



# Case Report

|   |                               |                                   |
|---|-------------------------------|-----------------------------------|
| 1 | Case Number                   | 0347/17                           |
| 2 | Advertiser                    | Ferrero Australia Pty Ltd         |
| 3 | Product                       | Food and Beverages                |
| 4 | Type of Advertisement / media | Billboard                         |
| 5 | Date of Determination         | 13/09/2017                        |
| 6 | DETERMINATION                 | Upheld - Modified or Discontinued |

## ISSUES RAISED

Advertising to Children Code 2.14 Food and beverages  
RCMI 1.1 - Advertising Message AFGC - Advertising Message  
2.6 - Health and Safety Within prevailing Community Standards

## DESCRIPTION OF THE ADVERTISEMENT

The advertisement is an interactive game on a large, screen that requires the player to touch the Kinder Surprise product as it appears on the screen. The chocolate eggs then reveal a toy inside them. There is an "age-gate" on the screen used to commence play and images of clouds and a brightly coloured rainbow. The text matches the game with 'level up' and the time and score as the player progresses. An option to try again comes up on screen at the end of play.

## THE COMPLAINT

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

*This advertisement is promoting confectionery-chocolate i.e. junk food, and obviously targeting children based on the fact that it is a game with colourful image and music.*

*It starts with an image with a large play button and a kinder chocolate egg, with a title "Magic Island".*

*Once you pressed the play button, it will move to next page with another play button, game instructions and a statement "By touching play you are confirming you are 14 years or over".*

*However, the size of the statement is comparatively small compare to those of the instruction and colourful images. If I was a child, I can still press the button and play the game.*

## **THE ADVERTISER'S RESPONSE**

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

*Response from Ferrero Australia Pty Limited to Complaint Reference Number: 0347/17*

### *1 Introduction*

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

*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 interactive panel the subject of the complaint (Interactive Panel) 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 Clause 2.14 of the Code for Advertising and Marketing Communications to Children (Children's Code).*

*2.1 The complaint alleges that Ferrero has breached clause 2.14(a) of the Children's Code. Paragraph (a) of that clause 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.*

*Ferrero denies that the Interactive Panel is an Advertising or Marketing Communication 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 Interactive Panel on the basis that it was directed at parents of children, not to Children themselves.*

*Ferrero's target audience for the KINDER SURPRISE® product is "Grocery Buyers 25-54". The Interactive Panel is not directed primarily to children and is instead directed primarily to this audience and, more specifically, to parents with children aged 3 to 8 (the Target Audience). The Interactive Panel is not, having regard to its theme, visuals and the language used, directed primarily to children.*

*2.2 The Interactive Panels are designed to catch the attention of adult shoppers, who are our target, just before they enter a supermarket. Research has suggested that retail panels at the point of sale bring forward the memory structures laid down by earlier promotional activity, acting as a reminder just before the shopper walks into a store. It is not necessary that the shopper personally engages with the Interactive Panel – a busy parent shopping at the supermarket may not have time to stop and use the Interactive Panel him or herself, but there will be a 'halo' promotional effect if they observe other individuals engaging with the Panel*

*as they walk past.*

*2.3 The visuals used in the Interactive Panel are designed to appeal to the Target Audience by presenting an interactive game on a large, adult-sized screen that requires quick inter-reaction over the whole screen to play the game. The theme of the game, quickly touching eggs to reveal the toy inside, is one that appeals to adults as well as children and so cannot be said to be directed primarily to children.*

*2.4 The language on the screen used to start the Interactive Panel includes an “age-gate” setting a minimum age to play the game. This is designed to ensure that it is the parent of a young child who starts the Interactive Panel.*

*2.5 The functionality of the Interactive Panel is designed to appeal to the Target Audience in the following ways:*

*(a) The Interactive Panel screens are over 2 metres tall and playing the game requires that the player be sufficiently tall to reach all of the screen;*

*(b) The Interactive Panel screens are located near the entry to supermarkets in shopping malls in positions likely to attract the attention of the Target Audience;*

*(c) The Interactive Panel contains an “age-gate” on the screen used to commence play. This would discourage children 14 years and younger from attempting to operate it;*

*(d) The Interactive Panel runs at a speed that is intended to be suitably fast to engage the Target Audience. It is likely to be too fast for younger players to keep up themselves, particularly where they cannot reach the entire screen; and*

*(e) The Interactive Panel contains higher levels and a “turbo” speed all of which make it even harder to play and inappropriate for younger players.*

