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BUREAU**

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Case Report

1	Case Number	0205/14
2	Advertiser	Nestle Australia Ltd
3	Product	Food and Beverages
4	Type of Advertisement / media	TV
5	Date of Determination	25/06/2014
6	DETERMINATION	Dismissed

ISSUES RAISED

RCMI 1.1 - Advertising Message AFGC - Advertising Message

DESCRIPTION OF THE ADVERTISEMENT

The Advertisement features an extended family – made up of grandparents, parents and 2 children who start off in real life and who get transported into an animated world which grows stranger and even sinister as they explore it.

The Advertisement opens with an overhead shot of a kitchen table with the family sitting around it. They are all leaning in curiously to look at a block of WONKA chocolate in the middle of the table as it is jostling around and there is a muffled chant of WONKA Chocolate coming from inside. The Grandfather starts to reach in but the block bursts open and pieces fly into the air – an imaginary world appears and the family are taken on a journey where a series of events suddenly appear and happen to the adults:

- A piece of chocolate flies through the air and morphs into a book. As it does, the pages flutter open causing it to fall right into the Grandfather's hands. He rips out a page and eats it.
- The Father then treads on something which emits a noise, the ground opens up and a periscope like object comes up and then expands to create a pipeline.
- The Grandmother, after snapping a stick on a tree, suddenly shoots into the air after her legs grow tall and thin while the rest of the family floats past in a hot air balloon.

While in the balloon, the Advertisement depicts the Mother handing the daughter a single piece of chocolate before the Mother whispers 'scrumdiddlyumptious' through her hands (which appears in writing) and it flies across the sky into a giant hanging ear in the sky and after the word has travelled through the ear, it appears in the end frame transformed into a

product shot.

THE COMPLAINT

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

The OPC considers this TV ad breaches the Responsible Children's Marketing Initiative ('RCMI') because: -

- 1. It is a marketing communication directed primarily to children;*
- 2. The Wonka Cookie Creamery Chocolate block does not represent a healthy dietary choice consistent with established scientific or Australian government standards; and*
- 3. The ad does not promote healthy dietary habits or physical activity.*

The advertisements are marketing communications directed primarily to children

When regard is had to the theme, visuals, and language used, the TV advertisement is clearly a marketing communication directed primarily to children. "Primarily" is taken to mean "in the first instance", as frequently underscored by the board. That is, the fact that there may be elements of the ad that appeal to adults does not detract from the overwhelming thrust of the campaign being directed primarily to children.

In support of this assertion, we rely on the following elements of the advertisement:

- 1. The product advertised is itself designed for children, which is evident from the name Wonka, referencing the character of Willy Wonka from the well-known children's book Charlie and the Chocolate Factory written by acclaimed British author Roald Dahl in 1964 (film versions were made in 1971 and 2005). The term 'Scrumdiddlyumptious' was also coined by Roald Dahl, reinforcing this link between children's literature and the product;*
- 2. Advertisements that focus heavily on children's stories have previously been held by the board to tend to show the ad is directed primarily to children (see **)*
- 3. The fact the product itself is aimed at children is also evident from the design of the Wonka website, which is itself a sophisticated platform for the promotion of Wonka chocolate products through adventure-themed games and promotions, with the slogan "Feed Your Imagination". Under the Play tab, the "Wonka Imaginator" features an online drawing game, with brightly coloured brushes, backgrounds and icons including other Nestle products such as Nerds™, Laffy Taffy™ and Kazoozles™ (see <http://www.wonka.com/home.aspx/wonkaimaginator>).*
- 4. The heavy emphasis on children on the product's website shows the advertiser's intention to focus on engaging young consumers. It may be inferred the intention of the TV ad, using the same style of animation and colour, was also intended so. This tends against any argument by the advertiser that the ad campaign is designed to appeal to an adult's sense of nostalgia for childhood rather than appealing to actual children.*
- 5. The ad relies heavily on childish themes of adventure, fantasy and magic, with items such as books and flowers made out of chocolate;*
- 6. The advertisement uses a cartoon-like animation style, very similar to several popular children's cartoon programs. This type of animation has been previously held by the board to tend to show the ad is directed primarily to children (see 0179/13 (Kellogg's LCM), 0180/13 (Kellogg's Coco Pops) and 0247/123 (Oreos));*
- 7. Although use of animation is not, of itself, determinative on the issue of whether an ad is directed to children, the presence of other elements including the references to children's literature, made-up words ('scrumdiddlyumptious'), fantasy and an absence of more adult-*

oriented factual information about nutrition or characteristics of the product mean this ad may be contrasted with other animated ads that have been found to be primarily directed to adults (e.g. Kraft Chips Ahoy: 0229/11; see also discussion regarding Oreo's Wonderfilled ad: 0247/123).

