



## Case Report

<b>1</b>	<b>Case Number</b>	<b>0247/13</b>
<b>2</b>	<b>Advertiser</b>	<b>Mondelez Australia Pty Ltd</b>
<b>3</b>	<b>Product</b>	<b>Food and Beverages</b>
<b>4</b>	<b>Type of Advertisement / media</b>	<b>TV</b>
<b>5</b>	<b>Date of Determination</b>	<b>24/07/2013</b>
<b>6</b>	<b>DETERMINATION</b>	<b>Dismissed</b>
<b>7</b>	<b>Date of reviewed determination</b>	<b>11/09/2013</b>
<b>8</b>	<b>Determination on review</b>	<b>Upheld - Modified or Discontinued</b>

### ISSUES RAISED

RCMI a - Advertising Message AFGC - Advertising Message

### DESCRIPTION OF THE ADVERTISEMENT

The advertisement opens with a bright blue background with Oreo cookies flipping over in time to the music and the word “wonder” appears on the screen, with an Oreo for the ‘o’. We then see various cartoon characters eating an Oreo cookie and changing the way they behave (for example a wolf is shown about to blow down a house containing three pigs but after eating the Oreo cookie we see him using his breath to blow on the sail of a boat he is sharing with the pigs).

The final scene shows an Oreo cookie against a blue background and the word, "Wonderfilled" written in white underneath.

### THE COMPLAINT

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

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

*In our submission the advertisement breaches the RCMI because: -*

*1. It is a communication directed primarily to children;*

2. Oreos do not represent a healthy dietary choice consistent with established scientific or Australian government standards; and

3. It does not promote healthy dietary habits or physical activity.

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

*The OPC submits this advertisement is an extreme example of marketing designed specifically to appeal to children. It is, on any common sense view of its themes, visuals and language, a communication directed primarily to children, within the meaning of the RCMI and associated guidelines.*

*The advertisement takes the viewer on an entirely animated, cartoonish, musical fantasy journey, depicting recognizable characters from popular children's fairy stories, including a big bad wolf and a Count Dracula character in a lonely castle turret. These characters would not be used if the advertisement was targeting adults. The colours used in the animated sequence are strikingly bright and cheerful, with the big bad wolf shown in purple, wearing a small black hat, and the Octopus coloured bright pink, with large googly eyes.*

*The jingle that plays throughout tells the story of how the two gloomy characters shown (the Count and the big bad wolf) have their points of view turned upside down (made positive and happy) by the gift of an Oreo. The scenes change rapidly, and the viewer is raced along with the characters as they are transported off to exciting adventures on the ocean or open road, upon receiving an Oreo.*

*The "Wonderfilled" theme song is catchy, innocently optimistic and child-like, with the tinkling sounds of a glockenspiel reinforcing the heavy use of fantasy, magic and adventure depicted in the animation.*

*These highly evocative aspects of the advertisement will exclusively and powerfully appeal to children's sense of playfulness and adventure, using themes designed just for children including fantasy, fairy stories, recognizable characters, adventure and imagination.*

*Further, the advertisement was broadcast during many programs watched by very large numbers of children, including The Block Sky High (7.30pm timeslot), Bondi Vet (7.30pm timeslot), The Voice (8.30pm timeslot) David Attenborough's The Life of Mammals (6.30pm timeslot), Nine's Friday Night Live Football and movies Superman returns and The Lost World – Jurassic Park.*

*Oreos do not represent a healthy dietary choice*

*According to the Dietary Guidelines for Children and Adolescents in Australia, care should be taken in relation to children's diets to consume only moderate amounts of sugars and foods containing added sugars. The Australian Dietary Guidelines 2013 also recommend that Australians limit intake of foods and drinks containing added sugar and salt.*

*The advertiser has previously agreed that Oreos do not represent a healthy dietary choice (see decision 0409/10). This concession is no doubt on account of the product being extremely high in added sugar, and also very high in saturated fat and total fat. Sugar is the first ingredient in Oreos, constituting 40.4% of the product. Oreos also contain 10.5% saturated fat, and 19.8% total fat.*

*Oreo cookies are therefore clearly not a healthy snack choice for children, and do not represent healthy dietary choices consistent with the Dietary Guidelines for Children and Adolescents in Australia.*

