Surprise mechanism or process. The virtual toy emerges as part of an animation from a ribboned box reminiscent of a generic gift box, rather than a Kinder Surprise chocolate egg or the recognisable egg-shaped plastic capsule that Kinder Surprise toys are packaged in. The mechanism for receiving the virtual toy is therefore distinct from how Kinder Surprise toys are packaged and received as the animation shows a conveyer belt with gift boxes and once a selection is made, the surprise is revealed. By contrast, a Kinder Surprise requires opening the foil wrapper, splitting open the chocolate egg to reveal the egg-shaped plastic capsule with the unassembled toy and instructions inside and then assembling the toy. The virtual toy in the App is not represented as a toy that you would actually receive in a Kinder Surprise product. The virtual toy is provided for entertainment value and is not accompanied by any promotional or other communication to promote Ferrero product. In addition, the QR code scanner made available in the Surprisery section of the App does not include any prompts or appeals to purchase any products (this is discussed in more detail in Part 2.2 below). In line with the above, Ferrero considers that the Codes do not fundamentally apply and the Complaint should be dismissed. This result would be consistent with the Board's previous determinations below. In 0103/11, the Board dismissed a complaint under the Quick Service Restaurant Industry Initiative (QSR) (which contains equivalent requirements to the RCMI) for a McDonald's 'Happy Meals' website which was described as a "fun site for kids to play some free games, look around, play and be creative". The website contained electronic games, colouring in sheets and other entertainment content and activities for children, some of which related to the toy in the Happy Meal. The website is therefore similar to the App, designed as a fun place for kids to enjoy and learn and as a brand extension of the Happy Meal product and brand. The McDonald's website did not show or advertise any Happy Meal food or drinks and contained a limited reference to McDonald's and Happy Meals in the form of a Happy Meals logo. There was no information or images about any food or beverage products. As such, the Board considered that the website did not promote the organisation (McDonald's) or the Happy Meal product or actively encourage children to buy the product. The 'Happy Meal' logo was also of itself not enough to constitute an advertisement for Happy Meals or draw the attention of children to Happy Meals in a manner calculated to promote Happy Meals. Accordingly, the Board determined it was not an Advertising or Marketing Communication and the Codes were not applicable and complaint dismissed. This decision was also confirmed by Independent Review. In any event, in the present case concerning the App, there are no logos for Ferrero and no Ferrero food products featured, and we trust that the Board will make a consistent finding that the App which is set up to provide educational and entertainment content for children as a brand extension of Ferrero under the banner 'Magic Kinder', is not an 'Advertising or Marketing Communication' within the meaning of the Codes. Similarly, in 0338/12, the Board held that a website 'Mac Pack' which promoted sport and healthy lifestyle to children and which featured McDonald's branding (i.e. golden arches) and images of Ronald McDonald training with children, was not an Advertising or Marketing Communication as it was not a website for the promotion of McDonald's*



