



Case Report

1	Case Number	0443/10
2	Advertiser	Ferrero Australia Pty Ltd (Ferrero Rocher)
3	Product	Food and Beverages
4	Type of Advertisement / media	TV
5	Date of Determination	10/11/2010
6	DETERMINATION	Dismissed

ISSUES RAISED

Advertising Message AFGC - Advertising Message
2.8 - Food and Beverage Code undermines healthy lifestyle

DESCRIPTION OF THE ADVERTISEMENT

The ad opens in a regular suburban family home where we see a young girl sitting on a couch watching TV.

The ad cut to a new shot of outside. Dad hands her a Kinder Surprise Egg and she fidgets excitedly as she takes it from him. As they sit on some outdoor lounge chairs we watch as she enjoys the Kinder Chocolate, whilst at the same time we see her bouncing her new-found toy through the air which is a bunny rabbit from the Coniglietti series.

The dad and daughter then point out clouds which look like a rabbit and a monkey and then we see chocolate being poured into an egg shape with a voice over describing Kinder Surprise as putting play in every day.

THE COMPLAINT

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

The advertisement is currently aired on television including on ATN 7 at 7:01pm during Home and Away on 19th August and on TEN 10 Sydney at 6:07pm during The Simpsons on 20th August. Both these programs are high rating programs with a high proportion of the audience being children. The Simpsons is a cartoon program that is directed primarily to children.

The advertisement is directed to children as:

- (a) *it features a young girl eating a chocolate egg*
- (b) *the young girl finds a toy and the advertisement shows all the toys available*
- (c) *both the imagery and storyline is particularly appealing to children- the excitement portrayed when her father gives her the chocolate the pleasure on her face as she eats it the fun she is having sitting on the swing with her father and playing imagination games with him and the “tickle” the Dad gives her at the end.*

We believe the advertisement breaches the Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry as this advertisement does not “represent healthy dietary choices”.

Advertising Messaging

Participants will not advertise food and beverage products to children under 12 in media unless:

1. those products represent healthy dietary choices consistent with established scientific or Australian government standards.

The main image in the advertisement is the child eating the chocolate egg. The Dietary Guidelines for Children and Adolescents in Australia advise “Consume only moderate amounts of sugars and foods containing added sugars” and “limit lollies”. School Canteen Guidelines around Australia categorise all confectionery in the RED category and so not to be sold from canteens and vending machines.

We believe the advertisement also breaches the Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry “Use of premium offers” section of the code as the toy being featured in two segments of the ad is more than “merely incidental to the product”.

Use of Premium Offers

Participants will commit to not advertising premium offers unless the reference to the premium is merely incidental to product being advertised in accordance with the AANA codes and in the Children’s Television Standards (CTS Section 20).

The advertisement shows the child discovering the toy associated with the egg and the final shot is of the range of toys available with each confectionery purchase. The toy is shown clearly as the child discovers it in her egg and then it is visible in her hand for the rest of the commercial. The final shot shows a large array of toys which gives children a teaser of what they could get if they had a chocolate.

Jacqueline a parent from Nerang has contacted us to object to the use of the toy in association with a chocolate egg. She feels that the toy is not merely incidental but has a huge effect on influencing children to want the chocolate.

This advertisement is also in breach of clause 2.15 (a) of the AANA Code for Advertising & Marketing Communications to Children as it encourages the consumption of unhealthy food. The main image in the advertisement is the child eating the chocolate egg. The Dietary Guidelines for Children and Adolescents in Australia advise “Consume only moderate amounts of sugars and foods containing added sugars” and “limit lollies”. School Canteen Guidelines around Australia categorise all confectionery in the RED category and so not to be sold from canteens and vending machines.

2.15 Food and Beverages

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

We request the Advertising Standards Bureau consider whether the Kinder Surprise advertisement breaches the Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry “advertising messaging” and “use of premium offers” clauses and clause 2.15(a) of the AANA Code for Advertising & Marketing Communications to Children.