*2.6 The Board has previously noted that simple interactive games featuring a large panel that is brightly coloured and has bright images (such as images of fruit and cans of FANTA®) are not, due to these elements alone, advertisements directed primarily to children. In Coca-Cola South Pacific, 230/17, the Board determined that an interactive billboard located within a shopping mall that featured these brightly colour elements on a large screen was not an advertisement directed primarily to children. The Board also noted that there was no spoken language providing instructions to those participating in the Interactive Panel but rather words appeared on the screen. The Interactive Panel operates in a similar way as no verbal instructions are given to players.*

*2.7 The decision of the Board in Coca-Cola South Pacific, 230/17 is also relevant in that the majority of the Board considered that young children are often involved in the shopping experience at malls and that, while a large interactive screen (such as the Interactive Panel) would appeal to children under the age of 14, overall the Advertisement was attractive to a broad audience and was not clearly directed in the first instance to children under 14.*

*2.8 If the Board does find that the Interactive Panel 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 Interactive Panel there are only images of the KINDER SURPRISE®*

*product wrapped and, when a product is touched, of the toy emerging from inside. There are no images featuring the chocolate element of the product and there is no element of consumption of the product within the Interactive Panel. The Interactive Panel does not include any call to action by way of encouraging purchase or consumption of the KINDER SURPRISE® products.*

*2.9 There is no content in the Interactive Panel that might encourage an inactive lifestyle. On the contrary given the size of the screen upon which the Interactive Panel is played, playing a game is itself an active task as it is necessary to quickly reach eggs located in different positions over the entire 2 metre high panel.*

*2.10 While the Interactive Panel displays the KINDER SURPRISE® product it does not promote its consumption. 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). Further, the Board confirmed that an interactive game that merely shows product images (in that case FANTA® cans) as an element in the game, carried no suggestion of frequency of consumption, or consumption of multiple cans, and did not undermine the importance of a healthy or active lifestyle (Coca-Cola South Pacific 230/17). Even an interactive game that involved a monster eating “WIZZ FIZZ” products did not undermine the importance of a healthy or active lifestyle (Fyna Foods, 101/14). In that case the Board determined that even that aspect of the game:*

*“...was not suggestive that children should be encouraged to consume excessive amounts of Wizz Fizz but rather participate in a fun game that would likely be monitored by parents/guardians.”*

*2.11 Summary of Response to Claim No 1*

*It is clear from the information set out above that the Interactive Panel is not an “Advertising or Marketing Communication to Children” within the meaning of the Children’s Code. Even if it were, the Interactive Panel does not encourage or promote an inactive lifestyle or unhealthy eating or drinking habits. To the contrary, playing with the Interactive Panel is in itself engaging in an energetic activity.*

*3 Alleged Breach of Clause 2.6 of the AANA Code of Ethics (Code of Ethics)*

*3.1 The complaint alleges that Ferrero has breached clause 2.6 of the Code of Ethics which reads 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 Code of Ethics to mean the community standards determined by the Advertising Standards Board as those prevailing at the relevant time in relation to Advertising or Marketing Communications.*

*3.2 Ferrero submits that the Interactive Panel is not contrary to Prevailing Community Standards on health for the following reasons:*

*(a) The Interactive Panel is directed to the Target Audience.*

*(b) The Interactive Panel is merely a fun interactive game that uses as part of its graphics images of KINDER SURPRISE® products together with other images. It does not display or promote the consumption of the KINDER SURPRISE® products.*

*(c) The Interactive Panel itself requires a significant level of activity in order to play it successfully.*

*(d) The depiction of KINDER SURPRISE® products in the Interactive Panel amongst other graphics would not encourage or promote an inactive lifestyle or unhealthy eating habits. The Board has previously stated:*

*“That whilst there is a 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).*

*(e) In the determinations referred to in section 2.10 above, the Board considered that interactive games of a similar nature were not contrary to those standards.*

#### *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.*

*4.2 Section 2.1 of the AANA Food & Beverage Advertising & Marketing Communications Code (Food & Beverages Code) contains a similar requirement to that in Section 2.6 of the Code of Ethics 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 Interactive Panel is not contrary to Prevailing Community Standards on health nor is it contrary to Section 2.2 of the Food & Beverages Code for the reasons outlined in section 3.2 above.*

*4.4 Even though the Interactive Panel 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 Interactive Panel 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), 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 always endeavours to ensure that its promotional activities meet the requirements of the Codes All proposed new marketing communications are the subject of a management compliance review prior to final approval for broadcast/release.*