*food or beverage products and did not feature, refer to or otherwise promote McDonald's food or beverage products. The mere existence of the McDonald's logo and an image of Ronald McDonald was not of itself a promotion of a food or beverage and did not breach any of the Codes or the QSR. Ferrero considers that as the App does not promote any Ferrero products and specifically does not contain any Ferrero food products or brands, it is not an 'Advertising or Marketing Communication and importantly, it is not an 'Advertising or Marketing Communication to Children'. Accordingly in line with the reasoning of the Board in the above McDonald's decisions, the Codes do not apply and the Complaint should be dismissed entirely. Part 2: Are any of the Codes otherwise in breach? 2.1 RCMI Insofar as the RCMI definition is concerned, an 'Advertising or Marketing Communication' must be published or broadcast using a 'Medium' defined as "Television, radio, print, cinema, internet sites". The App is clearly not a television, radio, print, cinema or internet site. It is a computer program and its content is only accessible within the application and not via any internet site. Crucially, a user cannot access the App, download the App, use the App or access the App's content on an internet site; rather, the content is exclusively viewed in the application itself, which can only be accessed via the Apple App Store or Google Play for direct download to a device (such as a phone or tablet). The reference to 'internet site' in the definition of 'Medium' in the RCMI is specific and we submit, relates to a website rather than the Internet generally. Accordingly the App cannot be considered an Advertising or Marketing Communication under the RCMI as it is not published or broadcast using a Medium. This is a critical consideration as this App clearly does not fall within this RCMI definition. The wording of the relevant sections of the RCMI are clearly applicable only to food and beverage advertisements and are capable of being breached only if the App contains food and beverage products, which it does not. In the absence of any reference to Ferrero food products in the App, the App is not in breach of any section of the RCMI. Ferrero does not respond to the Complaint insofar as the nutritional criteria of Ferrero products is concerned as such arguments made by the Complainant are not applicable where there is no inclusion of any food or beverage product in the App. Specifically, we note the App is not food and beverage related and therefore not required to represent healthier dietary choices, or reference good dietary habits or physical activity consistent with S1.1. Further, this provision S1.1 is only applicable to a 'Medium' and this does not apply to the App as set out above as the App is not a 'Medium' within the definition set out in the RCMI. Irrespective of this, the App does encourage physical activity with video tutorials for soccer and yoga poses, as the Complainant has pointed out. S1.2 of the RCMI is not in breach as the App does not reference or contain any Ferrero food or beverage products, further this provision S1.2 is only applicable to a 'Medium' and this does not apply to the App as set out above as the App is not a 'Medium' within the definition set out in the RCMI. S1.3 states "Signatories must ensure that any interactive game directed primarily to Children which includes the Signatory's food and/or beverage products is consistent with S1.1". Again, as the App does not include any of Ferrero's food products, S1.3 does not apply and there is no breach of S1.3. S1.4 does not apply and is not relevant here. Given the above, Ferrero denies that the*



*Magic Kinder App breaches the RCMI and the Complaint should be dismissed. 2.2 Children's Code and Food Code The App is designed to provide parents a choice for education and fun of their children. The App supports values that parents hold dear, such as education and online safety. In addition: The Complainant submits the App breaches section 2.7(b) of the Children's Code and section 3.5 of the Food Code. These provisions are similar and require that an Advertising or Marketing Communication to Children does not contain an appeal to Children to urge their parents or another person to buy a product for them. While Ferrero denies that the Children's Code or Food Code is applicable to the App for the reasons stated in part 1 above, in any event, the App is not in breach of section 2.7(b) or of the Children's Code or section 3.5 of the Food Code, or indeed any other section of these Codes. The App does not include any wording directed to children that would amount to direct encouragement of a child to urge parents or other adults to buy any food or beverage product. Ferrero products are not mentioned or shown in the App. The call to action 'Get your daily surprise' which the Complainant raises is not an urge for parents to buy a Kinder Surprise or any other Ferrero product; rather, it is a feature of the App to obtain a virtual surprise and this surprise is made available daily and can be obtained by the user within the App, for free and without any purchase requirement. The process for download and opening of the App supports that the App is directed to parents. To download the App, the user is required to have a compatible device and hold an Apple App Store or Google Play account (which requires the user to have a credit card), and download it using account verification (ie your password or facial recognition depending on the device). So it is not available on a platform accessible to children without parental supervision or approval. The App includes a parental control section with the ability for parents to limit App usage which supports the ongoing overall control of parents in relation to the App. The Complaint has additionally raised that the function to scan a QR code to unlock certain content forms part of the "appeal". Ferrero denies this. The Board has previously determined in 0146/15 concerning a Peters Ice Cream website that use of a special code to unlock games on a website where the code is provided on product packaging does not amount to a breach of section 2.7(b). This is because purchasing of product for the purpose of obtaining a code is a decision that can be made by the adult present and the need for a code to unlock games on a website was not considered by the Board to be a specific appeal to children to urge parents to buy the product. There is a wide range of content and features available for free within the App daily including the daily surprise, without the use of any QR code. There are no prompts within the App encouraging the purchase of any products to obtain a QR code, and no reminders or calls to action in relation to obtaining this QR code. The Complaint suggests that the appeal is "implied" however previous decisions by the Board makes it clear that there must be some express instruction or urging to buy a product in order to breach these provisions. In case 0366/15 concerning McDonalds 'Happy Readers' app, the Board referenced the need for there to be a "blatant encouragement" and stated: "In the Board's view, to interpret any marketing which is attractive to a child as amounting to 'pester power', without any direct or obvious appeal to children, would have the effect of banning all advertising to children... this is*



