



## Case Report

1	Case Number	0345/17
2	Advertiser	Ferrero Australia Pty Ltd (Ferrero Rocher)
3	Product	Food and Beverages
4	Type of Advertisement / media	TV - Free to air
5	Date of Determination	09/08/2017
6	DETERMINATION	Dismissed

### ISSUES RAISED

Advertising to Children Code 2.14 Food and beverages  
RCMI 1.1 - Advertising Message AFGC - Advertising Message

### DESCRIPTION OF THE ADVERTISEMENT

The 30 second version features various scenarios where parents find themselves surprised by their children. This includes a woman on a bus finding a drawing from her child, a man in awe of a shot his child makes in a cricket game, a mother seeing her daughter in the bath with the dog. Finally a father brings a Kinder Surprise egg in to the room where his son is. They then play with the toy within the egg. The end of the advertisement features a short promotional link with the movie Despicable me that mentions the discovery of ten new toys. The 15 second version features only the scene of the father and son and the Despicable Me 3 promotion.

### THE COMPLAINT

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

*1. The advertisement breaches the Responsible Children's Marketing Initiative*

*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 less than 12 years of age in media, unless those products represent healthier dietary choices consistent with established*

*scientific or Australian government standards.*

*The OPC submits that the advertisement breaches S1.1 of the RCMI because:*

- a) it is an advertising or marketing communication directed primarily to children, for a food product;*
- b) Kinder Surprise chocolate does not represent a healthier dietary choice consistent with established scientific or Australian government standards; and*
- c) it does not promote healthy dietary habits or physical activity.*

*The advertisement is an advertising or marketing communication directed primarily to children, for a food product*

*The RCMI applies to material that is published or broadcast on television, radio, print, cinema and internet sites. This advertisement has been broadcast a substantial number of times on a range of free-to-air television channels around Australia. The RCMI therefore applies.*

*Based on its themes and visuals, the advertisement is clearly directed primarily to children within the meaning of the RCMI.*

*The OPC highlights the following features of the advertisement, which the OPC submits establish that the advertisement is directed primarily to children.*

- a) Kinder Surprise chocolates are clearly a product for young children, containing at their centre, toys that appeal to young children.*
- b) The advertisement features a young child, who appears to be younger than 12 years old, as its main character and depicts his visual expressions and reactions.*
- c) The theme of the advertisement is simple and easily understood, showing a child receiving a treat that he finds very exciting, followed by images from the Despicable 3 children's movie.*
- d) The second part of the advertisement is clearly speaking to and directed at children. It is dedicated to depicting the well-known characters from the very popular children's movie, Despicable Me 3, all shown in animation like the movie itself, and containing a sound clip of the characters laughing from the movie. The animations and sounds are clearly of primary appeal to young children, given the popularity of the movie with young children.*
- e) The advertisement promotes fun toys to collect that are characters from the very popular children's movie, Despicable Me 3.*
- f) The voice over uses language that is simple; it invites child viewers to 'enter the world' of the very popular Despicable Me 3 movie. This is language clearly directed to children and a message that would be very appealing to young children given the popularity of the movie. The tone and delivery of the voice over is in an excited manner likely to appeal to children, especially against the backdrop of the Despicable Me 3 movie characters and their sounds. The voice over also encourages the viewer to 'discover' the 10 new toys. Again, this is a message directed to young children, in easily understandable language, as they are the ones that will be eating the Kinder Surprise chocolate and 'discovering' the toys.*

*While the advertisement does contain a message which appears to be directed to parents, 'your kids never stop surprising you', 'give some surprise back', this messages is not vocalised and flashes on the screen for a very short period of time. The main focus of the advertisement is first on the child and his wonder and delight at receiving the Kinder Surprise chocolate, and then on the very popular children's movie, Despicable Me 3, with the language directed to young children. These themes are clearly designed to have a strong appeal to children.*

*The Kinder Surprise chocolate is clearly a food product.*

*Kinder Surprise chocolate does not represent a healthier diet choice*

*The Kinder Surprise product is chocolate and is not a healthier diet choice. The Australian Dietary Guidelines recommend that foods containing added sugar and saturated fat should be limited. The World Health Organisation (WHO) also supports the limited intake of sugar, releasing an updated guideline in 2015 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%.*

*Kinder Surprise has a significant level of sugar, 52.3%, and close to 25% saturated fat. It does not represent a healthier diet choice for children. Consumption of energy dense, high-sugar food, such as Kinder Surprise can contribute to weight gain and obesity in children. It is not appropriate to target promotion of a product so high in sugar and fat to children for consumption.*

*Ferrero's company action plan does not set out nutrition criteria, stating that such criteria will be published at a later stage. It states that nutrition criteria will be consistent with established scientific evidence and/or national and international guidelines. As stated above, the national and international guidelines both recommend limiting foods high in sugar and saturated fat. Ferrero therefore cannot demonstrate that chocolate is a healthier dietary choice consistent with scientific and/or national and international guidelines.*