*5.2 Ferrero respectfully submits that it has established processes and procedures to ensure its compliance with the Codes identified above and maintains that no aspect of the complaint has been made out. Ferrero also submits that the Interactive Panel does not breach any other aspect of 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 Interactive Panel 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 Interactive Panel does not encourage or promote an inactive lifestyle or unhealthy eating or drinking habits. On the contrary the Interactive Panel encourages activity in those old enough to play it;*

*(b) the Interactive Panel does not breach clause 2.6 of the Ethics Code as it does not depict material contrary to Prevailing Community Standards on health and safety. No such standards would preclude the promotion of a product merely because it is a treat product; and*

*(c) the Interactive Panel does not breach any other section of the Children's Code, the Food & Beverages Code or the Code of Ethics.*

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

*Supplementary Response from Ferrero Australia Pty Limited to Complaint Reference Number: 0347/17*

### *Introduction*

*On 31 July 2017, Ferrero Australia Pty Limited (Ferrero) submitted to the Board its response to Complaint Reference No 0347/17 (Complaint). That Complaint did not make any reference to the Responsible Children's Marketing (RCMI) and accordingly Ferrero's response did not address the RCMI.*

*Ferrero has been contacted by the Board and informed that the Board has formed the view*

*that the advertisement the subject of the Complaint (the Interactive Panel) does fall under the provisions of the RCMI as it is an interactive game. The Board has asked Ferrero to provide a supplementary response addressing the RCMI by Friday 25 August 2017.*

*Ferrero thanks the Board for the opportunity to address this further matter that the Board has raised. Ferrero again confirms its commitment to the RCMI as a signatory to the RCMI. Ferrero refers the Board to the introductory comments in its initial response dated 31 July 2017 (Initial Response).*

*Conclusion that the Interactive Panel falls within the provisions of the RCMI*

*The Board has determined that the Interactive Panel falls under the provisions of the RCMI as it is an interactive game. Ferrero respectfully requests the Board to give further consideration to this determination as Ferrero submits it is inconsistent with the provisions of the RCMI.*

*The RCMI is intended only to apply to Advertising and Marketing Communications to Children. This is evident from the following of its terms.*

*The RCMI is an initiative relating to the marketing practices in Advertising and Marketing Communications to Children (RCMI, item 1 Background).*

*The objectives of the RCMI are each specifically related only to Advertising and Marketing Communications to Children (RCMI, item 2 Objectives).*

*This interpretation is supported by the recent determination of the Board in Ferrero, 345/17 where the Board found that where an advertisement did not meet the criteria of an “Advertising and Marketing Communication to Children” the Core Principles of the RCMI did not apply.*

*The RCMI defines Advertising and Marketing Communications as advertising via a Medium, which in turn is defined as 'television, radio, print, cinema, internet sites'. As a result, the background and objectives to the RCMI indicate that it can only apply to advertising on television, radio, print, cinema or internet sites. An interactive billboard such as the Interactive Panel is not a 'Medium' as defined in the RCMI. Consequently, the Interactive Panel is not subject to the RCMI.*

*Even if the Core Principles are applicable to the Complaint (which Ferrero maintains is not the case) Core Principle S1.3 in the RCMI refers to interactive games. 'Interactive games' is not defined. The principle requires that an interactive game is consistent with principle S1.1, which applies only to Advertising and Marketing Communications. S1.3 should be read in the context of S1.1, along with the background and objectives to the RCMI which clearly confine its application to specified Media. Ferrero submits that the proper construction of the RCMI is that S1.3 can only apply to an interactive game delivered via a Medium, for example an internet-based game.*

*Ferrero's position on this point is also confirmed in the decision of the Board in Coca-Cola South Pacific, 230/17 in which the Board considered an interactive panel featuring a large interactive game that advertised the beverage “FANTA Jelly Fizz” (FANTA Determination). In that case, the Board determined that RCMI did not apply to the interactive billboard as it*



*was not on a relevant Medium. The Interactive Panel is a device of the same type as the interactive billboard described in the FANTA Determination and accordingly should also be found to fall outside the RCMI.*

*In view of:*

*the proper interpretation of the RCMI terms; and*

*the recent findings by the Board that the RCMI does not apply unless a communication falls within the definition of “Advertising and Marketing Communications to Children” and, more specifically, that the RCMI does not apply to games delivered via interactive billboards,*