8. The animation shows a family's encouragement of children to discover the magic of a whimsical Wonka chocolate experience, with the mother figure feeding chocolate to one of the children;

9. The advertisement clearly encourages child viewers to imagine themselves participating in fantastic, magical adventures such as sailing in a hot air balloon, associating fun and imagination with the consumption of the product;

10. The fact that children under 12 are unable to make purchasing decisions on their own does not detract from the ad's overall appeal to children (as discussed in decision 0247/123) Further, the ad was broadcast repeatedly during programs with large numbers of child viewers including included Modern Family (Ten Network), Bondi Vet (Ten Network) and AFL coverage (Seven Network).

In short, we submit the advertisement is a marketing communication directed primarily to children.

Wonka Cookie Creamery Chocolate is not a healthy dietary choice, consistent with established scientific or Australian government standards:

The Wonka website makes the nutritional information for Wonka Cookie Creamery difficult to access, with the print being too small to read, however we understand the product is high in fat and added sugar. <http://www.wonka.com/home.aspx/products>.

The National Health and Medical Research Council, in the Australian Dietary Guidelines 2013 (Summary), recommends avoiding foods and drinks high in added sugars. In providing tips to limiting added sugars, the Guidelines summary recommends keeping "to a minimum the amount of sugars, honey, sweetened sauces or syrups added to foods and made at home – or avoid adding sugars at all", and "avoid sweetened drinks."

The Nestle Australia Company Action Plan also refers to dietary recommendations issued by the World Health Organisation, which has, since 2003, recommended that sugar represent no more than 10% of energy in the diet. It is expected to further revise this recommendation on the basis that further health benefits are realised if sugar consumption is reduced to no more than 5% of dietary energy.

The advertisement does not promote good dietary habits or physical activity

Even in the case of a product that (unlike Wonka Cookie Creamery Chocolate) represents a healthy dietary choice, the RCMI provides the advertiser may only promote 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.

We submit the advertisement does not encourage good dietary habits and physical activity by virtue of the written messaging. Further, the Board has previously noted (see 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 the advertiser has failed to do in this advertisement. Relevantly, the Board has also 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 precedent, it is submitted that the advertisement depicts fictional characters eating chocolate while in a hot air balloon thereby failing to meet the test of positively promoting participation in actual physical activity to

children.

Conclusion

We ask that the Board require the advertiser to discontinue the Wonka Cookie Creamery TV ad campaign immediately. We understand that there are other advertisements on television promoting the same products, using the same characters and themes, which may use a slightly different script. We ask that all advertisements in this series be withdrawn for the reasons set out above.

THE ADVERTISER'S RESPONSE

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

Advertisement Complaint – Reference 0205/14

I refer to your letter to Nestlé Australia Ltd (Nestlé) regarding a Complaint (Complaint) received concerning the WONKA Cookie Creamery television commercial (Advertisement) and wonka.com website (Website). Thank you for the opportunity to comment on the issues raised in the Complaint.

As stated below, the Website is not an Australian website, nor is the Website promoted or referenced in any Australian marketing material for the WONKA product.

Nature of Complaint

The concern articulated by the Complainant is that the Advertisement may not comply with the AFGC Responsible Children's Marketing Initiative (RCMI). Under the RCMI, Nestlé (as a signatory) has agreed to not advertise food and beverage products to children under 12 unless these products represent healthy dietary choices.

The Complainant considers that the Advertisement breaches the RCMI in that;

- (a) it is a marketing communication directed primarily to children;*
- (b) WONKA 'Cookies Creamery' chocolate does not represent a healthy dietary choice; and*
- (c) the Advertisement does not promote a healthy dietary habits or physical activity.*

The Complainant also refers to the wonka.com website and claims that the design of the website (through "adventure themed games and promotions") reinforces that the WONKA Cookie Creamery bar is aimed at children and that "the heavy emphasis on children in the product's website shows the advertiser's intention to focus on engaging young consumers".

Nestlé Response

Nestlé has also considered the AANA Code for Advertising and Marketing to Children (AANA Children's Code), the AANA Advertiser Code of Ethics (Code of Ethics) and the AANA Food and Beverages Marketing and Communications Code (Food and Beverage Code).

We wish to state from the outset that Nestlé does not consider the Advertisement to be in breach of the RCMI or any of the Codes which the ASB administers.

1. wonka.com website (Website)

Before we address the Advertisement which is the focus of the Complaint, it is important that we respond to the claims that the Website reinforces an intention by the advertiser to focus on engaging of young consumers.

The RCMI governs Advertising and Marketing Communications, which are defined as materials undertaken by or on behalf of a signatory to the RCMI and relates to materials over which the signatory has a reasonable degree of control.

The Website is in fact a US based website and controlled by Nestlé USA – Nestlé Australia (being the entity who is the signatory to the RCMI and the Company Action Plan (CAP)) does

not control the Website nor contribute to its content.

Further, the Website is not promoted or advertised in Australia by any means, nor are there any links provided to this Website through any Nestlé Australia marketing materials. There is no Australian website for WONKA and any promotion or advertisement of WONKA in Australia refers consumers to the WONKA ANZ Facebook page (www.facebook.com/wonka.anz). We specifically note that Facebook has a lower age limit on participants of 13 years of age.