*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 Ferrero may only advertise the product to children if the advertising and/or marketing communication references, or is in the context of, a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages:*

- a) good dietary habits, consistent with established scientific or government criteria; and*
- b) physical activity.*

*The 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.*

*The advertisement does not positively encourage good dietary habits. The only food shown in the advertisement is the chocolate. There are no healthy food products shown or consumed. In addition, the suggestion to discover the ten new toys from the Despicable Me 3 movie encourages children to pester their parents to purchase a large number of Kinder*

*Surprise chocolates in order to try to obtain all ten new toys. Children watching this advertisement, knowing that ten different toys are available, would most likely wish to collect all of the ten toys, rather than stop at one. Contrary to good dietary habits, this encourages excessive consumption of the chocolate, an unhealthy food.*

*The advertisement does not positively encourage physical activity.*

*The child is shown to be engaged in sedentary activity, throughout the advertisement he is playing while seated at the coffee table.*

*Request for action*

*For the above reasons, the OPC asks the ASB to request that Ferrero withdraw the Kinder Surprise chocolate advertisement immediately for the reason that it contravenes the RCMI.*

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

*The OPC submits that this advertisement breaches clause 2.14 of the Code for Advertising & Marketing Communications to Children (Children's Code) because:*

- 1. it is an advertising or marketing communication to children for food; and*
- 2. it encourages and promotes unhealthy eating habits*

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

*The Children's Code applies to material that is published or broadcast on any medium. The advertisement has been broadcast on STV, as explained in section 1 above, and therefore the Children's Code applies.*

*Based on its themes, visuals and language, the advertisement is clearly directed primarily to children, within the meaning of the Children's Code. Please see the analysis of the advertisement in section 1 above which lists the factors that show the advertisement is primarily directed to children. We also highlight the additional factors below, to reflect the list in the Children's Code Practice Note.*

*a) The product is clearly targeted towards and of principal appeal to children. The main appeal of the Kinder Surprise chocolate product is the children's toy found inside the chocolate. It is clearly not a product that is ordinarily enjoyed by adults. For the reasons already set out in Section 1 above, the advertisement is not one that is directed to adults or parents to purchase the product, it is clearly directed towards children as it shows a child as the primary character, followed by images from the very popular children's movie *Despicable Me 3* and a voice over directed to children to take action.*

*b) As discussed in Section 1 above, the advertisement uses very popular children's characters, from the *Despicable Me 3* movie.*

*c) The story clearly includes the child's excited reaction and expression in receiving the Kinder Surprise product.*

*d) The storyline is clear and simple, showing the child's excitement at receiving the*

*Kinder Surprise chocolate, followed by images of the Despicable Me 3 movie characters.*

e) *The visuals are clearly designed to appeal to children, particularly through inclusion of the animated Despicable Me 3 movie characters.*

f) *The language used in the advertisement is simplistic and able to be comprehended by children 14 years and younger. The message is clearly a direction to children to 'enter the world of Despicable Me with Kinder Surprise' and 'discover ten new toys'. The message is given against the backdrop of cartoons of the Despicable 3 Movie and Kinder Surprise chocolates.*

g) *The primary actor in the advertisement, as set out in Section 1 above, is a child younger than 14 years old, and he is eating a food product that is targeted toward and of principal appeal to children as discussed at a) above.*

h) *The advertisement directs a call to action to children, as discussed in f) above. The only message to adults in the advertisement is very short, as set out in Section 1 above, is in writing, without sound, that is flashed very briefly on the screen in the early part of the advertisement.*

*The Kinder Surprise chocolate is clearly a food.*

*The advertisement promotes unhealthy eating habits*

*The advertisement promotes the consumption of Kinder Surprise chocolates, an unhealthy product with high levels of sugar and fat as set out in Section 1 above. The promotion of this product encourages children to consume it and thereby promotes unhealthy eating habits. Further, the advertisement directs children to 'discover ten new toys' from the very popular children's movie Despicable Me 3. This is clear language in the advertisement that encourages children to consume a large number of Kinder Surprise chocolates, in order to obtain all ten new toys, thereby encouraging excessive consumption of this unhealthy food. Presumably more than ten chocolates would need to be purchased before all ten toys were found. The advertisement shows the child happily eating the chocolate, it does not therefore suggest buying the Kinder Surprise product for the toy alone, discarding the chocolate.*

*As set out in Section 1 above, there is no physical activity shown in the advertisement, the child is sedentary throughout.*

*Request for action*

*For the above reasons, the OPC asks the ASB to request that Ferrero withdraws the Kinder Surprise advertisement immediately on the basis that it contravenes the Children's Code.*