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

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

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

*The Board has previously noted, in its decision 0454/11, that merely omitting any references to unhealthy eating choices is not sufficient to discharge this obligation. It is quite clear that the advertiser is required to positively encourage good dietary habits and physical activity, which Kellogg has failed to do in this advertisement.*

*Relevantly, the Board has previously found that mere suggestion of “adventure” in advertising does “not amount to an implication or encouragement of physical activity” (decision 0454/11). Consistent with that precedent, it is submitted that although the advertisement shows characters going on adventures and may promote “fun”, it does not meet the test of positively promoting physical activity.*

*The advertisement breaches the AANA Food and Beverage Code.*

*Further, and in the alternative, the OPC submits that the advertisement is in breach of clause 2.1 of the AANA Food and Beverages Code, which 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”.*

*This advertisement contravenes prevailing community standards by promoting unhealthy food and beverages to children using animation, themes of adventure, fantasy, magic and animals. We submit that the overpoweringly child-oriented themes, music and visuals of this ad reveal a calculated attempt to profit from this vulnerability. The advertiser has not communicated in a “manner appropriate to the level of understanding of the target audience” and this contravenes prevailing community standards.*

*When considering the scope of ‘prevailing community standards’, the board will be further assisted by recent research showing 83% of Australian main grocery buyers surveyed in 2012 were in favour of banning advertising of unhealthy food at times when children watch TV (Belinda Morley et al, ‘Public opinion on food-related obesity prevention policy initiatives’ 2012 23(2) Health Promotion Journal of Australia 86).*

*Conclusion*

*For the above reasons, the OPC submits this advertisement is unacceptable advertising conduct, which is harmful to children and contravenes prevailing community standards and provisions of the RCMI. We ask the ASB to require the advertiser to withdraw the Oreo “Wonderfilled” advertisement immediately.*

## **THE ADVERTISER’S RESPONSE**

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

*We refer to your letter of 9 July 2013. Thank you for providing us with the opportunity to respond to this complaint.*

*As one of Australia’s largest food manufacturers and advertisers, Mondelez International (formerly Kraft Foods) has a significant role that we take very seriously in marketing and advertising our products.*

*Mondelez International’s values state that a foundational part of Creating Delicious Moments of Joy is that we support the values of the community in which we live and operate.*

*This incorporates our key value to Discuss, Decide, Deliver and that our actions speak louder than words.*

*We have made the commitment not to market to children in any way that undermines these values and to always market in a responsible and sensitive manner. We have robust internal marketing to children policies that go above and beyond external requirements, and have mandated regular training for all of our marketers and external agencies to ensure we uphold these principles.*

*We follow the marketing to children principles outlined in the Australian Food and Grocery Council's (AFGC) Responsible Children's Marketing Initiative (RCMI) of which Mondelez International is a founding signatory to, and the AANA Code of Ethics incorporating the Code for Advertising & Marketing Communications to Children and Food & Beverages Advertising & Marketing Communications Code (AANA Code).*

*We note that the RCMI states, amongst other things, that participants voluntarily subscribed to the code, will not engage in the marketing that is primarily targeted at children under 12, unless those products represent healthy dietary choices, and are consistent with established scientific or Australian Government standards.*

*Mondelez International does not advertise products that do not meet our Sensible Solution criteria during television programs viewed primarily by children aged six to 12 years. In addition, we do not market any products during television programs viewed primarily by children aged under six.*

*The complainant has raised a number of issues that fall within the AANA code and the AFGC's RCMI including that:*

- 1. the ad creative is directed primarily to children;*
- 2. the product does not represent a healthy dietary choice; and that*
- 3. the ad creative does not promote healthy dietary habits or physical activity.*

*On review of the complaint received and examination of information surrounding the development and placement of the Oreo 'Wonderfilled' TVC, we firmly believe that the TVC does not breach the RCMI, and is consistent with the principles outlined in the AANA's Code and is not directed primarily to children.*

*Our response to each of the items raised is outlined below.*

*Issue raised: The ad creative is directed primarily to children.*

*Response: The RCMI follows the definition of 'Advertising or Marketing Communications to Children' contained in the AANA Code, which means advertising or marketing communications which, having regard to the theme, visuals or language used, are directed primarily to children.*