On this basis, Nestlé respectfully submits that the Complaint so far as it relates to the Website should not be considered by the Board and any reliance on it in relation to the Complaint about the Advertisement should be disregarded as it is out of scope of the RCMI and all AANA Codes.

In the event that the Board considers the Website to be within scope of the RCMI and/or the AANA Codes, we would request a further opportunity to respond.

2. Advertisement

2.1 Context

The Advertisement was first aired on television in August 2013 and was created to launch the WONKA family blocks in the Australian market. It has appeared on television since this date (in both 15 second and 30 second versions) and was recently returned to television to support Nestlé's launch of its new flavour, Cookie Creamery.

Since August 2013, Nestlé has not received any other complaints other than the Complaint about the Advertisement.

We note that the Advertisement is currently 2 weeks into a planned 3 week burst to promote the new flavour in the WONKA range.

2.2 Content of Advertisement

The Advertisement features an extended family – made up of grandparents, parents and 2 children who start off in real life and who get transported into an animated world which grows stranger and even sinister as they explore it. Various aspects of the Advertisement tie into the moulds used for the WONKA chocolate blocks– for example, the book the grandfather has in his hands and the chocolate pipes that are formed (Chocolate Tales and Triple Chocolate Whipple respectively).

The Advertisement opens with an overhead shot of a kitchen table with the family sitting around it. They are all leaning in curiously to look at a block of WONKA chocolate in the middle of the table as it is jostling around and there is a muffled chant of WONKA Chocolate coming from inside. The Grandfather starts to reach in but the block bursts open and pieces fly into the air – and the strange and imaginary world appears and the family are taken on a fast moving and somewhat absurd journey where a series of events suddenly appear and happen to the adults:

- A piece of chocolate flies through the air and morphs into a book. As it does, the pages flutter open causing it to fall right into the Grandfather's hands. He rips out a page and eats it.*

- The Father then treads on something which emits a noise, the ground opens up and a periscope like object comes up and then expands to create a pipeline.*

- The Grandmother, after snapping a stick on a tree, suddenly shoots into the air after her legs grow tall and thin while the rest of the family floats past in a hot air balloon.*

While in the balloon, the Advertisement features a limited consumption moment where the Mother hands the daughter a single piece of chocolate before the Mother whispers 'scrumdiddlyumptious' through her hands (which appears in writing) and it flies across the sky into a giant hanging ear in the sky and after the word has travelled through the ear, it appears in the end frame transformed into a product shot.

3. Whether the Advertisement is contrary to the RCMI

Nestlé is committed to the RCMI and not advertising food products to children under 12 unless they represent healthy dietary choices. Nestlé has a Company Action Plan (CAP). We have previously provided a copy of the CAP to the ASB and are happy to resubmit this if the ASB requires it.

A. PLACEMENT

In any RCMI complaint of this nature, the first assessment is whether the Advertisement meets the 'Placement' hurdle outlined in the RCMI i.e. that the Advertisement has been placed in a "Medium that is directed primarily to Children (in relation to television this includes all C and P rated programs and other rated programs that are directed primarily to Children through their themes, visuals and language); and/or where Children represent 35 per cent or more of the audience of the Medium".

If the Advertisement does not appear in Medium that meets the criteria set out above then the RCMI is not relevant in terms of where the Advertisement was placed.

Nestlé's media buy and placement of advertisements for WONKA is targeted at the Main Grocery Buyer with children aged 7-11. For the Advertisement, Nestlé went to great lengths to ensure that the Advertisement was not placed in Medium as defined by the RCMI.

The Advertisement was given a CAD Rating of C. Notwithstanding this, Nestlé has applied a W rating to ensure that the networks did not place the Advertisement in C programs, adjacent to P and C rated programs period or in other programs likely to attract a substantial child audience.

Nestlé's media agency was also directed to comply with Nestlé's own mandatory media placement requirements including that the Advertisement was not to be run during programs where 25% or more of the audience were children aged 14 years and under (noting this is more restrictive than the 35% threshold in the RCMI). The Advertisement was only shown in programs where 75% or more of the audience was over the age of 14 years and was not run during programs where more than 35% share of audience was children 0-14 years. Specific instructions were also provided that no bonus spots were to be used for the Advertisement to ensure that placement was controlled and in accordance with Nestlé's policies.

As set out in the spot list provided, the Advertisement was shown in a range of adult day-time programming as well as evening programs whose primary audience was adults. The Advertisement was not shown during children specific programming or 'C' programs or either side of 'P' programs.

The Complainant has specifically referenced placement of the Advertisement in Modern Family, Bondi Vet and AFL coverage and considers that these named shows have large number of child viewers. In the Oreo's decision (0247/13) the Board specifically noted that while a program like Bondi Vet could be of appeal to children, it is primarily directed at a family audience and not directed primarily to children. In addition, we note that Modern Family has a PG rating. Given the very nature of AFL, it is not reasonable to claim that the audience of an AFL game is predominantly children. Our agency has advised that the audience numbers for the named programs are 18%, 13% and 10% respectively.