## **THE ADVERTISER'S RESPONSE**

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

*Ferrero Australia Pty Limited (Ferrero) thanks the Board for this opportunity to respond to the complaint that has been made.*

*Increasing worldwide attention to diet, nutrition and physical activity is of great significance to the international food and beverage community, of which Ferrero is a part.*

*Ferrero supports the notion that responsible commercial communications can assist consumers in making appropriate choices about food and beverage products, as well as in understanding the role of nutrition, diet and physical activity in order to achieve a globally healthy and active lifestyle. By conveying commercial communications consistent with the principles of good nutrition, balanced diet, physical activity and personal choice, industry can play an important role.*

*As a global industry player, Ferrero consistently applies the “Framework for responsible food and beverage communication” adopted by the ICC - International Chamber of Commerce, as well as the regional and national self-regulatory Codes developed locally on that basis. In Australia, this is expressed by us being a signatory to the Responsible Children’s Marketing Initiative (Initiative).*

*Ferrero recognises the need for proper enforcement mechanisms to sanction or amend advertisements that do not meet the above-mentioned self-regulatory requirements. Ferrero believes that an effective self-regulation of commercial communications provides a valuable framework to best serve the consumer’s interest in receiving truthful and accurate communications. This is why Ferrero, individually as well as through the Associations to which it belongs (such as AANA, WFA, the World Federation of Advertisers, and IFBA, the International Food & Beverage Alliance), is an active player in the self-regulatory process at national, as well as international level.*

*Ferrero has always believed in the crucial role played by parents in educating their children to a balanced diet and a healthy and active lifestyle. Therefore, advertising and marketing communications concerning our food products in Australia are directed primarily to the adults who make the household purchasing decisions. Although the existence of a direct link between advertising and children’s eating habits has not been proven, Ferrero believes that particular care should be exercised when commercial communications are directed primarily to children, especially when children are most likely exposed to such communications without parental supervision.*

*To ensure its compliance with the Initiative and the codes established by the AANA (the Codes), Ferrero management conducts an assessment of all new communications for compliance, including, when required, obtaining the assistance of an external advisor and reviewing and considering findings in previous cases considered by the ASB. Ferrero has openly shared our marketing commitments and requirements with our communication trade partners. We conduct an internal audit of all spot lists prior to any campaign going to air which entails checking every program in which we will communicate with an aim of ensuring that our target audience requirements are met.*

*Ferrero maintains that the advertisement the subject of the complaint (Advertisement) does not breach the Codes or the Initiative. Ferrero’s reasons for taking this view are set out below both in response to the specific allegations contained in the complaint and in general responses that deal with sections of the Codes not referred to in the complaint.*

*2 Alleged Breach of the Responsible Childrens Marketing Initiative of The Australian Food and Grocery Council in relation to Advertising Messaging*

2.1 The complaint asserts that Ferrero has breached the Initiative by failing to comply with section S1.1 of the Initiative which reads as follows:

*“Advertising and Marketing Communications to Children for food and/or beverages must:*

- a. Represent healthy dietary choices, consistent with established scientific or Australian government standards, as detailed in Signatories’ Company Action Plan; and*
- b. Reference, or be in the context of, a healthy lifestyle, designed to appeal to Children through messaging that encourages:*
  - i. Good dietary habits, consistent with established or scientific government standards; and*
  - ii. Physical activity.”*

2.2 The Initiative only applies to Advertising or Marketing Communications to Children. The Advertisement is directed primarily to adults, and the Initiative does not apply to it, for the reasons described in Section 2.6 below. In summary:

- (a) Ferrero’s media buying target for the Advertisement is “Grocery Buyers 25-54 years”;*
- (b) The Advertisement presents the parent’s perspective and the theme, visuals and language used in it all appeal to adults; and*
- (c) “Despicable Me 3” is a film of broad appeal that is rated “PG”.*

2.3 In coming to the conclusion in Section 2.2 above, Ferrero has had regard to relevant definitions in the Initiative as follows:

- (a) “Advertising or Marketing Communications to Children” means:*

*“Content*

*Advertising or Marketing Communications which, having regard to the theme, visuals and language used, are primarily directed to Children and food and/or beverage products; and Placement*

*Advertising or Marketing Communications that are placed in Medium that is directed primarily to Children (in relation to television this includes all PG rated programs and other rated programs that are directed primarily to Children through their themes, visuals and language); and/or*

*Where Children represent 35% or more of the audience of the Medium.”*

- (b) “Medium” means “Television, radio, print, cinema, internet sites”.*

- (c) “Children” means “Persons under 12 years of age”.*

2.4 As mentioned above, Ferrero is a signatory to the Initiative. Ferrero has made a specific commitment in its Company Action Plan in relation to the Initiative by stating that it will not advertise its products to media audiences with a majority of children under the age of 12 except for: products which fulfil the specific nutrition criteria; or non-product-specific brand campaigns advocating a healthy lifestyle.