THE ADVERTISER'S RESPONSE

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

1 Introduction

Ferrero takes its responsibilities as a signatory to the Responsible Children's Marketing Initiative of the Australian Food and Grocery Council (Initiative) very seriously. Ferrero has published a Company Action Plan and its 2009 Report pursuant to that Plan and copies of these documents are attached to this response as attachments "A" and "B". Ferrero's approach to the marketing of its products is in line with the approach of its parent company, Ferrero S.p.A. Relevant pages from Ferrero S.p.A.'s Corporate Social Responsibility Report for the year 2008/2009 can be found as attachment "C" to this response.

Ferrero maintains that the advertisement the subject of the complaint (Advertisement) does not breach the AANA Code of Ethics, the AANA Food & Beverages Advertising & Marketing Communications Code, the AANA Code for Advertising and Marketing Communications to Children 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 complainant alleges that Ferrero has breached the Initiative by failing to comply with the section of the Initiative dealing with Advertising Messaging which reads as follows: "Participants will not advertise food and beverage products to children under 12 in media unless:

1. those products represent healthy dietary choices, consistent with established scientific or Australian government standards;

2. the advertising and/or marketing communication activities reference, or are in the context of, a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages:

- good dietary habits consistent with established or scientific government criteria;*
- physical activity."*

2.2 As mentioned above, Ferrero is a signatory to the Initiative. In its Company Action Plan 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. Although the existence of a direct link between advertising and children's eating habits has not been proven, Ferrero agrees that it is preferable to avoid directing advertising to children when they are most likely exposed to commercial communications without parental supervision."

Accordingly, Ferrero has made a specific commitment in its Company Action Plan in relation to the Advertising Messaging requirement of 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.

2.3 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; and

(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).

2.4 In the case of the Advertisement Ferrero notes the following:

(a) the Advertisement was due to be aired in Sydney on ATN 7 between 6.30pm and 7.00pm on 19 August 2010 during the broadcast of Today Tonight. It appears that the Advertisement was aired at 7.01pm during the Today Tonight program and not during the Home and Away program as alleged by the complainant. The clip of the Advertisement provided with this response is a clip of the Advertisement within the ad break at 7.01pm on 19 August 2010. The clip shows the Advertisement is followed by an advertisement for a Suzuki car and then the continuation of the Today Tonight program. In any case, Ferrero points out that both Today Tonight and Home and Away are clearly programs that are not directed to children. E-tam data (supplied by AGB Nielsen) indicates that on 19 August 2010 the Sydney audience share for 0 to 12 year olds of Home and Away was 8.91%. E-Tam data indicates that on 19 August 2010 the Sydney audience share for 0 to 12 year olds of Today Tonight was 6.04%. A table showing the audience percentage figures by age band for Sydney is attached to this Response and marked "D". It is clear that Ferrero has complied with its commitment not to advertise its KINDER SURPRISE® products to media audiences with a majority of children under the age of 12.

(b) the Advertisement was also aired on Ten 10 Sydney at 6.07pm on 20 August 2010 during the broadcast of The Simpsons television program. Ferrero strongly rejects the assertion that The Simpsons is a program that is primarily directed to children. On the contrary, The Simpsons is a program containing a large percentage of humour directed at adults and a large percentage of its audience is comprised of adults. Some episodes of The Simpsons are rated "M" and are not suitable viewing for children under the age of 12. The Ten Network has confirmed that The Simpsons is not marketed in any media consumed by children under 12, nor is it promoted to advertisers as a children's program. Network Ten's target demographics for the program are people 16 to 39 and people 18 to 49. The chart of audience figures shown in attachment "D" to this response shows that the highest percentage of viewers falls into the 25 to 34 years age band. This data (supplied by AGB Nielson) indicates that on 20 August 2010 the Sydney audience share for 0 to 12 year olds of The Simpsons was 24.75%. The additional number of children in the age bracket 13 to 17 years (inclusive) included in the audience figures for The Simpson's on that day was only 4.74% of the total audience. It is clear that Ferrero has complied with its commitment not to advertise its KINDER SURPRISE® products to media audiences with a majority of children under the age of 12.