We also note that none of these programs are listed under the RCMI as programs covered by the RCMI, they do not have a predominantly child audience nor are they consistent with the types of programs covered by the RCMI as they are not designed for or of primary appeal to children through their themes, visuals and language used.

Nestlé also maintains an extensive internal reviews process for its marketing communications and this was followed in relation to this Advertisement. As a result of this rigorous internal process, Nestlé determined that the Advertisement could be aired as it believed it is compliant with the RCMI.

Accordingly, it is Nestlé's submission that the RCMI does not apply as the Advertisement was

not placed in Medium.

B. CONSIDERATION OF CONTENT REGARDLESS OF PLACEMENT

Nestlé acknowledges that, even if the Board determines that the RCMI does not apply because it was not placed in Medium, it must still consider whether the Advertisement (being for a food product) having regard to the theme, visuals and language used, is directed primarily to Children (as defined by the RCMI).

From the outset, Nestlé strongly contends the Advertisement is not primarily directed to Children. The structure of our response below considers the factors that the Board has considered in previous decisions as well as those that apply under the AANA Children's Code given the same definitions are used there.

(a) Directed primarily to children

The Board has previously referenced the dictionary definition of 'primarily' as being "in the first place" which would require the Advertisement to be aimed in the first instance at children to be within scope of the RCMI. Advertising that is directed to the main grocery buyers, to parents and to adults is not within the scope of the RCMI.

The Complainant contends that the use of animation is indicative that Nestlé intended that the Advertisement focus on engaging children. As the Complainant acknowledges, use of animation is not necessarily indicative of an Advertisement directed primarily to children.

We note that an advertiser is not prohibited from using fun and animation from engaging with adults and to this end, the animation style chosen by Nestlé was deliberate – we used an animation that was not engaging to a child through elements like bright colours, characters and overly simplified characters or scenes or objects seen commonly by children in their everyday life.

Further, it is not an animation style that is commonly (if at all) used in children's cartoons or programs – for example it is not comparable to the animation style in Peppa Pig or Dora the Explorer – programs which are primarily directed at children.

Instead an animation style similar to what adults see in programs like Futurama, American Dad or Family Guy was chosen. This animation includes:

- Use of imagery that is not immediately recognisable or appealing to children i.e. strange triangles shaped, multi coloured mountains, dark mossy backgrounds, sinister cloud formations and unrecognisable plants. These are not images of a child's every day environment and would not engender a feeling of familiarity or association;*
- Disconcerting elements such as the giant spy glass that rises out of the ground, peers at the family (including a perspective from inside it) and especially at the grandmother in somewhat of a sinister manner before it morphs into a larger structure and also the ear that hangs in the sky detached from a human head. These elements give the Advertisement a surreal aspect (not dissimilar to a painting by Dali) rather than a context of magical and fantastical world;*
- The use of a darker tonal palette – a palette of this nature is not consistent with how imaginary or magical worlds are depicted for children; and*
- A general lack of the usual elements of a bright animation like laughter and smiles – for example the grandmother's face appears startled as she shoots into the air.*

Contrary to the Complainant's claim, the animation used is distinguishable from that used in other recent advertisements considered by the Board including Streets 'Trop-o-Saurus Slime' (0410/13), McDonalds Minions (0244/13) as well as the recent decisions against Kellogg for LCMs with snail (0179/13) and Coco Pops (0180/12) and Oreos (0247/13) identified in the Complaint.

Nestlé strongly contends that the animation in the Advertisement is not childlike nor is it likely to appeal primarily to children. We do not consider that the nature of the animation encourages child viewers to imagine themselves participating in this world – on the contrary, children would feel a level of discomfort due to the dark and unfamiliar nature of the world

depicted. It does not suggest to them, contrary to the Complaint's claim, that eating chocolate is linked to fun and imagination.

The Complainant also appears to contend that the distinction between whether an advertisement is directed primarily at children or adults is the inclusion of factual information about nutrition or characteristics of the product. We note that an advertiser is not required to include factual information about nutrition or characteristics of the product in its advertising to demark it as advertising primarily directed the main grocery buyer, a parent or an adult.

It is Nestlé's submission that that the Advertisement is not aimed in the first instance at Children but is instead aimed at an older and more sophisticated audience and therefore it is outside of the scope of the RCMI. This is further reinforced by the consideration of the elements set out below.

(b) Nature of the Product

The product is a family sized chocolate block (a common product in the confectionery aisle) - it is not designed primarily for children and does not appeal to them in contrast to products like Freddo Frogs or Chuppa Chups.

Instead, chocolate blocks are designed to primarily appeal to adults – and this includes the Main Grocery Buyer who is the provider of treats to the family in a portion controlled manner. We note that the range includes more sophisticated flavours including hazelnuts and honeycomb.