*Ferrero submits that the RCMI does not apply to the Interactive Panel.*

*Advertising and Marketing Communications Children*

*If the Board does find that the Interactive Panel is an interactive game that is subject to the RCMI (which Ferrero maintains is not the case) then, in the alternative, Ferrero submits that the Interactive Panel should only be assessed by reference to Ferrero’s commitment with regard to interactive games in its Company Action Plan.*

*The commitment given by Ferrero in its Company Action Plan in relation to the use of its products in interactive games is as follows:*

*“There will be no intentional placement of Ferrero products in interactive games primarily directed to media audiences with a majority of children under 12, unless the interactive game incorporates or is consistent with healthy dietary choices under Advertising Message 1 above”.*

*Ferrero submits that there has been no intentional placement of Ferrero products in any interactive game primarily directed to media audiences with a majority of children under 12 because the Interactive Panel is not such an interactive game.*

*Ferrero submits that, in commissioning and approving the Interactive Panel, it had no intention to place Ferrero products in an interactive game primarily directed to media audiences with a majority of children under 12. In this regard, Ferrero submits that it has complied with the commitment given in its Company Action Plan. The Interactive Panel was commissioned by Ferrero on the basis that the target audience for the Panel was adult grocery buyers. Ferrero instructed its advertising agency that the target audience was “parents with kids 3-6 years old”. The agency responded in its campaign recommendation document confirming the target for the campaign (including the Interactive Panel). Attached is a page from the agency’s response describing the target audience for the Interactive Panel as “Parents with children 3-8” in the Volume Segment “Grocery Buyers 25-54” (Annexure A).*

*Ferrero submits that its instructions to its agency, and the confirmation of the agency approach, clearly show that there has been no intentional placement of Ferrero products in any interactive game primarily directed to media audiences with a majority of children under 12. The target audience is clearly identified as grocery buyers in the age bracket 25 to 54.*

*Ferrero's intention of targeting grocery buyers in the age bracket 25 to 54 in its use of the Interactive Panel is confirmed when figures available in relation to consumer traffic in the area where the Interactive Panel the subject of the Complaint was placed are considered. Information provided by the Broadway, Sydney shopping centre indicates that in recent years visitors to the Broadway, Sydney shopping centre are comprised of 46% young professionals, 28% students (living in close proximity to Sydney University and the University of Technology) and 12% young families. This is consistent with population figures for the inner west produced by Australian Bureau of Statistics from the 2016 Census showing the percentage of children aged 0-11 in the Inner West Council area was 13%. These figures suggest that the percentage of Children in the "audience" for the Interactive Panel would appear to be of less than 20%.*

*Ferrero has received a report from the agency that designed the Interactive Panel, oOh! Media, confirming that the Interactive Panel was successful in reaching the target audience specified by Ferrero and also successful in presenting an advertisement that did not attract any significant proportion of Children. A copy of this report from oOh! Media in the form of a PowerPoint presentation is Annexure B to this supplementary response (Agency Report).*

*The Agency Report presents information obtained through technology supplied by Quividi. The Interactive Panel had a lens installed that scanned biometric data of individuals in proximity to the Interactive Panel. The Agency has informed Ferrero that at no stage are photos of people taken through the Quividi lens. The lens scans people within a 180 degree radius of the Interactive Panel and up to a distance of approximately 20m. This enables the Quividi system to count the number of people that are in proximity to the Panel, that pass by the Panel and that engage with the Panel. It also detects the number of people that actually glance at the Panel whilst someone else is playing with it (ie a "halo" viewer). The Quividi software is able to scan individuals and provide a breakdown of the data collected including the gender and age range of participants, viewers and halo viewers. The Quividi is not designed to store any images of people who are analysed and the only information stored on the Quividi software is numbers of individuals falling within the categories specified in the software who were scanned in proximity to the Panel.*

*The data collected by the Quividi software shows that Ferrero's marketing strategy was successful as only approximately 5% of those who engaged with the Interactive Panel were children under 15 years, with the majority being in the categories Young Adults 15 – 34 years (57%) and Adults 35 – 64 years (31%). This Agency Report confirms that the Interactive Panel is not only intended to attract a majority of adult viewers and participants, but clearly succeeded in this aim as only a small proportion of children under 15 years did in fact engage with the Interactive Panel. Details are not available of the number of children under 12 years who engaged with the Interactive Panel but this would have been below 5% of the individuals scanned.*