(c) Ferrero also rejects the assertion that the Advertisement is directed to children. 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) the Advertisement focuses on the interaction between a father and his daughter. The theme is a family moment when a father is bonding with his daughter. 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 Australians work the longest hours in the developed world. Corporate men aged between 35 and 49 represent the largest group of those who do not take their full 4 weeks holidays each year and half of these men have children under the age of 12. The aim of the Advertisement was therefore to capture a moment of play between a busy Dad and his child and the focus of the action in the Advertisement was on the interaction between the father and the child;

(ii) research in relation to possible marketing approaches was undertaken with mothers of children aged 3 to 8 years. At no time did Ferrero's advertising agency explore the likely reaction of children to the communication (for example, mothers were not asked how they perceived their child might feel towards the communication);

(iii) the visual appearance of the Advertisement is an everyday family setting. The child is not in fact sitting on a swing but on a chair. There is no use of popular visual techniques used in advertisements aimed at children such as cartoon characters or fantasy figures;

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

(v) the emotional cues used in the Advertisement were those that Ferrero's advertising agency perceived would make the most impression when targeting a father;

(vi) the Advertisement was booked for broadcast during television programs that are not directed primarily at children and which have an audience comprised of more adults than children.

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 the Initiative in relation to Use of Premium Offers

3.1 The complainant alleges that Ferrero has breached the Initiative by failing to comply with the section of the Initiative dealing with the Use of Premium Offers which reads as follows:

"Participants will commit to not advertising premium offers unless the reference to the premium is merely incidental to product being advertised in accordance with the AANA codes and in the Children's Television Standards (2009) CTS Section 33."

With respect, the complaint is misguided as the Advertisement makes no reference to a premium whatsoever. In the Children's Television Standards 2009 (CTS 2009) a "premium" is defined as follows:

"premium means anything offered with or without additional costs that is intended to induce the purchase of an advertised product or service."

3.2 The KINDER SURPRISE® product is a product that is comprised of a small toy designed to appeal to children aged between 3 and 12 years, a plastic container in which the small toy is placed and a hollow egg shaped chocolate that is comprised of more than 32% milk. The toy contained within the chocolate egg is clearly not a premium. It is an integral part of the product. The combined toy plus egg product branded KINDER SURPRISE® has been sold in this form in Australia by Ferrero since 1993. The toy component of the KINDER SURPRISE® product is clearly not a premium as defined in CTS 2009 or as defined in the AANA code for Advertising and Marketing Communications to Children (Children's Code).

3.3 Ferrero's interpretation of the definition of "premium" is consistent with findings in decisions of the Advertising Standards Board in relation to complaints with Reference Nos 55/10, 573/09 and 571/09. In each case the Board made it clear that the combination of a

food item and toy was the offer of a composite product that did not include any offer to supply a premium. This means that the section of the Initiative dealing with the use of premium offers is simply not applicable to the Advertisement.

Summary of Response to Claim No. 2

In summary, Ferrero submits it is clear from the information and submissions set out above that the Advertisement did not include any offer of a premium. Ferrero submits that it is clear that the Advertisement did not breach the Initiative as the section of the Initiative dealing with the use of premium offers is simply not applicable to the Advertisement.

4 Alleged breach of Clause 2.15(a) of the Children's Code

4.1 The complainant alleges that Ferrero has breached clause 2.15(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. Ferrero denies that the Advertisement is an Advertising or Marketing Communication to Children. 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. The Advertisement does not contain the sort of theme, visuals and language that are designed to appeal primarily to children such as cartoon characters, fantasy figures and catchy jingles. In addition, the Advertisement was not broadcast during programs where a majority of the audience was comprised of children. The Board is referred to the elements of the Advertisement and its genesis described in point 2.4(c) above.

4.2 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 special treat that would be fun to indulge in from time to time. Ferrero notes that in the Board's decision in Complaint Reference No 55/10 in relation to Donut King's "Ice Age 3 Combo" promotion the Board noted:

"The Board's view is that there is not yet a community standard that treat foods should not be advertised at all, nor is there a standard that food products should not be sold in conjunction with toys or other merchandise."

4.3 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.

Summary of Response to Claim No 3

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 special treat.

5 General Responses

5.1 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 2.4 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 and based on research carried out on behalf of the ASB as it sees fit in relation to Advertising or Marketing Communications.

5.2 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.

5.3 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 excitement 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. As noted above, the Board has previously stated its view:

"... that there is not yet a community standard that treat foods should not be advertised at all, nor is there a standard that food products should not be sold in conjunction with toys or other merchandise." (Complaint Reference No 55/10).