(c) Theme of Advertisement

The Advertisement does not reference any characters (fairy-tale or derived from literature) in its content – instead it depicts an everyday family in an alternative world. It is not a story of childish adventure and fantasy or one which readily calls on cues from a child's every day environment.

The Advertisement is, in part, intended to appeal to an adult's sense of nostalgia – especially given the original book (from 1964) and movie (from 1971) were memories from their own childhood.

The story of Charlie/ Willy Wonka and the Chocolate Factory is not just a children's story and is designed to appeal to people of all ages. The story contains many dark or sophisticated themes and motifs like poverty and wealth and good vs bad where bad children are punished in sadistic or painful ways in order to reform them as well as requiring a suspension of belief that can only occur in a more developed viewer.

The Australian Classification

(<http://www.classification.gov.au/Pages/Results.aspx?q=wonka&t=lf>) for the 1971 film rates it as a G rated – it is a family film rather than only for young audience. By contrast, the version from 2005 directed by Tim Burton is rated a PG (i.e. not recommended viewing for children under 15 without parental guidance) on the basis that frightening things happen to children and because it is dark and eerie. We would submit that even this more recent version would not hold much relevance for children as it is 10 years old and because it explores the darker more complex themes which are within Roald Dahl's story.

We also note that the RCMI itself does not include Charlie/ Willy Wonka & the Chocolate Factory in its 'Indicative Television Program List' in Table 1 as a program that meets the criteria as being directed primarily to Children – unlike listed movies like Care Bears, Dr Seuss and Wall-E for example. These are movies which are clearly directed to children through its themes, visuals and language.

The Complainant has contended that the product is designed for children – particularly as it references the name Wonka which is derived from Roald Dahl's book and the subsequent movies and Nestlé submits that this is a tenuous link. Aside from the use of the name WONKA (being the brand name for the product which features at the end of the Advertisement), the

Advertisement does not focus on the Roald Dahl story at all, does not contain any familiar music and does not feature the characters from the story. Nestlé submits that a child viewer would not be able to connect the Advertisement with Charlie/ Willy Wonka & the Chocolate Factory in the limited time of the Advertisement, particularly in the absence of the characters from the story.

Further, the mere connection of the Wonka name to the book and movies does not prohibit Nestlé from marketing its products under the WONKA brand.

(d) Perspective

There is no use of a child's perspective in the Advertisement and the limited voiceover in the end frames is adult. This distinguishes the Advertisement from the Kellogg LCM ones referred to by the Complainant which were considered to be in breach of the RCMI for use of the child's perspective and child voiceover.

We also note that it was a deliberate decision to have the events (the spyglass, the book flying, the growing long legs) happen to the adults in the story.

(e) The Storyline

The storyline is one far removed from reality which requires the viewer to suspend their belief. The Advertisement is made up of a complex series of abstract scenarios and there is a quick transition between these. A child viewer is not likely to readily understand the Advertisement due to its nature.

(f) Visuals

The Advertisement uses a cartoon style animation – the Complaint compares this to several popular children's cartoon programs without identifying any program in particular to allow Nestlé to consider the point.

Notwithstanding this, as we have noted above, the characters in the Advertisement were created specifically for it – they are not characters that a child could associate with, or recognise from, a story or a movie. This creates a point of difference from the Oreos decision (0247/13) which featured familiar storybook characters.

We have otherwise addressed the question of the visuals of the Advertisement above under whether it is primarily directed at Children.

(g) Language

There is no voiceover in the body of the Advertisement nor do the characters speak any lines - rather there is a song and music track which accompanies the Advertisement. Nestlé submits that this is not a song that is likely to be understood by children - it is a preposterous song (to match the preposterous world) with unusual syntax and quicker pace. Further, it is not an uplifting jingle but is underpinned by some more ominous sounding instrumentals and was created for this Advertisement to have general appeal.

The voiceover is a call to action for the Main Grocery Buyer as detailed below.

The word 'scrumdiddlyumptious' appears at the end written across the sky. The Complainant is correct in identifying this as a word that appears in the Roald Dahl book however Nestlé submits that this does not mean the Advertisement is primarily directed at Children. It is a word that has entered into common usage (appearing in the Urban Dictionary for example) and is used by many people to express enjoyment in something they have eaten – we have heard it recently in a Frozen Yoghurt advertisement on Sydney radio for example.

All of these elements together give the language used a more adult feel rather than language directed primarily to Children.

(h) Age of characters

We acknowledge that the Advertisement does feature children however they are in the company of parents and grandparents (i.e. a family unit) and the inclusion of children in an advertisement does not mean it is directed to children. The context in which the children appear reinforces the view that the Advertisement is directed at an adult audience.

(i) Call to action

The call to action in the Advertisement is to adults – and specifically the main grocery buyer as it calls out that there is a new product in stores. The super on the Advertisement also directs people to the WONKA Facebook page – and as the Board is aware, Facebook has in its terms the requirement that all users must be over 13.