#### *Content of Interactive Panel not directed primarily to Children*

*If the Board does find that the Interactive Panel is an interactive game that is subject to the RCMI (which Ferrero maintains is not the case) then, in the alternative, Ferrero also submits that the Interactive Panel was not a form of advertising directed primarily to Children within the meaning of the RCMI. This is due to the fact that the Interactive Panel was not placed in a Medium that is directed primarily to Children as described above in Section 3 of this letter and also on the basis that, having regard to the theme, visuals and language used in the*

*Interactive Panel, it was not primarily directed to Children.*

*In determining whether any advertising material is “primarily directed” to a media audience of children under 12 it is necessary to consider the meaning of the words “primarily directed”. In McDonalds Aust Limited, 282/15 the Board noted that the definition of “Advertising and Marketing Communications to Children” in the AANA Children’s Code is largely the same as that in the RCMI. The Board’s comment indicates that the use of “directed primarily to” is consistent in both. The Board noted that it is essential for it to consider all elements of an advertisement and to make a decision on how all the elements of the advertisement interact, and the overall impression that they make, in determining whether an advertisement is clearly directed primarily to Children.*

*In the recent determination in Ferrero, 345/17, the Board noted that the dictionary definition of ‘primarily’ is ‘in the first place’ and that to be within the RCMI the Board must find that the advertisement is aimed in the first instance at children under 12.*

*Ferrero has made detailed submissions in its Initial Response as to why the content of the Interactive Panel is not content directed primarily to Children. These points are set out in paragraphs numbered 2.1 to 2.7 of that Response. Ferrero reiterates those points in this Response as follows:*

*“2.1 ...Ferrero denies that the Interactive Panel is an Advertising or Marketing Communication 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 Interactive Panel on the basis that it was directed at parents of children, not to Children themselves.*

*Ferrero’s target audience for the KINDER SURPRISE® product is “Grocery Buyers 25-54”. The Interactive Panel is not directed primarily to children and is instead directed primarily to this audience and, more specifically, to parents with children aged 3 to 8 (the Target Audience). The Interactive Panel is not, having regard to its theme, visuals and the language used, directed primarily to children.*

*2.2 The Interactive Panels are designed to catch the attention of adult shoppers, who are our target, just before they enter a supermarket. Research has suggested that retail panels at the point of sale bring forward the memory structures laid down by earlier promotional activity, acting as a reminder just before the shopper walks into a store. It is not necessary that the shopper personally engages with the Interactive Panel – a busy parent shopping at the supermarket may not have time to stop and use the Interactive Panel him or herself, but there will be a ‘halo’ promotional effect if they observe other individuals engaging with the Panel as they walk past.*

*2.3 The visuals used in the Interactive Panel are designed to appeal to the Target Audience by presenting an interactive game on a large, adult-sized screen that requires quick inter-reaction over the whole screen to play the game. The theme of the game, quickly touching eggs to reveal the toy inside, is one that appeals to adults as well as children and so cannot be said to be directed primarily to children.*

*2.4 The language on the screen used to start the Interactive Panel includes an “age-gate”*

*setting a minimum age to play the game. This is designed to ensure that it is the parent of a young child who starts the Interactive Panel.*

*2.5 The functionality of the Interactive Panel is designed to appeal to the Target Audience in the following ways:*

*The Interactive Panel screens are over 2 metres tall and playing the game requires that the player be sufficiently tall to reach all of the screen;*

*The Interactive Panel screens are located near the entry to supermarkets in shopping malls in positions likely to attract the attention of the Target Audience;*

*The Interactive Panel contains an “age-gate” on the screen used to commence play. This would discourage children 14 years and younger from attempting to operate it;*

*The Interactive Panel runs at a speed that is intended to be suitably fast to engage the Target Audience. It is likely to be too fast for younger players to keep up themselves, particularly where they cannot reach the entire screen; and*

*The Interactive Panel contains higher levels and a “turbo” speed all of which make it even harder to play and inappropriate for younger players.*

*2.6 The Board has previously noted that simple interactive games featuring a large panel that is brightly coloured and has bright images (such as images of fruit and cans of FANTA®) are not, due to these elements alone, advertisements directed primarily to children. In Coca-Cola South Pacific, 230/17, the Board determined that an interactive billboard located within a shopping mall that featured these brightly colour elements on a large screen was not an advertisement directed primarily to children. The Board also noted that there was no spoken language providing instructions to those participating in the Interactive Panel but rather words appeared on the screen. The Interactive Panel operates in a similar way as no verbal instructions are given to players.*