(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. It then displays the toy to be 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 Dietary Guidelines for Children and Adolescence in Australia advise:

“Consume only moderate amounts of sugars and foods containing added sugars” and “limit lollies.”

The source quoted by the complainant clearly acknowledges that moderate amounts of lollies and sugars can be permitted 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 Complaint Reference No 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 contains no suggestion that there is a set of toys within the KINDER SURPRISE® 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 there is not a high level of duplication of toys within the KINDER SURPRISE® products and therefore there is a good chance, if the products are purchased from time to time, that a different toy would be discovered inside on each occasion.

5.4 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 2.2 and 2.7) and the requirements set out in Section 3 of the Food & Beverages Code.

5.5 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 pages from the Corporate Social Responsibility Report of Ferrero’s parent company, Ferrero S.p.A., for the year 2008/2009 being pages 51-58 of that Report. The Board will see that the Ferrero Group internationally is a strong supporter of various initiatives to address concerns about childhood obesity. The Ferrero Group’s practices in relation to portion control, its commitment not to use hydrogenated fats (which can contain trans-fatty acids), 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.

6 Conclusion

6.1 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 also published its 2009 Report containing its statement of compliance with the Initiative. That Report is Attachment “B” to this response. In that Report Ferrero outlines steps it has taken to ensure compliance with the Initiative. These steps include the following:

(a) for television advertising Ferrero audits the 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

(b) Ferrero reviews audience share reports for media advertising for its brands that are significantly consumed by children which identify the program, when it was advertised and the audience share for children under 12 years old for that program. This enables Ferrero to check that advertisements were not placed in inappropriate programs.

Having taken the steps above, Ferrero was able to confirm for the 2009 year that it did not advertise its product to media audiences with a majority of children under the age of 12.

6.2 In its 2009 Report Ferrero also noted additional action it would be taking having reviewed its first year as a signatory to the Responsible Children's Marketing Initiative. Ferrero stated that it had identified control issues in the areas of managing bonus airtime provided by the network and where it was not aware of the content of scheduled "Family Movies" in television buying schedules. To manage these issues, Ferrero has proceeded to avoid the genre of "Family Movies" in its television buying schedules and has instructed networks that no bonus airtime may fall with children programs or family movies.

6.3 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 Advertising Messaging Section of the Initiative because the Advertisement is not an advertisement directed to children under 12;

(b) the Advertisement does not breach the "Use of Premium Offers" of the Initiative as there is no offer of a premium in the Advertisement. Instead, the product advertised in the Advertisement is comprised of a chocolate egg containing a toy. Therefore, provisions dealing with an offer of a premium are not applicable to the Advertisement;

(c) the Advertisement does not breach clause 2.15(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

(d) 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.

6.4 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 Section 2 of the AANA Advertiser Code of Ethics (the "Code"), 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 reviewed the advertisement and noted the advertiser's response.

The Board noted the complainant's concern that the advertisement breaches the RCMI because it is directed primarily to children, and because the advertised product does not represent a healthier dietary choice; it does not comply with the Dietary Guidelines for Children and Adolescents in Australia; it contains more than an incidental reference to a premium and breaches 2.15 of the Children's Code as it encourages the consumption of unhealthy food.

The Board considered whether the advertisement met the requirements of the AFGC RCMI. The Board noted that under the AFGC RCMI the relevant requirement is that the company not advertise food and beverage products to children under 12 in 'media' unless those products represent healthy dietary choices. The Board noted that the advertised product 'Kinder Surprise' is not a healthier dietary choice. As a result the product cannot be advertised to children under 12 in 'media'.

Media is defined as: 'Media means television, radio, print, cinema and third-party internet sites where the audience is predominantly children and/or having regard to the theme, visuals, and language used are directed primarily to children'.

The Board also noted the recent Guideline to the AFGC RCMI Initiative which provided that advertising or marketing communication activities are captured under the AFGC RCMI Initiative if:

1. the audience of the communication activity is predominantly children (under 12);
2. the media in which the communication activity appears is clearly directed primarily to children (under 12)
3. The communication activities are, regardless of the audience, clearly directed primarily to children under 12.