On this basis, there is no call to action primarily directed to children in the Advertisement.

RCMI Summary

As outlined above, Nestlé does not use the Advertisement as a vehicle to advertise its products to children; rather the Advertisement was created with principal appeal to, and directed at, adults – including those who would understand the place of products such as chocolate in their children's diets as a treat or sometimes food.

The nature of the animation was specifically designed to engage with adults who understand and engage with darker and more adult styles of animation. On this basis, we respectfully submit that the Advertisement with its themes, visuals and language used is clearly directed primarily to an adult audience and therefore, outside of the scope of the RCMI.

We also refer to the spot schedules we have provided about the range of programs in which the Advertisement was broadcast and note that the programs are directed at adults and are not programs which are primarily directed to children or likely to have a significant child audience. Although some children may view some of these programs, it does not automatically mean that the Advertisement is therefore directed at children.

4. Consideration of other Codes

4.1 Children's Code

Nestlé submits that as the Advertisement is not directed primarily at children (as discussed above) then the Children's Code does not apply.

If the ASB does not accept this submission and considers the Children's Code does apply, Nestlé does not consider that the Advertisement breaches any of the matters set out in the Children's Code.

In relation to Section 2.15a of the Children's Code which is indirectly referred to, Nestlé submits that the Advertisement does not encourage nor promote an inactive lifestyle or unhealthy eating habits. On the contrary, the Advertisement depicts the family in an outdoor setting and, particularly in relation to the children there is a very limited consumption moment which is controlled by the parent.

4.2 Food & Beverage Code

Nestlé does not consider the Advertisement breaches any of the matters set out in Section 2 of the Food and Beverage Code. There are no product specific statements in the Advertisement and no statements which could otherwise contravene this section of the Food and Beverages Code.

Although not specifically raised by the Complainant, having regard to the key issue of advertising or marketing to children raised by the Complainant, we have considered Section 3 of the Food and Beverages Code.

In relation to Section 3, Nestlé submits:

(a) the Advertisement is not primarily directed to children (as discussed above) with effect that Section 3 does not apply in its entirety; and

(b) the product (WONKA chocolate) is not a “Children’s Food and Beverage Product” (as defined in the Food and Beverage Code) as it has appeal and is consumed across all ages and could not be said to be targeted towards or have principal appeal to children, with effect that Section 3.2 does not apply.

In the event the ASB considers Section 3 of the Food and Beverages Code applies to the Advertisement in its entirety, Nestlé submits it does not breach any of the matters set out in Section 3 as it does not:

(a) contain any statements that are misleading or deceptive in relation to health or nutrition claims (as per Section 3.1) as there are no nutritional or health claims in the Advertisement; or

(b) encourage children to consume what would be considered excessive quantities of the product.

In relation to Section 3.2, Nestlé notes that the Advertisement features a minor consumption moment in which the responsible parent is seen dispensing one piece of chocolate to her daughter.

4.3 Code of Ethics

Nestlé submits that the Advertisement does not contain any breaches of the Code of Ethics and that none of the matters set out in Section 2 of the Code of Ethics are infringed by the Advertisement.

The Advertisement could not be construed as infringing prevailing community standards nor does it contain any statements that are misleading or deceptive. There are no product specific statements contained in the Advertisement and non statements that could otherwise offend the Code of Ethics.

5. Final Submission

Nestlé acknowledges the Complaint and the importance of ensuring responsible marketing in this area. Nestlé applies a rigorous internal review process to its marketing communications, and specifically reviewed the Advertisement to ensure compliance with the RCMI and the principles applied in previous ASB decisions. In all the circumstances as set out above, Nestlé considers that the Advertisement is not reasonably [portrayed] as marketing to children. The Advertisement is directed to adults, was developed to appeal to adults and for products which are primarily appealing to adults. Nestlé specifically had the Advertisement placed in programs that have a predominantly adult audience. Nestlé therefore submits that

the Complaint should be dismissed.

THE DETERMINATION

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

The Board reviewed the advertisement and noted the advertiser's response. The Board noted the complainant's concern that the advertisement breaches the RCMI because it is an advertisement directed primarily to children; that Wonka chocolate bars do not represent a healthy dietary choice and that the advertisement does not encourage healthy dietary habits or physical activity.

The Board considered whether the advertisement met the requirements of the AFGC RCMI. The RCMI applies to advertising or marketing communications to children (under 12 years of age). The Board noted the RCMI Initiative provides that advertising or marketing communication activities are captured under the RCMI if they are:

“Content: 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

Placement: Advertising or Marketing Communications that are placed in Medium that is directed primarily to Children (in relation to television this includes all C and P rated programs and other rated programs that are directed primarily to Children through their themes, visuals and language); and/or where Children represent 35 per cent or more of the audience of the Medium.”

The Board noted the advertiser's response which indicated that the Nestle Company Action Plan states that Nestle will not advertise products other than healthier choice products where there is more than 25% of children under 12 in the audience and that this is a stricter requirement than the RCMI itself.