2.5 In accordance with its Company Action Plan and the Initiative, Ferrero:

- (a) creates advertising campaigns for products such as the KINDER SURPRISE® product that are directed to parents rather than to children;*
- (b) instructs its advertising agency that these advertisements should not be aired in C Periods and P Periods under the Children’s Television Standards 2009;*
- (c) instructs its advertising agency that these advertisements are not to be aired during programs directed primarily to children having regard to the theme, visuals and language used (even where these programs are broadcast outside of C Periods and P Periods); and*
- (d) reviews lists of proposed “spot lists” showing proposed broadcast positions for its advertisements to check that its instructions have been met in the selection of spots.*

2.6 Ferrero rejects the assertion that the Advertisement breaches S1.1 of the Initiative because it does not fall within the definition of “Advertising or Marketing Communications to Children” for the following reasons:

(a) The Advertisement has not been placed in Medium that is primarily directed to Children. Ferrero’s media buying target is “Grocery Buyers 25-54 years”. This is the target audience for the television programs selected for placement of Ferrero advertisements for the KINDER SURPRISE® product. Ferrero directs agencies to ensure that the Advertisement is not placed in P Periods or C Periods or in any other rated programs that are directed primarily to Children through their themes, visuals and language. In this regard, Ferrero has specifically instructed that the Advertisement must not appear during any program where Children represent 35% or more of the audience of the Medium.

(b) The Advertisement is not, having regard to its theme, visuals and the language used, directed primarily to Children. In determining whether an advertisement is directed primarily to children, the Board has noted that “primarily” means “in the first instance” and that it must: “...find that the advertisement is aimed in the first instance at children” (Bulla Dairy Foods, 190/17). Ferrero commissioned and obtained the Advertisement on the basis that it was directed at parents of children, not to children themselves. The Advertisement meets these criteria and is clearly not directed to children for the following reasons:

(i) In developing the Advertisement the focus of Ferrero and its advertising agency was on targeting parents as the audience. Ferrero thought this to be the appropriate strategy as it is this audience that makes the purchasing decisions. One of the insights that formed the creative idea for the Advertisement was that many parents look for moments in their busy routines when they can create a moment of spontaneous joy for their child. The aim of the Advertisement was therefore to capture such a moment between a busy Dad and his child and the focus of the action in the Advertisement is on the interaction between the father and the child and the child’s spontaneous moment of surprise and joy;

(ii) The theme in the 15 second commercial is a family moment when a father has time to give his son a surprise present and play with him. The interaction between the father and son is shown from the father’s perspective.

(iii) the visual appearance of the Advertisement is an everyday family setting in the home. This calm family scene starts with a child seated at a coffee table drawing and this is clearly a scene that will appeal to adults;

(iv) there is no rapid action or excitement in the interaction between parent and child that would appeal particularly to children;

(v) the language used in the Advertisement is everyday language used by families and has not been modified to appeal to children;

(vi) the emotional cues used in the Advertisement were those that Ferrero’s advertising agency perceived would make the most impression when targeting a parent of a child aged between 3 and 8 years. It targets the adult’s anticipation of surprise and joy when presenting a special treat to a child;

(vii) the music used in the Advertisement is music without lyrics that appeals to adults and is not the sort of bright, catchy music that would appeal to children;

(viii) the Advertisement has been booked for broadcast during television programs that are not directed primarily at Children and which have an audience comprised of more adults than Children.

(ix) while images of the “Despicable Me 3” range of toys that form part of some KINDER SURPRISE® products, and images of some characters, are shown at the end of the Advertisement, this is only in the latter part of the Advertisement to show to the watching parent the new range of toys that has been released. The Board has previously determined that one of the “Minions” films (of which “Despicable Me 3” is the most recent) was a film



*that is popular with children but also considered that: "... many families would watch the movie together and also enjoy the associated marketing material" (McDonald's, 280/15). Therefore, the reference to the "Despicable Me 3" movie will appeal to adults who would also enjoy the movie and the associated marketing material. The Complainant has asserted that the "Despicable Me 3" movie is popular with very young children but Ferrero notes that it is rated "PG" meaning it is not recommended for viewing by persons under 15 without guidance from parents or guardians. The images of characters from the "Despicable Me 3" movie are included at the very end of the Advertisement as part of the message to parents. The use of the image is not in itself something that makes the Advertisement directed primarily to children. These images are directed at adults along with the rest of the Advertisement;*