The Board also noted that under the Guideline 'the key to determining whether the media or communication activities are directed to children is whether the themes, visuals, language and concepts are those that are attractive to children under 12.' The Board noted, however, that while useful in determining whether the advertisement is directed to children, the requirement is that the advertisement is 'clearly directed primarily' to children.

The Board noted the extensive information provided by the advertiser about the range of programmes in which the advertisement was broadcast. The Board noted that the programmes in which the advertisement appears are programmes that are directed to adults and are not programmes which are primarily directed to children or likely to have significant child audiences. The Board considered that the programming in which the advertisement

appeared was not directed primarily to children – although some children would view some of the programmes.

In particular, the Board noted that the complaint indicates that the television programme in which the advertisement was broadcast was “Home and Away” and ‘The Simpsons’. The Board noted that these programmes are rated PG. The Board noted that the audience profile for Home and Away during 2010, provided by Channel 7, shows that less than ten percent of the audience are aged 12 or under. On the day in particular the audience was 8.91% under 12s. The Board considered that this is not a programme where the audience is ‘predominantly’ children: i.e. there is not a viewing audience of more than 50% children under 12. In relation to The Simpsons, the Board noted the advertiser’s response which indicated that the viewing audience for Under 12s on the day referred to in the complaints was 24.75%. The Board noted that this programme has a higher proportion of under 12s viewers but in the Board’s view the program is not primarily directed to children.

On the basis of the overall schedule of programming, the viewing audience of those programmes, and the nature of the programmes specifically referred to by the complainant the Board determined that the advertisement was not broadcast in a program where the audience is predominantly children or the program is directed primarily to children.

The Board noted that the revised guidelines require that the Board also consider whether the ‘communication activities are, regardless of the audience, clearly directed primarily to children under 12’.

The Board noted that the dictionary definition of ‘primarily’ is ‘in the first place’ and that to be within the AFGC RCMCI the Board must find that the advertisement is aimed in the first instance at children. The Board considered the theme of the advertisement (a father giving his child the product and sitting outside looking at clouds), the visuals (child and parent sitting looking at clouds) and the language (adult language). The Board considered that the presence of a child and the product does not of itself indicate that the advertisement is targeted primarily to children and considered that the tone of the advertisement is adult and does not contain visual imagery or music that would be particularly likely to attract a child.

On balance, the Board considered that the visuals, language and theme of this advertisement create an overall impact of this advertisement that is not specifically directed or designed to be clearly directed primarily to children. The Board considered that the advertisement was more likely to be taken as being primarily directed to adults.

On this basis, the Board determined that the advertisement is not broadcast within ‘media’ as provided by the RCMCI and that the advertisement does not breach Principle 1 of the RCMCI Initiative.

The Board noted the complainant’s concern that the advertisement places undue emphasis on a premium and does not meet the requirement of Principle 6 of the RCMCI Initiative. Principle 6 provides that ‘participants will commit to not advertising premium offers unless the

reference to the premium is merely incidental to the product being advertised in accordance with the AANA Codes and the Children's Television Standards (CTS Section 33).'

The Board noted that the AANA Children's Code and the AANA Food Code restrict the amount of prominence which a 'premium' can be given in advertising directed to children. The Board noted that the CTS Section 33 similarly limits the use of premiums in any advertising.

The Board noted that the definition of 'premium' to be used in determining compliance with the AFGC RCMI is the definition of 'premium' in the AFGC RCMI which is that a premium is: 'anything offered free or at a reduced price and which is conditional upon the purchase of a children's food or beverage product.'

The Board noted that this definition is largely similar to the definitions in the Children's Code and Food Codes and that the same interpretation should be adopted. The Board noted that under the Children's Code premium is defined as 'anything offered free or at a reduced price and which is conditional upon the purchase of a regular product.' The Board noted that the Food and Beverages Code provides a slightly different definition 'anything offered free or at a reduced price and which is conditional upon the purchase of a regular Children's Food or Beverage Product.' The Board considered that despite the slight wording difference the definition has broadly the same effect.

The Board noted that the RCMI definition does not include the requirement that the product that the premium is offered in addition to must be a 'regular' product and that this different wording can result in an outcome different to that envisaged under the Children's Code or the Food Code. However the Board considered that in this particular case there was no effect on the outcome.