*Mondelez International took a very considered approach when creating the TVC to ensure it was directed primarily to main grocery buyers and had 'general appeal' through the theme, language, visual and executional cues as follows:*

- While the ad utilises animation, all characters that are depicted within the ad are*

*heavily stylized, abstract and in the case of animals, anthropomorphised*

- The pace of the ad moves the view very quickly through abstract scenarios which would be difficult for young children to comprehend*
- The ad uses references to identifiable characters to prompt the viewer to deduce an alternative ending to well-known stories – again, a layer of complexity to promote the general appeal to an older audience*
- There is no script or voiceover, but an audio track by electronica music act, Owl City*

*In addition, the ad concept was reviewed by an independent child psychologist who viewed that, based on Piaget's (1970) theory, the ad was complex and fit within Piaget's fourth stage of child development – the 'formal operations stage' which applies to children older than 11. The 'formal operations stage' states that a child no longer requires concrete objects to make rational judgments and that they are capable of deductive and hypothetical reasoning as an adult might.*

*The complainant also contends that the ad was shown in programs that had a large number of children viewers. The ad was given a 'W' rating by CAD which means that it cannot be placed in or adjacent to P and C programming. Our ongoing instructions to our media buying partner are to not place our ads in programming that is directed to children or that may attract a large child audience. Bonus spots are not to be accepted unless approved in writing prior.*

*Further to this, we do not believe that the programming supplied by the complainant is child directed media.*

*The Australian Council on Children and the Media (ACCM), an organisation dedicated to defending the rights of children to live in a media environment that supports their healthy development has provided reviews on popular movie releases so parents are able to make informed choices on what their children watch.*

*The movie Superman Returns is rated M and is suggested by ACCM suggests that the movie is not suitable for children under 13 due to its scary, violent scenes. Similarly, Jurassic Park – The Lost World which is rated PG is suggested to have scenes that would scare children aged under 13.*

*This is supported by the audience data (please see separate attached document) which demonstrates the shows listed by the complainant all had audiences well under the 25% threshold for under 12s which is well under the 50% requirement set by the RCMI.*

*Issue raised: the product does not represent a healthy dietary choice.*

*Response: Mondelez International takes a leading role on educating consumers on the energy value of a serving size through an energy thumbnail front-of-pack visual. On-pack labelling provides consumers with full nutrition information to allow them to incorporate treats sensibly into a balanced diet.*

*We recognise that Oreo is a treat and therefore we advertise the product in compliance with the RCMI, AANA Codes and our further, more stringent, internal marketing to children policy. As outlined in section 1 of this letter, Mondelez International has advertised the*

*product to the main grocery buyer in compliance with the RCMI.*

*The Oreo 'Wonderfilled' TVC does not encourage unhealthy eating habits and does not undermine or disparage the promotion of healthy, balanced diets. Appropriate consumption is demonstrated by only one character in the ad being shown eating one Oreo. This is scaled down from a typical serving size of 2-3 biscuits for an adult and there is clearly no suggestion of over consumption. Further, as outlined above, we firmly believe that the Oreo 'Wonderfilled' TVC is not directed at children, and therefore is not subject to this section of the RCMI.*

*Issue raised: the ad creative does not promote healthy dietary habits or physical activity*

*As Mondelez International does not believe that the Oreo 'Wonderfilled' TVC is directed at children under 12 (as outlined in section one), the ad is not bound by the guideline in the RCMI.*

*Ruling 0228/12 from the Board stated that 'advertising a snack is not, of itself, something which is contrary to prevailing community standards.' The submission by the complainant that the ad contravenes prevailing community standards as we have not 'communicated in a manner appropriate understanding of the target audience.' As the ad is directed at the main grocery buyer, we believe that it does not breach section 2.1 of the AANA Food and Beverages Advertising & Marketing Communications Code.*

*Please contact us should you have any further questions in relation to this matter.*

## **THE DETERMINATION**

The Advertising Standards Board (Board) considered whether this advertisement breaches section 2 of the AANA Advertiser Code of Ethics (the "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 (AFGC RCMI).