*(x) The written words on the screen are very specifically directed to adults. The spoken words supplement that message by notifying parents and other adults of the new toy range and the number of new toy designs available (pointing out there are 10 new designs rather than just the 4 shown). Nothing in the written or spoken message is directed at Children and does not in any way encourage "collectability" nor does it encourage Children to pester adults to purchase multiple products. The Board noted in Doughnut Time, 155/17 that the promotion of a particular product (in that case a special doughnut) in a "limited time" offer did not promote unhealthy eating habits or an inactive lifestyle. The position here is similar. The focus of the Advertisement is on the surprise to a child caused by receiving a rare treat. Providing multiple treats on a regular basis would destroy the element of surprise and be contrary to the theme of the Advertisement.*

*2.7 Ferrero notes that the Advertisement is a modified form of an advertisement that has been used by Ferrero in Australia from time to time since October 2013 with the only difference being that the range of toys is updated to feature the most recent release of toys in the last section of the Advertisement. The script combined with story board images for the Advertisement and a preceding advertisement based on the same model are attached to this response as attachment "C". Story boards for the 30 second and 15 second version of each advertisement have been included. In each campaign the 30 second version of the advertisement was broadcast for a period prior to the broadcast of the 15 second version commencing. The extra 15 seconds in the 30 second version focuses on the parent's experience of being surprised by his or her child and is comprised of realistic scenes designed specifically to appeal to parents. Ferrero has not been notified of any complaint concerning earlier versions of this advertisement.*

### *2.8 Summary of Response to Claim No. 1*

*In summary, Ferrero submits it is clear from the information set out above that the Advertisement is not an advertisement directed to children under 12. Ferrero submits that it is clear that the Advertisement did not breach the Initiative in any way and was in accordance with Ferrero's Company Action Plan.*

### *3 Alleged breach of Clause 2.14 of the Code for Advertising and Marketing Communications to Children (Children's Code).*

#### *3.1 The Complainant alleges that Ferrero has breached clause 2.14(a) of the Children's Code which reads as follows:*

*"Advertising or Marketing Communications to Children for food or beverages must neither encourage nor promote an inactive lifestyle or unhealthy eating or drinking habits."*

*In the Children's Code "Advertising or Marketing Communications to Children" is defined as follows:*

*“Advertising or Marketing Communications to Children means Advertising or Marketing Communications which, having regard to the theme, visuals and language used, are directed primarily to Children and are for Product.”*

*Children are defined as persons 14 years old or younger.*

*3.2 While the definitions under the Children’s Code mean that Advertising or Marketing Communications to Children include those directed primarily to children 14 years or younger, the meaning of that term is otherwise equivalent to “Advertising or Marketing Communications to Children” under the Initiative. Accordingly, the responses set out in section 2 above are also applicable to this second claim in the complaint.*

*3.3 Ferrero denies that the Advertisement is an Advertising or Marketing Communication to Children within the meaning of the Children’s Code. The Advertisement is not directed primarily to children and is instead directed primarily to parents of children. The theme, visuals and language used in the Advertisement are designed to appeal to parents by evoking a recognition of the pleasure the parent will receive when giving a special treat to a child who clearly does not receive such treats on a regular basis. The focus of the Advertisement is on the way in which the parent relates to the child and the child’s surprise and joy at receiving the treat. The Advertisement is composed largely in a quiet domestic scene showing a child drawing that will appeal far more to parents than to children. The images of the new range of toys comprised in the products only appear at the end of the Advertisement and do not include any images of the child reacting to those toys. In addition, the Advertisement was not broadcast in P periods or C periods or during programs where more than 35 percent of the audience was comprised of children. The Board is referred to the elements of the Advertisement and its genesis described in Section 2.6 above.*

*3.4 If the Board does find that the Advertisement was directed primarily to Children (which Ferrero maintains is not the case) then, in the alternative, Ferrero submits that it is not an advertisement that would encourage or promote an inactive lifestyle or unhealthy eating or drinking habits. In the Advertisement a child is shown receiving a special treat. The Advertisement would be readily understood by the community to show a treat that is a surprise because it is something that is not given on a regular basis.*

*3.5 An advertisement for a product that shows a specific situation in which a treat is provided to a child (who, given the level of excitement displayed, clearly does not receive such treats on a regular basis) could not be found to encourage or promote an inactive lifestyle or unhealthy eating habits. Ferrero notes that the Board has consistently confirmed that the promotion of a product which may have a particular nutritional composition is not, per se, encouraging or promoting unhealthy eating or drinking habits (Doughnut Time, 155/17, Unilever, 465/16, Nestle, 385/16).*

*3.6 Summary of Response to Claim No 2*

*It is clear from the information set out above that the Advertisement is not an “Advertising or Marketing Communication to Children” within the meaning of the Children’s Code. Even if it were, the Advertisement does not encourage or promote an inactive lifestyle or unhealthy eating or drinking habits. To the contrary the Advertisement is directed to parents and shows that the product displayed is to be used by providing it to a child on an irregular basis as a surprising treat.*