*2.7 The decision of the Board in Coca-Cola South Pacific, 230/17 is also relevant in that the majority of the Board considered that young children are often involved in the shopping experience at malls and that, while a large interactive screen (such as the Interactive Panel) would appeal to children under the age of 14, overall the Advertisement was attractive to a broad audience and was not clearly directed in the first instance to children under 14.”*

*In support of the submissions set out above, Ferrero attaches a file showing an adult interacting with an interactive panel identical to the Interactive Panel the subject of the Complaint (Attachment A). The Board will see that an adult’s size and speed are necessary to be able to participate fully in the game presented.*

### *Conclusion*

*Ferrero always endeavours to ensure that its commercial activities meet the requirements of the RCMI and are the subject of a management compliance review prior to final approval broadcast or release.*

*Ferrero respectfully submits that it has established processes and procedures to ensure its compliance with the RCMI and maintains that this aspect of the Complaint has been made*

*out. Ferrero submits that the Interactive Panel is not an “Advertising Marketing Communication to Children” within the meaning of the RCMI and is not covered by the provisions of the RCMI. Ferrero further submits that the Interactive Panel is not an interactive game that was directed primarily to Children and, on the contrary, its intention was to direct the Interactive Panel to an audience of grocery buyers in the age bracket 25-54 and this intention is reflected in the placement, and in the content and format, of the Interactive Panel as described above. The success of this strategy is displayed in the Agency Report showing that approximately 95% of the individuals who engaged with the Interactive Panel were over the age of 14.*

*Ferrero thanks the Board for its consideration of its Initial Response and also this additional 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 is directed primarily to children, Kinder Surprise is not a healthier option and the advertisement does not promote physical activity.

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

The Board noted that the marketing material complained about is located on a digital billboard within a shopping centre. The Board noted that the advertisement features an interactive panel where users touch the screen to start and then using their hands to quickly touch the eggs to reveal the toy inside and collect points. The Board considered that this material is an interactive game.

The Board considered whether this is within the scope of the RCMI. The Board noted that billboards generally are not within the scope of the RCMI – which specifically defines relevant ‘medium’ as “Television, radio, print, cinema, internet sites”. The Board noted however that Schedule 1 - S1.3 of the RCMI makes specific reference to “interactive games” and the requirement that signatories must ensure that any interactive game directed primarily to Children which includes the Signatory’s food and/or beverage products is consistent with the requirements of the RCMI. The Board therefore noted that material that is an interactive game falls within the scope of the RCMI.

The Board noted that it had previously considered in case 0230/17 that the medium of an interactive billboard did not fall within the definition of medium and therefore the RCMI did not apply.

The Board noted that the RCMI was last updated in 2014 and that the nature of advertising and marketing is evolving rapidly. The Board considered that as the billboard is interactive and the material on that billboard is a game, it is more correct to characterise the material as an interactive game which therefore brings it within the scope of the RCMI.

The Board noted that this change of interpretation may result in an adverse determination for the advertiser and asked that the Bureau ensure that the Board's approach is communicated to signatories as quickly as possible.

Having determined that the complaint related to an interactive game, the Board considered Schedule 1 - S1.3 of the RCMI and noted that it states that 'Signatories must ensure that any interactive game directed primarily to Children which includes the Signatory's food and/or beverage products is consistent with S1.1.'

The Board then considered whether the interactive game is 'directed primarily to children.' The Board noted that there is not a specific definition of what is considered to be 'directed primarily to children' but noted that the RCMI covers content which is '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.'

The Board considered therefore that the key indicators of what is 'directed primarily to children', is the theme, visuals and language of the interactive game.

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 firstly noted the theme of the advertisement – chasing and touching the eggs to reveal a toy and collect points. The Board noted that the toys revealed are all toys of appeal to small children and considered that this theme is a theme that appeals to children.

The Board noted the visuals of the advertisement. The Board noted that large panel is brightly coloured and has images of kinder surprise eggs for the player to hit. The images include a rainbow and a pony (my little pony) and simple graphics as well as the words that appear on screen being brightly coloured.

The Board noted that animation per se does not mean that an advertisement will be considered to be directed primarily to children (eg: Kraft 0229/11 and Smiths Chips 0190/13) but considered that in this game the animated images are images of toys and rainbows and are of such a nature as to be clearly appealing primarily to small children.