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

The Board noted the complainant's concern that the advertisement is directed to children and does not represent a healthy dietary choice.

The Board firstly 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 does not advertise food and beverage products to children under 12 in 'media' unless those products represent healthy dietary choices.

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 noted the RCMI Initiative provides that advertising or marketing communication activities are captured under the RCMI Initiative if:

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

The Board also noted that it should consider 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 information provided by the complainant that the advertisement was viewed during programs such as The Block, Bondi Vet, The Voice and David Attenborough’s – The Life of Mammals. The Board noted that the programs mentioned are not listed in Appendix II to the AFGC RCMI under ‘Programs not covered by the RCMI’ and considered that whilst programs such as The Block and Bondi Vet could be of appeal to children, they are directed at a family audience and not directed primarily to children.

The Board also noted that the programmes in which the advertisement was broadcast do not have audiences which are predominantly children. On this basis the Board determined that the advertisement was not broadcast in programmes where the audience is predominantly children or where the programmes are directed primarily to children.

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

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. The Board considered the theme of the advertisement (the sharing of Oreos with others), the visuals (cartoon style characters from various fairytales interacting with each other) and the language used (an up-beat jingle sung by a young male). The Board agreed that the advertisement would be attractive to children because of the focus on fairytale characters. However, the Board considered that the fairytale images in this advertisement are stylised in a manner that is of more interest to an older audience and that the fairy tale characters interact in ways that are not consistent with children’s fairy tales. The Board considered that the rapid appearance and disappearance and fast montage of characters increased the likelihood that children would not have a suitable amount of time to recognise and connect with the particular fairytale or characters.

Overall, the Board considered that the advertisement was aimed at the grocery buyer and that many adults would appreciate the concepts within the advertisement. The Board considered that the overall tone of the advertisement had an adult feel and was not clearly directed primarily to children under 12 and did not breach the provisions of the AFGC RCMI.

The Board then considered the advertisement under the AANA Code for Advertising and Marketing Communications to Children. The definition of what is advertising and marketing communications to children' in the AANA Children's Code is largely the same as that in the RCMI. For the same reasons noted above, the Board considered that this advertisement is not directed primarily to children; therefore the provisions of the Children's Code and of Part 3 of the AANA Food and Beverages Code are not applicable in this case.

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

The Board noted section 2.1 of the Food Code which provides that: advertising or marketing communications for food or beverage product shall not...otherwise contravene Prevailing Community Standards...'

The Board considered that advertising a biscuit is not, of itself, something which is contrary to prevailing community standards and that there is nothing contrary to community standards in the manner in which the product is promoted in this particular advertisement.

The Board determined that the advertisement did not breach Section 2.1 of the Food Code.

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

The Board considered that the advertising or promotion of Oreo biscuits is not, per se, inconsistent with or undermining of a balanced diet or healthy lifestyles. The Board noted that the jingle refers to "if I gave one to you" and that there was nothing in the advertisement which suggested or promoted excess consumption.

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

The Board determined that the advertisement did not breach the AANA Food Code.

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

## **THE INDEPENDENT REVIEWER'S RECOMMENDATION**

This is an application for review of a decision of the Advertising Standards Board (the Board) relating to a television advertisement by the Advertiser, Mondelez Australia Pty Ltd. The advertisement is described and set out in Case Report 0247/13 as follows:

The advertisement opens with a bright blue background with Oreo cookies flipping over in time to the music and the word 'wonder' appears on the screen, with an Oreo for the 'o'. We

then see various cartoon characters eating an Oreo cookie and changing the way they behave (for example a wolf is shown about to blow down a house containing three pigs but after eating the Oreo cookie we see him using his breath to blow the sail of a boat he is sharing with the pigs).

The final scene shows an Oreo cookie against a blue background and the word, “Wonderfilled” written in white underneath.

The grounds on which a decision of the Board may be reviewed are:

- Where new or additional relevant evidence which could have a significant bearing on the determination becomes available. An explanation of why this information was not submitted previously must be provided.

- Where there was a substantial flaw in the Board’s determination (determination clearly in error having regard to the provisions of the Code, or clearly made against the weight of evidence).