*4 General Responses*

*4.1 Ferrero has been requested to provide comprehensive comments in relation to the complaint and also to address all aspects of the advertising codes. Accordingly, Ferrero sets out below some general comments on other aspects of Section 2 of the AANA Code of Ethics and other codes that have not been raised in the complaint.*

*Section 3.1 of the AANA Code of Ethics states that the Children’s Code applies to Advertising or Marketing Communications to Children and that Section 2.6 of the AANA Code of Ethics*

does not apply to those advertisements. Ferrero has demonstrated above that the Advertisement is not an “Advertising or Marketing Communication to Children” and in these circumstances Section 2.6 of the AANA Code of Ethics will apply. Section 2.6 states as follows:

“Advertising or Marketing Communications shall not depict material contrary to Prevailing Community Standards on health and safety.”

Prevailing Community Standards is defined in the Advertiser Code of Ethics to mean community standards determined by the ASB as those prevailing at the relevant time in relation to Advertising or Marketing Communications.

4.2 Section 2.1 of the AANA Food & Beverage Advertising & Marketing Communications Code (Food & Beverages Code) contains a similar requirement in relation to meeting Prevailing Community Standards. In addition, Section 2.2 of the Food & Beverages Code prohibits advertisements that undermine the importance of healthy lifestyles or the promotion of healthy balanced diets, or encourage what would reasonably be considered as 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.

4.3 Ferrero submits that the Advertisement is not contrary to Prevailing Community Standards on health nor is it contrary to Section 2.2 of the Food & Beverages Code for the following reasons:

(a) The Advertisement is directed at parents as described above as Ferrero regards parents as the appropriate decision makers in relation to the purchase of a treat product such as the KINDER SURPRISE® product. This is in accordance with Ferrero’s Company Action Plan published on the Australian Food and Grocery Council website in which Ferrero states: “Ferrero has always believed in the crucial role played by parents in educating their children to a balanced diet and a healthy lifestyle.”

For this reason Ferrero directed the Advertisement at parents. Therefore the Advertisement does not in any way undermine the authority of parents but instead supports that authority and responsibility for purchasing decision.

(b) The Advertisement depicts a specific situation in which a treat is provided to a child (who, given the level of surprise and displayed, clearly does not receive such treats on a regular basis). Providing a special treat on an irregular basis to a child would not encourage or promote an inactive lifestyle or unhealthy eating habits. The Board has previously stated: “... that whilst there is community concern about the advertising of unhealthy food products to children in the Board’s view this concern does not amount to a community standard that advertising of a food of a particular nutrition profile to children should be prohibited.” (Peters, 146/15).

(c) The Advertisement does not dwell on the consumption of the chocolate component of the KINDER SURPRISE® product. The child is shown biting into the product and this displays to parents the constitution of the product which includes a relatively thin chocolate shell comprised of a higher than average percentage of milk. The child then plays with the toy found within the egg. The average amount of chocolate comprising the chocolate egg is approximately 20grams which is a controlled portion of chocolate to be provided to a child as a treat. In these circumstances it is clear that consuming small treat products in moderation is not contrary to Prevailing Community Standards on health. In the complaint the Complainant has noted that the World Health Organisation (WHO) supports the limited intake of sugar and has recommended that daily sugar intake be reduced to 10% of daily dietary intake and ideally, for best health outcomes, to 5%. The WHO thus clearly acknowledges that moderate amounts of sugars can be permitted from time to time and the

*Complainant has produced no evidence of any guidelines that suggest children should be prohibited from consuming chocolate as an occasional treat.*

*(d) The Advertisement does not display the child requesting a KINDER SURPRISE® product nor does it contain any suggestion that the product should be purchased and given to children on a regular basis. Ferrero notes the finding of the Board in Retail Food Group, 55/10 that:*

*“The mere fact that there is a toy advertised as part of a product does not lead to the advertisement containing an appeal to children to urge parents or others to buy the particular product.”*

*(e) The Advertisement does not encourage or promote “collectability” of the toys comprised in the KINDER SURPRISE® product. It does not state that there is a set of toys within the products that should be collected. Rather, the parent is shown a range of toys at the end of the Advertisement to indicate to the parent that new toys that are likely to appeal to (and surprise) their child are available. The number of toys mentioned indicates that, if the products are purchased from time to time, it is likely that a different toy would be discovered inside on each occasion. The fact that a range of toys may be promoted as a special release does not in itself amount to encouragement or promotion of unhealthy eating habits (the Board is referred to its similar conclusion in Doughnut Time, 155/17).*

*4.4 Even though the Advertisement is not an “Advertising or Marketing Communication to Children”, Ferrero maintains that it does in any case meet all the requirements of Section 2 of the Children’s Code (including Sections 2.1 and 2.7) and the requirements set out in Section 3 of the Food & Beverages Code.*