The Board noted the language of the advertisement. The Board noted there was no spoken language in the advertisement and words appeared on screen to explain how to use the game and how to get started. The Board noted that the title 'magic island' appears on the screen and simple words such as "level up" and magic score and images of Kinder Surprise eggs are what the player hits with their hands.

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 considering the theme,

visuals and language of the content of the interactive game, it is a game is directed primarily to children under 12.

The Board noted the extensive submission from the advertiser regarding the placement of the interactive game, the demographics of the shopping centre in which the interactive game is located, and the evidence regarding the actual users and viewers of the game, and that the advertiser's submission is that the target audience for the game is the grocery buyer aged 25 to 54, specifically parents with young children aged 3 to 8.

The Board agreed that an interactive game of this nature is a medium that is not of itself directed primarily to children under 12, even though young children are often involved in the shopping experience at shopping centres and that this type of attraction would appeal to children under the age of 12.

However, the Board considered that the RCMI requires consideration of the content of the interactive game, rather than the medium in which the game is delivered, and in this instance the Board considered that the game itself is directed primarily to children.

The Board considered that the advertisement is for Kinder Surprise, although there is no image of the chocolate component of the product in the game and that the material is an interactive game directed primarily to children under 12 which includes the signatory's food product.

The Board then considered Section 1.1 of the RCMI which states that Advertising and Marketing Communications to Children for food and/or beverages must:

- a. Represent healthier 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 scientific or government standards; and
  - ii. Physical activity.

The Board first noted S1.1a regarding the representation of healthier dietary choices, consistent with established scientific or Australian government standards, as detailed in Signatories' Company Action Plan.

The Board noted that the product is a chocolate confectionery and noted that the advertiser had replied to say that they "do not rely on a defined healthier choice criteria for this product as the marketing communications for all of our brands in each instance is primarily targeted at the adult shopper in both creative and placement."

The Board accepted that the product, Kinder Surprise, was not intentionally marketed to children, but considered, on the basis of the advertiser's response, that Kinder Surprise does not meet the requirements of S1.1(a).

The Board then noted that under S1.1b the advertisement must 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 scientific or government standards; and
- ii. Physical activity

The Board noted that the product is a Kinder Surprise and that the size and nature of the

product is intended to be a snack or treat item. The Board considered that the game based language, visuals and text were related to the game and did not amount to messaging that encourages good dietary habits (although in the Board's view it did not undermine good dietary habits)

The Board also considered that the action of the movement initiated by the interactive nature of the game does not amount to messaging that encourages physical activity, even though a child would need to jump about to play the game.

Based on the above, the Board considered that the advertisement did not meet the messaging requirement of the RCMI and breached the RCMI.

The Board then considered whether the advertisement complied with the Children's Code. The definition of 'Advertising or 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 reasons mentioned above, the Board considered that the advertisement, having regard to theme, visuals and language used was directed primarily to children.

The Board noted the definition of Product in the Children's Code means: 'goods, services and/or facilities which are targeted toward and have principal appeal to Children', and considered whether Kinder Surprise falls within this definition.

The Board noted that the advertised product is a chocolate egg that contains a small toy. The Board considered that although the product may appeal to a broad audience, the size, colour and concept as a whole is targeted for consumption by and of principal appeal to children. The Board considered therefore that the Children's Code did apply.

The Board firstly considered section 2.14(a) of the Children's Code which states that: 'Advertising or Marketing Communications to Children for food or beverages must neither encourage nor promote an inactive lifestyle or unhealthy eating or drinking habits'.

The Board noted that the promotion of Kinder Surprise – a chocolate confectionary - in an interactive game (that operates by manually touching the screen and requiring some physical action to operate the game) is not encouraging or promoting an inactive lifestyle.

The Board noted that the aim of the game is to hit the eggs to reveal the toy inside. The Board considered that in the context of the game and with a direct relationship to the Kinder Surprise product, this was not an action that was encouraging or promoting unhealthy eating or drinking habits.

The Board noted that consistent with previous decisions (Fanta 230/17, 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 considered that the advertisement did not breach section 2.14 of the Children's Code.



The Board then considered Part 3 of the AANA Food and Beverages Advertising and Marketing Communications Code (Food Code).

The Board considered specifically section 2.1 of the Food 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.’