The Board also noted that the definition of Children in the Initiative means persons under 12 years of age.

The Board first considered the programming in which the advertisement was broadcast. The Board noted the information provided by the complainant that the advertisement was viewed during programs such as Modern Family, Bondi Vet and the AFL coverage. The Board considered that whilst the mentioned programs could be of appeal to children, they are directed at a family audience and not directed primarily to children.

The Board also noted that the information provided by the advertiser that the programs in which the advertisement was broadcast do not have audiences where children represent 25% or more of the audience of the Medium (as agreed in the Nestle Company Action Plan).

The Board agreed that the advertisement was not broadcast in media directed primarily to children or in media with a child audience of more than 25%.

Although the advertisement was not considered to be advertising or marketing communications to children on account of placement, the Board must also consider whether the Advertising or Marketing Communications, having regard to the theme, visuals and language used, are directed primarily to Children and are for food and/or beverage products.

The Board agreed that the Wonka chocolate bar is a food.

The Board then considered whether the advertisement is directed primarily to children – having regard to the theme, visuals and language used.

The Board noted the dictionary definition of “primarily” is “in the first place” and that to be within the AFGC RCMI the Board must find that the advertisement is aimed in the first instance at children under 12 years.

The Board considered the theme of the advertisement (a family, including grandparents that share an adventure commenced by the opening of a Wonka chocolate block), the visuals (real life characters that change into animated characters who walk through a magical land and then travel by hot air balloon sharing chocolate) and the language (an upbeat song, sung by a group of men).

Considering the theme, visuals and language in the current advertisement, the Board agreed unanimously that the current advertisement was not directed primarily to young children nor was it clearly directed primarily to adults or the main grocery buyer. The Board agreed that the key issue, based on its consideration of the advertisement’s theme, visuals and language, was whether the advertisement was directed primarily to older children (8-11 for example) or to a general audience.

The Board noted that it has considered the issue of whether or not an advertisement is directed primarily to children in a number of advertisements but that of most relevance to the current case is the previous case of Mondelez (ref: 0247/13).

With regards to the theme of the advertisement more specifically, the Board noted that the

product being promoted is a “Wonka” chocolate bar and that the advertisement is designed to be a direct link to Willy Wonka and based on the books and movies of Roald Dahl – Charlie and the Chocolate Factory. The Board agreed that the story of Charlie and the Chocolate Factory is a story familiar to both children and adults and noted that the original book is a well-known children’s book, but that the movie adaptations (in particular the 1991 movie was more directed to a family audience) . The Board considered that the theme of this advertisement was slightly obscure –a family sharing chocolate in a strange fantasy world. The Board noted that in the Mondelez case the Board had considered: “the advertisement presents a number of fairy tale or fantasy characters and, after sharing a biscuit, they end up behaving better than you would expect eg: vampire ends up leaving his castle and going for a drive with a woman with blonde hair, the big bad wolf takes the three little pigs out on a boat and a giant octopus does not sink the boat. The Board considered that this theme is not a complex theme and, in the Board’s view, older children would easily understand the theme. The Board considered that the different outcomes may not be understood by young children but that they would certainly understand the theme of sharing.”

In the present case, the Board considered that the theme was not clear or simple and that it was not directed primarily to children.

With regards to the visuals the Board considered the animated nature of the advertisement. The issue of animated characters is one where the Board has previously stated that animation per se does not mean that an advertisement will be considered to be directed primarily to children. Specifically the Board noted scenes in advertisements for Kellogg LCMs (0179/13 and 0180/13) (which predominantly featured real life images of children at school but also included images of cartoon snails and dinosaurs) and for Kellogg’s Coco Pops (0144/13)(which predominantly featured the image of a cartoon bowl of coco pops playing a well-known pool game). By contrast however in a number of other advertisements including animated characters (eg: Kraft 0229/11 and Smiths Chips 0190/13) the Board had considered that the advertisements were not directed primarily to children. The Board reiterated its view that including a licensed character or cartoon or fantasy images will not of itself mean that an advertisement is directed primarily to children. It is essential for the Board to consider all elements of the advertisement and to make a decision based on how all of the elements of the advertisement interact, and the overall impression that they make, in determining whether an advertisement is clearly directed primarily to children.

The Board considered then the images in the current case, noting that in the Mondelez case, the Board’s view was that “...the cartoon characters are directed to children and are likely to be very attractive to children as the characters in the advertisement are very similar or referable by children to well-known children’s programs or stories. The Board considered that the vampire character is likely to be seen by younger children as similar to a Sesame Street character and that older children would relate to a vampire given the current popularity of youth fiction around vampires. Similarly, in the Board’s view the three little pigs and big bad wolf are easily recognised and part of a well-known children’s fairy tale. The Board noted that in its initial decision it had referred to the images being “stylised” and more likely to be attractive to adults and teenagers. The Board noted, upon further consideration, that the imagery is not dissimilar to a number of cartoon programs that are directed to non pre-school children and broadcast in children’s viewing times. For example programs such as Adventure Time, which is PG rated but highly popular with a broad range of children in the age range 7-12 years. The Board considered that “the cartoon characters are directed to children and are

likely to be very attractive to children as the characters in the advertisement are very similar or referable by children to well-known children's programs or stories.”