*4.5 Ferrero maintains that the Advertisement is in accordance with Prevailing Community Standards on health and in accordance with Ferrero’s own corporate social responsibility philosophy in relation to its products. The Board will find attached and marked “C” a copy of the Ferrero Advertising and Marketing Principles issued by Ferrero’s parent company, Ferrero S.p.A., in January 2017, which can be found publicly at [www.ferrero.com/social-responsibility/ferrero-advertising-and-marketing-principles](http://www.ferrero.com/social-responsibility/ferrero-advertising-and-marketing-principles). The Board will see that the Ferrero Group internationally is a strong supporter of various initiatives to address concerns about childhood obesity. Ferrero’s social commitments, goals and achievements are publicly reported in its annual Corporate Social Responsibility report ([www.ferrerocrs.com](http://www.ferrerocrs.com)), under the chapter titled “People”. This chapter reports on the Ferrero Group’s practices in relation to responsible communication, portion control, its initiatives to encourage physical activity by children and their families and its policy of providing information to enable informed decisions to be made about the purchase and consumption of its various products all support Ferrero’s philosophy.*

## *5 Conclusion*

*5.1 Ferrero is a signatory to the Responsible Children’s Marketing Initiative. Ferrero’s parent company, Ferrero S.p.A., is a signatory to similar initiatives overseas. The culture of the Ferrero Group fosters a strong sense of corporate social responsibility and this is evidenced in Ferrero’s commitment to the Australian Food and Grocery Council’s Responsible Children’s Marketing Initiative. Ferrero has not only published a Company Action Plan pursuant to the Initiative but has instituted practices and procedures designed to ensure ongoing compliance with the Initiative. The steps that Ferrero takes to ensure compliance with the Initiative include the following:*

*(a) All proposed new marketing communications are the subject of a compliance review by management prior to final approval for broadcast/release;*

*(b) Media buying agents are instructed to select TVC spots in programs targeted at “Grocery Buyers 25-54 years”;*

*(c) Ferrero audits the TVC spot schedule prior to its campaign to identify any programs that it determines are predominantly for children and/or the theme, visuals and language used is directed primarily to children. Advertisements for Ferrero products will not be placed in these spots; and*

*(d) Ferrero has in the past identified control issues in the area of managing bonus airtime provided by networks. Ferrero has proactively reached out to the television networks through its media buying agents reminding the networks of its communication requirements.*

*5.2 Ferrero respectfully submits that it has established processes and procedures to ensure its compliance with the Initiative and the Codes identified above and maintains that no aspect of the complaint has been made out. Ferrero also submits that the Advertisement does not breach any other aspect of the Initiative or the Codes identified above that was not identified in the complaint. Ferrero respectfully submits to the Board that the complaint should be dismissed for the following reasons:*

*(a) the Advertisement does not breach the Initiative because the Advertisement is not an advertisement directed primarily to children under 12;*

*(b) the Advertisement does not breach clause 2.14(a) of the Children's Code because it is not an "Advertising or Marketing Communication for Children" within the meaning of the Children's Code. Even if it were, the Advertisement does not encourage or promote an inactive lifestyle or unhealthy eating or drinking habits. On the contrary the Advertisement is directed to parents and shows that the product displayed is to be used by providing it to a child on an irregular basis as a special treat; and*

*(c) the Advertisement does not breach any other section of the Children's Code, the Food & Beverages Code, the AANA Code of Ethics or the Responsible Children's Marketing Initiative.*

*5.3 Ferrero thanks the Board for its consideration of this Response and awaits the Board's decision in relation to the complaint.*

## **THE DETERMINATION**

The Advertising Standards Board (the "Board") 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 "AFGC RCMI").

The Board noted the complainant's concern that the advertisement breaches the RCMI because it is an advertisement directed primarily to children, Kinder Surprise is not a healthy dietary choice and the advertisement does not reference a healthy lifestyle encouraging good dietary habits and physical activity.

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

The Board noted that the medium the subject of complaint is a television advertisement and that this falls within the scope of the AFGC RCMI.

The Board noted the RCMI Initiative provides that advertising or marketing communication activities are advertising or marketing communications to children and therefore captured under the RCMI Initiative if:

1. the content of the advertisement or marketing communication is, having regard to the theme, visuals and language used, are directed primarily to children (and are for food and/or beverage products) or

2. the placement of the advertisement or marketing communication is in a medium that is directed primarily to children, ie:

a. in relation to television, all C and P rated programs and other rated programs that are directed primarily to children through their themes, visuals and language; and/or

b. where children represent 35 percent or more of the audience of the Medium.

With regards to point 1, the Board considered the theme, content and visuals of the advertisement. 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.