1. Where there was a substantial flaw in the process by which the determination was made.

The complainant/s claimed that the advertisement breached the Responsible Children’s Marketing Initiative (RCMI) of the Australian Food and Beverage Industry because:

- “It is a communication directed primarily to children ;
- Oreos do not represent a healthy dietary choice consistent with established scientific or Australian government standards; and

1. It does not promote healthy dietary habits or physical activity”.

In detailing the complaint, the complainant/s referred to previous Board decisions 0409/10 and 0454/11.

The complainant/s also claimed that the advertisement breached Clause 2.1 of the AANA Food and Beverages Code which 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 Complainant/s stated:

This advertisement contravenes prevailing community standards by promoting unhealthy food and beverages to children using animation, themes of adventure, fantasy, magic and animals. We submit that the overpoweringly child-oriented themes, music and visuals of this ad reveal a calculated attempt to profit from this vulnerability. The advertiser has not communicated in a ‘manner appropriate to the level of understanding of the target audience’ and this contravenes prevailing community standards.

The Advertising Standards Board Case Report 0247/13 states that the Board considered whether the advertisement breached the RCMI, section 2 of the AANA Advertiser Code of Ethics (the Code) and AANA Food and Beverages Advertising and Marketing Communications Code (the Food Code).

Mondelez Australia Pty Ltd is a signatory to the RCMI and such signatories must also abide by the other two Codes noted above.

#### THE DETERMINATION

In considering the complaint, the Board firstly considered whether the advertisement met the requirements of the Australian Food and Grocery Council RCMI.

The relevant provisions of the RCMI state:

#### 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

AND

2. The advertising and/ or marketing communications 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 scientific or government criteria
- Physical activity

The Board decision states that ‘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 noted that the RCMI Initiative provides that advertising and marketing communication activities are captured under the RCMI Initiative if:

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

The Board also noted that it should consider whether the themes, visuals, language and concepts are those that are attractive to children under 12.

In considering whether the advertisement was captured by the RCMI Initiative the Board decided:

1. That the programs in which the advertisement appeared, although some could be of appeal to children, were directed at a family audience and not directed primarily to children.
2. The Board determined that the advertisement was not broadcast in programs where the audience is predominantly children or where the programs are directed primarily to children.

The RCMI requires that in addition to the two criteria above, the Board also consider whether the ‘communications activities are, regardless of the audience, clearly directed primarily to children under 12’. The Board decided that in order to find that the advertisement was captured by the RCMI it must find that the advertisement ‘is aimed in the first instance at children’.

Having considered the theme of the advertisement (sharing of Oreos with others), the visuals (cartoon style characters from various fairy tales interacting with each other) and the language used (an up-beat jingle sung by a young male), the Board agreed that the advertisement would be attractive to children because of the focus on fairytale characters. The determination of the Board continues: “However, the Board considered that the fairytale images in this advertisement are stylised in a manner that is of more interest to an older audience and that the fairy tale characters interact in ways that are not consistent with children’s fairy tales. The Board considered that the rapid appearance and disappearance and fast montage of characters increased the likelihood that children would not have a suitable amount of time to recognise and connect with the particular fairy tale or characters.”

The Board determined that the advertisement was aimed at the grocery buyer and that many adults would appreciate the concepts within the advertisement. The Board considered that the overall tone of the advertisement had an adult feel and was not clearly directed primarily to children under 12 and did not breach the provisions of the RCMI.

The Board, for the same reasons as noted above, considered that the advertisement was not directed primarily to children and that therefore the provisions of the AANA Children’s Code and Part 3 of the AANA Food and Beverages Code were not applicable.

The Board then considered whether the advertisement complied with all other relevant provisions of the Food and Beverages Code, including section 2.1 which provides that: ‘advertising or marketing communications for food or beverage product shall not ... otherwise contravene Prevailing Community Standards’. The Board determined that ‘advertising a

biscuit is not, of itself, something which is contrary to prevailing community standards and that there is nothing contrary to community standards in the manner in which the product is promoted in this particular advertisement’.

Accordingly, the Board determined that Section 2.1 of the Food Code was not breached.

In addition, the Board considered Section 2.2 of the Food Code and determined that the advertising or promotion of Oreo biscuits is not, per se, inconsistent with or undermining or of a balanced diet or healthy lifestyles and that there was nothing in the advertisement which suggested or promoted excess consumption.