Consistent with previous determinations (Unilever 465/16, Nestle 385/16, Doughnut Time 0155/17), the Board considered that advertising a product of a particular nutritional composition, such as 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 of the Food Code which states that: “Advertising or Marketing Communications for Food or Beverage products 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 considered the Practice Note to the Food Code 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 Kinder Surprise is being shown as part of an interactive game which reveals toys rather than chocolate. The Board considered that the game does not depict or suggest consumption and considered that the likely interpretation of the advertisement is that the product advertised is intended to be consumed as a treat and that there is no suggestion of frequency of consumption or consumption of multiple eggs. The Board noted that no one is seen consuming the chocolate.

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

The Board determined that for the reasons mentioned above the advertisement did not breach Section 2.2 of the Food Code.

Finding that the advertisement did breach the AFGC RMCI, the Board upheld the complaint.

## **THE ADVERTISER'S RESPONSE TO DETERMINATION**

Ferrero Australia thanks the Advertising Standards Board (ASB) for providing the opportunity to respond to the complaint about the Kinder Surprise Interactive Shopper Panels. Ferrero would like to reassure the Board that it takes its position as a global food manufacturer seriously, always seeking to advertise its products in a responsible manner and not advertise to children.

As a member of the International Food & Beverage Alliance (IFBA) and in line with their ‘Global Policy on Marketing & Advertising to Children,’ Ferrero commits worldwide not to advertise its products to audiences of 35% or more children under the age of 12 years. On a local level this is reflected in Australia by Ferrero being a signatory to the Responsible

Children's Marketing Initiative (RCMI) and committing to its company action plan. As outlined in its Advertising and Marketing Principles, Ferrero has always believed in the crucial role played by parents in educating their children about a balanced diet and a healthy, active lifestyle.

Prior to the Board's assessment, advertisements of the Shopper Panel type were judged to be interactive billboards and not subject to the RCMI. The Board has overridden its previous determination in Case Number 230/17 where it decided that an interactive billboard did not fall within the definition of 'medium' under the RCMI, and therefore the RCMI did not apply to interactive billboards. As part of its normal due diligence procedures, Ferrero had specifically considered the Board's previous decision, and proceeded on this basis.

Regardless of whether the RCMI applied or not, Ferrero is pleased the ASB has recognised that it didn't intentionally market to children. The Kinder Surprise Interactive Shopper Panels were intended to showcase to adult shoppers (specifically grocery buyers 25 – 54 years) the variety of toys in everyday Kinder Surprise and to encourage parents to download and use the Magic Kinder App, which they could then enjoy with their child. The placement of the panels was to get the attention of adult shoppers prior to them entering the supermarket, which data has shown was effective.

To further ensure that adults used the panel different mechanisms, such as an age gate and a 'Turbo Speed' mode, were deliberately applied to the advertising activity to ensure adults, with or without their child, could enjoy it.

#### Response to creative assessment

The content of the interactive panels was intended for adult shoppers and to communicate the nature and essence of Kinder Surprise and the Magic Kinder App, whilst keeping to the brand style. To capture the attention of the target audience and communicate what the advertisement was for, it needed to be bright, colourful and utilise contrasting colours. The decision to use simple graphics was guided by out of home principles to cut through the noise in a shopping centre and allowed the activity to be engaged with quickly - as a core part of the game was time based activity.

The interactive panels were equipped with technology that scanned biometric data, and from that data it can be shown that 88% of people who were in proximity of the advertisement across the campaign were over 15 years of age, confirming that the visuals, themes and language did attract predominantly people over 14 years of age.

The rationale for using the Kinder Surprise eggs was that they represent a core part of the product experience and they required inclusion in the panel content. It was a deliberate decision to not include visuals of chocolate, consumption of Kinder Surprise or mention purchase in the creative.

The interactive panel game showed the toys on offer from Kinder Surprise. 'My Little Pony' was not used in the creative, which the complaint suggested and no licensed toys were used for the content of this interactive panel.

Phrasing, such as 'Magic Island' and 'Magic Score', was used to create the tone of the experience so parents knew what to expect when interacting with the panel, which was

promoting the Magic Kinder app. The term 'Level Up' is a common phrase used in gaming regardless of age.

## Conclusion

While disappointed with the ruling, Ferrero remains a strong supporter of the RCMI and the jurisdiction of the Board to make decisions in relation to its application to advertisers. Ferrero accepts the Board's decision and confirms that the advertisement has been discontinued.

Ferrero recognises the Board's comments in relation to its creative assessment and will be reviewing its systems and procedures to ensure that future advertisements remain directed to parents and do not contain elements that may be interpreted as primarily for children under 12 years of age.