*not the clear intent of the Code, nor is it yet a community standard". There is no wording in the App that encourages, urges or requests users including parents and children to purchase any product. Consistent with the above decisions, the Complaint should be dismissed. The App is not otherwise in breach of any other part of the Children's Code including section 2.14. The App does not encourage excess consumption of any product (as no products are ever shown) and does not promote unhealthy eating habits or an inactive lifestyle and is not otherwise contravening prevailing community standards. The App is also not otherwise in breach of any other section of the Food Code. In the absence of the App containing any food or beverage products, there are no nutritional or health claims, there is no encouragement of excessive consumption of any food, there is no suggestion that Ferrero food products will have any physical, social or psychological advantage, and the App does not undermine the role of parents. In respect of the last point, the App must be registered to a parent and the process for download of the App is directed to parents and supports the overall supervision and control of parents. The App contains functionality to limit usage, including by setting timers on use which can be done in settings by a parent.*

**2.3 Code of Ethics**

*The App does not breach the Code of Ethics, and in particular, does not breach any provision of Section 2 of that Code which is not relevant here and which has not been raised by the Complaint. Summary In summary, the App is an education / entertainment platform and standalone product. It is not a food product or advertising or marketing communication for a food product or any Ferrero product. It does not contain any marketing communications regarding a food or beverage and so in line with the above, the Code provisions are either not applicable (for the reasons set out above) or to the extent that they may be considered by the Board to be applicable, Ferrero is not otherwise in breach of the Codes in any event. Ferrero submits that the Complaint should be dismissed in its entirety and thanks the Panel for the opportunity to respond to the Complaint.*

## **THE DETERMINATION**

The Ad Standards Community Panel (the Panel) considered whether this advertisement breaches the AANA Code for Advertising and Marketing Communications to Children (the Children's Code), the AANA Food and Beverages Advertising and Marketing Communications Code (the Food Code) and the AFGC Responsible Children's Marketing Initiative of the Australian Food and Grocery Council (the RCMI).

The Panel noted the complainant's concern that the advertisement is targeted towards children, is for products that do not represent a healthier dietary choice and does not sufficiently encourage good dietary habits or physical activity.

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



The Panel noted that the RCMI is designed to ensure that only food and beverages that represent healthier choices are promoted directly to children.

The Panel first considered whether the game 'Magic Kinder' is an advertising or marketing communication.

The Panel noted the definition for advertising and marketing communication is:

"Any material which is published or broadcast using any Medium which is undertaken by, or on behalf of a Signatory, and

- Over which the Signatory has a reasonable degree of control, and
- That draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct, but does not include labels or packaging for products, public relations communications (corporate or consumer) or in-store point of sale material."

The Panel noted the advertiser's response that the app does not promote directly or indirectly a product, service, person, organisation or line of conduct, and therefore does meet the definition of advertising or marketing material.

The Panel considered its decision in 0187/12 (Stuart Alexander – Chupa Chups Game) and noted that in relation to that interactive game available as an App:

"The Board noted the significant branding within the Chupa Chups App and agreed that the Chupa Chups App could be considered to draw the attention of a segment of the public to a product in a manner calculated to promote or oppose directly or indirectly that product..."

The Panel noted that the current app includes the brand logo for 'Kinder' on the main screen, and considered that while the organisation responsible for the App is Ferrero, a promotion of a recognisable brand closely associated with this organisation would amount to an indirect promotion for that organisation. The Panel considered that the use of the recognisable 'Kinder' logo as part of the Magic Kinder branding would be considered indirect advertising for the Kinder brand. The Panel considered that the App would be considered to draw the attention of a segment of the public to the brand Kinder and therefore the Panel considered that the app was a marketing communication within the RCMI.