Accordingly, the Board determined that Section 2.2 of the Food Code was not breached.

Having found that the advertisement did not breach the AANA Code of Ethics, Food Code or the AFGC RCMI, the Board dismissed the complaint.

### Review Application

The Complainant/s sought review of the Board’s decision. The Complainant states:

“There was a substantial flaw in the Board’s decision.” “... the original decision is clearly in error having regard to the provisions of the RCMI and clearly against the weight of evidence.” “The Board’s finding that the fairytale images were of more interest to older audiences was based on two statements that are unsupported by evidence or explanation and cannot form the basis of a valid decision. The two key findings complained of were that:

1. The fairytale images interact in ways that are not consistent with children’s fairy tales; and
2. The fairytale images’ rapid appearance and disappearance and fast montage of characters increased the likelihood that children would not have a suitable amount of time to recognize and connect with the particular fairytale or characters.”

The Complainant/s then goes on to detail the reasons why, in the Complainant/s view, the two findings above were incorrect and without supporting evidence.

The Advertiser also submitted a response to the application for review. In its response, Mondelez reiterated points made in its original case letter to support the view that the advertisement does not have a primary appeal to children. The advertisement, it submitted, was directed primarily to main grocery buyers and had ‘general appeal’ through the theme, language, visual and executional cues as follows:

- Animated characters are ‘heavily stylized, abstract and in the case of animals, anthropomorphised’
- The pace ‘moves the view very quickly through abstract scenarios which would be difficult for young children to comprehend’

- ‘The ad uses references to identifiable characters to prompt the viewer to deduce an alternative ending to well-known stories... a layer of complexity to promote the general appeal to an older audience’
- There is no script or voiceover, but an audio track by a music act.

The Advertiser also indicates differences it believes exist between the Oreo advertisement and cases 0454/11, 0144/13 and 0179/13 mentioned by the Complainant. Mondelez also nominates previous Board cases (0225/12, 0229/11 and 0245/13) which it says indicate that ‘the use of animation does not automatically determine that an ad has primary appeal to children’.

The Advertiser also notes that the advertisement concept (not the advertisement itself) was reviewed by an external child psychologist and a copy of his report is attached. This report was apparently available to the Board when making its decision, although no mention is made of it by the Board in their decision in the Case Report.

In addition, the Advertiser provided a script of the Oreo advertisement including frame shots and the words of the song in the accompanying soundtrack.

#### INDEPENDENT REVIEWER’S RECOMMENDATION

The grounds on which a decision of the Board may be reviewed have been set out above in this review.

There was no new information provided in the application for review and accordingly the requirements of ground (1) are not satisfied.

The Complainant/s claims that there was a substantial flaw in the Board’s determination (determination clearly in error having regard to the provisions of the Code, or clearly made against the weight of evidence –ground ( 2).

Despite the fact that the Complainant has not specifically invoked ground (3) it is the opinion of the Independent Reviewer that the supporting argument provided by the Complainant is more appropriate to ground (3) of the grounds for review noted above.

One of the bases for appeal on which the Complainant relies is that the Board, in its determination, employed key reasoning which is fundamentally flawed and that its findings were based on two statements which were unsupported by evidence or explanation (noted above). In this respect, the claim made by the Complainant is not so much that the Board’s determination was made against the weight of evidence, but rather, that it was made without supporting evidence or adequate explanation. Thus, in the opinion of the Independent Reviewer, the claim of the Complainant is not most appropriate to ground (2).

The Complainant/s also makes a significantly broader claim, which, in the opinion of the Independent Reviewer, directly relates to the process by which the Board came to its decision (ground (3). This claim is that the weight of precedent of previous Board decisions relating to the same provisions of the RCMI renders this decision on the Oreo advertisement, ‘entirely

inconsistent with the manner in which the code has been interpreted'. The Complainant/s goes on to discuss the previous cases which they regard as relevant to this issue and to compare them to the Oreo advertisement. In these three previous cases the Board decided that the advertisements in question were, regardless of audience, clearly directed primarily to children.