In the current advertisement, a minority of the Board considered that the visual images in the advertisement are reminiscent of a number of children's programmes ('In The Night Garden' and the movie 'UP') and that the fantasy images (such as the family being transported from their dining table to another location and being transformed in to cartoon characters along the way) which would be of strong appeal to children.

The Majority of the Board considered however that the visuals are animated, but that the characters are not strongly modelled on any recognisable animated characters and that there are no elements of the characters that appear more directed to children than to a general audience in particular the Board considered that the depiction of a family scene flying in a balloon was not likely to be of primary appeal to children.

With regards to the language the Board noted the advertisement has a unique sound track, with chanting style language, it is quite difficult to understand words with the most recognisable being a cursive image of the word 'scrumdiddliumptions' and the song 'just have a little word in Wonka's ear'. The Board considered that this language and music was not likely to be of more appeal to children than it would be to young adults.

Following considerable discussion however the majority of the Board considered that it was not clear who the intended audience of the advertisement was meant to be. The Board noted the cartoon style but compared it to Mondelez 0247/13 and considered that whereas the Oreos advertisement had an upbeat and happy theme and tune along with simple cartoon images of well-known characters from fairy tales, in the Board's view the Wonka advertisement has a much darker tone and the cartoon characters are not obviously based on any characters which would be as familiar to children as those used in the Oreos advertisement. The Board noted the link to Charlie and the Chocolate Factory and considered that a prior knowledge of this book would be required to fully understand the approach of the advertisement and in the Board's view this nostalgic approach is targeted more towards an older, young adult audience or a parent audience, than an audience of children under 12. The Board noted that the advertised product is a family bar of Wonka chocolate and considered that the depiction of a family sharing this bar and then enjoying an adventure together amounts to an overall depiction which, whilst of appeal to children, is not directed primarily to children under the age of 12.

The Board agreed that the advertisement would be attractive to children but considered that it would also be attractive to an older teen, young adult and chocolate lover audience. The majority of the Board considered that it was not possible to conclude that the advertisement was directed primarily to children under 12.

The Board noted that, although in this instance it had determined that the advertisement was not of itself directed primarily to children under 12, it was a very close decision of the Board and if an advertiser chooses to make an advertisement which has themes, visuals and

language that are attractive to children, it does run the risk of the Board determining that, on balance, the advertisement is in fact directed primarily to children.

The Board determined that as the advertisement is not directed primarily to children under 12, does not appear in media directed primarily to children and does not appear in media attracting a child audience share of greater than 25% the advertisement does not come within the AFGC RCMI.

The Board then considered whether the advertisement complied with the AANA Code for Advertising and Marketing Communications to Children.

The definition of what is “advertising and marketing communications to children’ in the AANA Children’s Code means: means Advertising or Marketing Communications which, having regard to the theme, visuals and language used, are directed primarily to Children and are for Product. The Board shall have regard to the Practice Note to this Code in determining whether Advertising or Marketing Communications are to children under this definition.

The Board noted that the definition is largely the same as that in the RCMI. For the same reasons noted above, the Board considered that this advertisement is not directed primarily to children and that the AANA Children’s Code and Part 3 of the AANA Food Code do not apply.

The Board then considered whether the advertisement complied with all relevant provisions of the AANA Food and Beverages Code.

The Board noted in particular section 2.2 which states: “the advertising or marketing communication...shall not undermine the importance of healthy or active lifestyles nor the promotion of healthy balanced diets, or encourage what would reasonably be considered excess consumption through the representation of product/s or portion sizes disproportionate to the setting/s portrayed or by means otherwise regarded as contrary to prevailing community standards.”

The Board noted the AANA Food and Beverages Advertising and Marketing Communications Code – Practice Note which provides that: ‘In testing whether an advertising or marketing communication encourages excess consumption through representation of products or portion sizes disproportionate to the setting portrayed, or by any other means contrary to prevailing community standards, the Board will consider whether members of the community in the target audience would most likely take a message condoning excess consumption.’

The Board noted that the advertised product is a family-sized bar of chocolate. The Board considered that, consistent with previous decisions (Hungry Jacks 282/11, Mars 208/11), promotion of a product which may have a particular nutritional composition is not, per se, undermining the importance of a healthy or active lifestyle.

The Board noted that the chocolate is shown being shared between family members and considered that the likely interpretation of the advertisement is that the product advertised is intended to be shared.

The Board considered that the advertisement did not encourage excess consumption or otherwise undermine the importance of a healthy active lifestyle.

The Board determined that the advertisement did not breach Section 2.2 of the Food Code.

Finding that the advertisement did not breach the AFGC RMCI, the Children's Code or the Food Code the Board dismissed the complaint.