The Panel noted the definition of medium is: "Television, radio, print, cinema, internet sites." The Board noted the complainant's reference to the definition of medium not including apps. The Board noted that S1.3 of the Code that states: Signatories must ensure that any interactive game directed primarily to Children which includes the Signatory's food and/or beverage products is consistent with S1. The Panel noted that it had previously considered apps under Sections 1.1 and 1.3 of the AFGC initiatives in



cases 0206/15, 0166/14 and 0187/12. Based on this, the Panel determined that the app is suitably considered under the Initiative.

The Panel then considered the definition of advertising or marketing communications to children within the RCMI. The definition states that 'Advertising or Marketing Communications which, having regard to the theme, visuals and language used, are directed primarily to Children and are for food and/or beverage products.' Under this initiative children means "persons under 12 years of age."

The Panel noted the advertiser's response that the advertisement does not feature any Kinder products, and therefore could not be considered an advertising or marketing communication to children for a food or beverage product.

The Panel considered whether the promotion of the Kinder brand was sufficient enough to be considered to promote a food or beverage product.

The Panel noted that they had previously considered a similar complaint about a website under the provisions of the AFGC Quick Service Restaurant Initiative in case 0103/11, in which:

"The Board noted that the website contains only one substantive reference (apart from the website address) to McDonald's or to Happy Meals in the form of the Happy Meals logo suspended from a balloon. On the remainder of the website there is no information or images about any food or beverage products from McDonald's or to McDonald's itself.

The Board considered that this website does not promote the organisation (McDonald's) or the Happy Meal product or actively encourage children to buy the product. The website is focused on providing games and entertainment to the child and in most cases would be visited by a child only after they had already purchased a Happy Meal. The Board noted, however, that brand association is an important part of marketing communications and that there will be clearly be an association for children with the website and the advertiser.

The Board determined that the website does not of itself constitute an advertisement or marketing communication as it is not drawing the attention of children to Happy Meals in a manner calculated to promote Happy Meals. However the Board cautioned that advertiser owned microsites directed to children must clearly avoid any reference to particular products and minimise organisational promotion in order for the website as a whole NOT to be considered as an advertising or marketing communication."

In the current advertisement the Panel considered that the Magic Kinder app could reasonably be considered an advertising or marketing communication for the brand Kinder through the use of the Kinder logo on the home screen of the app, and the



depiction of toys that can be found in Kinder Surprises. However, the Panel noted there was no reference to Kinder Surprises or any other food or beverage product in the advertisement.

The Panel noted that in case 0338/12: “The Board noted that there are no images or references to any McDonald’s food or beverage product at all on the website and that the only references to McDonald’s are the use of the logo and an image featuring Ronald McDonald. The Board considered that the Macpack website [www.macpack.com.au](http://www.macpack.com.au) was not of itself a promotion of a food or beverage.”

In the current advertisement, the Panel noted that the toys and the daily surprise may be associated with the Kinder surprise products, however this is an association which would only be made by people already familiar with the products, and is not a direct reference to a food product.

The Panel determined that the app was not an advertisement for a food or beverage product and therefore considered that the provisions of the RCMI, the Food Code and Section 3 of the Children’s Code did not apply.

The Panel then considered whether the advertisement breaches Section 2 of the Children’s Code.

The Panel noted the definition for advertising and marketing communication to children is:

“Advertising or Marketing Communication which, having regard to the theme, visuals and language used, are directed primarily to Children and are for Product. The Community Panel shall have regard to the Practice Note to this Code in determining whether Advertising or Marketing Communication are to children under this definition.”

The Panel noted the definition for Product is: “means goods, services and/or facilities which are targeted toward and have principal appeal to Children.”

Similar to the discussion under the RCMI Code, the Panel determined that the advertisement is for a brand, not a product and therefore does not meet the definition of Advertising or Marketing Communication to Children under the Children’s Code.

As the abovementioned Codes do not apply to the app the Panel dismissed the complaint.