Consistency in the Board's decision making process is a matter of the highest significance both to Advertisers and to the public. It is also critical to the credibility and integrity of the ASB Complaints Process. It is the view of the Independent Reviewer that the claim of the Complainant regarding inconsistency in the Board's decision making, allied to the claim of decision making unsupported by sufficient evidence or adequate explanation satisfies the requirements of ground (3).

In the Case Report, the Board noted that the advertisement would be attractive to children "because of the focus on fairy tale characters". The Board then went on to decide that the advertisement was not, regardless of its audience, clearly directed primarily to children based on the following points:

- "The fairy tale images in this advertisement are stylised in a manner that is of more interest to an older audience and that the fairy tale characters interact in ways that are not consistent with children's fairy tales"
- "The rapid appearance and disappearance and fast montage of characters increased the likelihood that children would not have a suitable amount of time to recognise and connect with the particular fairy tale or characters"

Based on the above points the Board decided that: "Overall, the Board considered that the advertisement was aimed at the grocery buyer and that many adults would appreciate the concepts in the advertisement. The Board considered that the overall tone of the advertisement had an adult feel and was not clearly directed primarily to children under 12 and did not breach the provisions of the AFGC RCMI". The Board did not elaborate on these points in its decision.

The Board also decided that the advertisement did not breach the AANA Code of Ethics or Food Code.

In reporting its decision in the Case Report, the Board did not mention other previous decisions which address the same RCMI provisions, of which there are at least three: 0144/13 (Kellogg's Coco Pops), 0454/11 (Unilever Paddle Pops) and 0179/11 (Kellogg's LCM bars). While there is no formal obligation on the Board to refer to previous cases which address the same Code/RCMI provisions, it is helpful to both advertisers and the public for the Board to articulate the reasons for its decision in a way which assists in distinguishing a case where the decision goes one way from decisions on the same provision/s which were decided differently. (The advertisements in the three cases noted above were found to be communications activities which were 'regardless of the audience, clearly directed primarily to children').

In this case, there are at least three Board decision precedents based on the same Code/RCMI

provisions which differ from the present decision. Under such circumstances, the requirements of a consistent approach to the decision making process indicate that where a decision is based on elements that are capable of an opposite interpretation, the rationale behind the interpretation of the Board is deserving of reasonable articulation and elaboration. For example, the Board does not articulate at all its reasons for determining that the ‘fairytale images’ are ‘stylised in a manner which is of more interest to an older audience’. It is many decades since cartoon/animation images had a standard ‘style’ and now a multitude of different styles prevail in animated product available to children of all ages (including those under 12) in television, film and computer games and also in illustrations in children’s books. In the interests of clarity, the Board needs to provide a more adequate explanation of the reasoning behind its view, which goes beyond the mere statement of that view. Nor does the Board articulate at all its reasons for stating that the fairy tale characters ‘interact in ways that are not consistent with children’s fairy tales’.

The second leg of the Board’s decision nominates the rapid appearance and disappearance and fast montage of the animated characters in the advertisement. Again, further elaboration of the reasoning and evidence for this view would assist in understanding the Board’s opinion, especially given that an opposite view is commonly held. Content on today’s multi media/digital devices, including those used by children under 12, provides not only rapid image/sound changes but also constant interaction between cascading images, sounds, text and other content. Computer games, played by vast numbers of children under 12, provide one example of this phenomenon and social media provides another. Rapid imagery change and constant variety of element interaction form the basis of much of the media content utilised and enjoyed by modern children.

It is also worthwhile noting that the Board, in making its decision, must consider all children under 12 and not just children of a very young age. The Board, in any decision on this provision of the RCMI, is required to decide whether the communications activity in question, regardless of audience, is directed primarily to children. It is not required to take a view as to whether or not any such targeting is ultimately successfully achieved in the marketplace.

In its summary statement the Board states that the advertisement was aimed at the grocery buyer, that ‘many adults would appreciate the concepts within the advertisement’ and that the overall tone of the advertisement ‘had an adult feel’. Again, given that the advertisement centres on fairytale characters and that the board concedes the ad would be attractive to children because of the focus on fairytale characters, some elaboration of these comments about adults would assist in distinguishing this decision from the opposing precedents.