The Board noted that there are two versions of the advertisement. The 30 second version features various scenarios where parents find themselves surprised by their children. This includes a woman on a bus finding a drawing from her child, a man in awe of a shot his child makes in a cricket game, a mother seeing her daughter in the bath with the dog. Finally a father brings a Kinder Surprise egg in to the room where his son is. They then play with the toy within the egg. The end of the advertisement features a short promotional link with the movie Despicable me that mentions the discovery of ten new toys.

The 15 second version features only the scene of the father and son and the Despicable Me 3 promotion.

The Board noted that in this instance as the two versions depicted material of same nature just different in length, the two advertisements would be considered together.

The Board noted the theme of the advertisement. The Board noted that the theme of parents appearing amazed or surprised by their children is not a theme that appeals to children. The Board noted that young children are seen in the advertisement but considered that in this particular advertisement any child viewers would be more interested in the product rather than the advertisement itself.

The Board noted the language of the advertisement. The Board noted there is no audible communication between the parents and their children and that the inclusion of the voiceover at the end is related to the tied promotion with the Despicable Me 3 movie and the release of the ten new toys. The Board noted that the product and the movie would be familiar to viewers but is spoken by an adult voice and there are no children speaking in the advertisement or language that is child-like.

The Board noted the visuals of the advertisement. The Board noted that the advertisement involves parents and children and the children are seen doing fun things such as playing cricket and washing the dog and drawing. The Board noted that the final scene features characters from the Despicable Me 3 movie and visuals of the Kinder Surprise product.

The issue of animation 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) which were considered to be directed primarily to children. 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 on the basis that the animation was in the context of a theme, music or text that be attractive to an older audience of either teenagers or adults or both.

In the current advertisement, the Board felt that the link to the movie component of the advertisement would have strong appeal to children but considered that this part was fleeting and was an add on to the main advertisement.

The Board reiterated that 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 that the advertisement was attractive to a broad audience and was not clearly directed in the first instance to children under 12. The Board noted that the animated component was not the primary focus of the advertisement and did not appear until the 22 second mark and lasts for 8 seconds. The Board considered that the overall theme, visuals and language used were of appeal to children of all ages and to adults alike and considered that the advertisement not directed in the first instance or mainly to children under 12.

The Board then considered part 2a in relation to television and noted that, regardless of whether the advertisement is directed primarily to children or not in terms of its content, it will fall within the RCMI if it is broadcast in C or P rated programs or other rated programs that are directed primarily to children through their themes, visuals and language;

The Board noted that specific programs were not provided by the complainant.

The Board noted the advertiser's response that Ferrero directs agencies to ensure that the Advertisement is not placed in P Periods or C Periods or in any other rated programs that are directed primarily to Children through their themes, visuals and language. In this regard, Ferrero has specifically instructed that the Advertisement must not appear during any program where Children represent 35% or more of the audience of the Medium.

The Board then considered part 2b relating to where children represent 35 percent or more of the audience of the Medium.

The Board noted the advertiser's response that media agencies are instructed to ensure the advertisement is not broadcast in programs where the proportion of viewers under 12 exceeds the 35% threshold.

The Board noted that as, the advertisement was not broadcast in programmes that were directed primarily to children under 12, the RCMI did not apply

Finding that the advertisement did not meet the criteria within points 1 or point 2 of the Initiative and was not directed primarily to children the Board considered that the Core Principles of the RCMI did not apply.

The Board then considered whether the advertisement complied with the Children's Code. The definition of "advertising and marketing communications to children" in the AANA Children's Code is: Advertising or Marketing Communications which, having regard to the theme, visuals and language used, are directed primarily to Children and are for Product. '

For the same reasons noted above the Board considered that this advertisement, considering its overall impact and the theme, visuals and language used is not directed primarily to children. The Board therefore considered 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 Food Code.

The Board considered section 2.1 of the Code which requires that ' Advertising or Marketing Communications for Food or Beverage Products shall be truthful and honest, shall not be or be designed to be misleading or deceptive or otherwise contravene Prevailing Community Standards..' The Board considered that advertising the product Kinder Surprise is not of itself contrary to prevailing community standards and that the advertisement did not breach section 2.1.

The Board then considered 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 that the advertised product is Kinder Surprise – a chocolate item. 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 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 end of the advertisement features the Despicable Me 3 characters and displays 3 Kinder Surprise eggs. The final scene includes the text "10 new toys" and the voiceover states "discover the 10 new toys". The Board noted that in order to collect the toys the buyer would have to purchase at least 10 eggs. The Board considered that the appeal of the promotion is the collection of the toys and although this would mean the purchase of the chocolate, the focus is on the toys.



The Board noted that there is no suggestion to eat 10 eggs successively and that the consumption would not necessarily be by one person. The Board considered that the likely interpretation of the advertisement is that the product advertised is intended to be purchased as a treat and there is no suggestion of frequency of consumption.

The Board considered that the advertisement did not encourage excess consumption.

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.