Consistent with previous decisions the Board considered that the toy in the Kinder Surprise is not a premium as a toy is an integral part of the product that is the Kinder Surprise.

The Board determined that the advertisement complied with the RCMI Initiative.

The Board then considered whether the advertisement complied with the requirements of the AANA Code for Advertising and Marketing Communications to Children (the Children's Code). To fall within this Code, or Part 3 of the AANA Food and Beverages Advertising and Marketing Communications Code (the Food and Beverages Code), the advertisement must be 'having regard to the theme, visuals and language used [...] directed primarily to children and are for product.'

The Board first considered whether the advertisement is directed primarily to children. The Board noted the practice note for the Food and Beverages Code which requires that 'in its determination of whether any advertising or marketing communication is directed toward children, the Board will apply the same criteria as used in considering complaints under the [Children's Code]. The Board will consider the advertiser's stated intent but will also make an evaluation based on its own review of the advertising or marketing communication material and the product being promoted.'

For the same reasons as noted in relation to the RCMI Initiative above, the Board agreed that the advertisement is not, in the terms of the Children's Code, 'directed primarily at children.'

The Board then considered whether the product is 'a good that is targeted to and of principal appeal to children' as required by the Children's Code. The Board noted that the advertiser agrees that the product is a product that is intended for consumption by children and is a good of principal appeal to children.

Although the Board determined that the product is a product which is of principal appeal to children, the Board considered that the advertisement is not directed primarily to children. The Board therefore considered that the Children's Code and Part 3 of the AANA Food and Beverages Advertising and Marketing Communications Code (the Food and Beverages Code) do not apply to this advertisement. As these Codes do not apply, the requirements of clause 2.15 of the Children's Code do not apply. The Board noted however that clause 2.2 of the Food Code provides a similar provision as is discussed below.

The Board then considered whether the advertisement complied with the provisions of the Food Code. Section 2.1 of the Code states:

"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 and shall be communicated in a manner appropriate to the level of understanding of the target audience of the Advertising or Marketing Communication with an accurate presentation of all information, including any references to nutritional values or health benefits."

The Board noted that under the Food Code it is not the role of the ASB Board to determine the healthiness or unhealthiness of foods. The Board agreed that the advertisement did not make any representations or value judgments as to the health benefits or otherwise of the product advertised.

The Board agreed that there were not misleading representations in the advertisement and that the product featured in the advertisements was emphasised as fun and something that would be understood by the prevailing community to be a treat that was fun to indulge in. The Board agreed that the advertisement was not in breach of section 2.1 of the Food and Beverages Code.

The Board noted that there are mixed views in the community in relation to the advertising of some food products. Therefore, the Board will consider the interests of all persons in the community and the advertiser's right to advertise their product. The Board noted that there are strong views in the community about advertising food and toy products, and in linking food and toy combinations with popular figures or movie characters. The Board's view is that there is not yet a community standard that treat foods should not be advertised at all, nor is there a standard that food products should not be sold in conjunction with toys or other merchandise. In the absence of a prevailing community standard in this area, the Board determined that the

advertising of the Kinder Surprise product which comprises chocolate and a toy did not depict material contrary to prevailing community standards on health and safety.

The Board noted the complainant's reference to the Dietary Guidelines for Children and Adolescents in Australia and the recommendation to 'consumer only moderate amounts of sugars and foods containing added sugars' and 'limit lollies'. The Board noted that there is not a ban on advertising products containing added sugars or lollies and that this advertisement does not encourage excess consumption or consumption that would contravene the Dietary Guidelines.

The Board determined that there was no breach of section 2.1 of the Food and Beverage Code.

The Board also considered section 2.2 of the Food Code which requires 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 be reasonably 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.'

The Board considered that advertising a chocolate product did not of itself amount to undermining of important messages around healthy eating, balanced diets or active lifestyles. In the case of this particular advertisement, the Board considered that the depiction of a child being given a 'treat' was not in breach of section 2.2.

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

Finding that the advertisement did not breach the AANA Code of Ethics, Children's Code, Food and Beverages Code or AFGC RCMI, the Board dismissed the complaint.