In the opinion of the Independent Reviewer, there was a substantial flaw in the process by which the determination was made, in that the Board has not provided sufficient reasoning to distinguish this case from opposing Board decision precedents on the same RCMI provisions.

The Board is at all times entitled to make decisions which differ from previous decision precedents but it should do so in a manner which satisfies the requirements of a consistent approach to decision making.

Accordingly, I recommend that the Board reconsider its decision, taking into account the comments above regarding the decision making process.

## **THE DETERMINATION ON REVIEW**

The Board noted that it was reconsidering its decision in relation to whether or not the advertisement met the requirements of the AFGC RCMI.

The Board noted the request for review, the complainant's points of concern about the Board's first decision and also noted the recommendation of the Independent Reviewer.

The Board noted that the Independent Reviewer considered that there was a substantial flaw in the process by which the determination was made, in that the Board has not provided sufficient reasoning to distinguish this case from opposing Board decision precedents on the same RCMI provisions. In particular the Board noted that the particular point requiring review was its decision that the advertisement was not directed primarily to children under 12.

The Board noted its earlier discussion 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 does not advertise food and beverage products to children under 12 in 'media' unless those products represent healthy dietary choices.

The Board noted the RCMI Initiative provides that advertising or marketing communication activities are captured under the RCMI Initiative if:

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

With regard to point 1, the Board noted that the programmes in which the advertisement was broadcast do not have audiences which are predominantly children. With regard to point 2, the Board noted the information provided by the complainant that the advertisement was viewed during programs such as The Block, Bondi Vet, The Voice and David Attenborough's – The Life of Mammals. The Board noted that the programs mentioned are not listed in Appendix II to the AFGC RCMI under "Programs not covered by the RCMI" and considered that whilst programs such as The Block and Bondi Vet could be of appeal to children, they are directed at a family audience and not directed primarily to children.

On this basis the Board determined that the advertisement did not meet point 1 or 2 of the RCMI in that it was not broadcast in programmes where the audience is predominantly children or where the programmes are directed primarily to children.

The Board noted that the primary point it is being asked to review is in regard to point 3 ie: is the communication activity, regardless of the audience, clearly directed primarily to children. In making this decision the Board noted that, in accordance with the RCMI, it should consider whether the themes, visuals, language and concepts are those that are attractive to children under 12.

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 clearly aimed in the first instance at children.

The Board noted its discussion in the original decision about whether the communication activities are clearly directed primarily to children. From the previous discussion, the Board noted it had previously considered:

“the theme of the advertisement (the sharing of Oreos with others), the visuals (cartoon style characters from various fairytales interacting with each other) and the language used (an upbeat jingle sung by a young male). The Board agreed that the advertisement would be attractive to children because of the focus on fairytale characters”.

However while noting that the advertisement would be attractive to children “because of the focus on fairy tale characters”, the Board went on to decide that the advertisement was not, regardless of its audience, clearly directed primarily to children based on the following points:

“The fairy tale images in this advertisement are stylised in a manner that is of more interest to an older audience and that the fairy tale characters interact in ways that are not consistent with children’s fairy tales”

“The rapid appearance and disappearance and fast montage of characters increased the likelihood that children would not have a suitable amount of time to recognise and connect with the particular fairy tale or characters”

The Board states that the advertisement was aimed at the grocery buyer, that ‘many adults would appreciate the concepts within the advertisement’ and that the overall tone of the advertisement ‘had an adult feel and was not clearly directed primarily to children under 12 and did not breach the provisions of the AFGC RCMI.

The Board carefully considered a range of cases previously considered under this provision of the RCMI and the various elements in those advertisements most importantly the theme, visuals and language of the advertisement and the overall impact of the advertisement.

The Board first considered a range of advertisements referred to by the complainant and the advertiser. The Board noted that it had considered that a number of advertisements containing cartoon or fantasy characters were directed primarily to children. Specifically the Board noted scenes in advertisements for Kellogg LCMs (0179/13 and 0180/13) (which predominantly featured real life images of children at school but also included images of cartoon snails and dinosaurs) and for Kellogg’s Coco Pops (0144/13)(which predominantly featured the image of a cartoon bowl of coco pops playing a well-known pool game). All three advertisements included cartoon images and fantasy scenes but also included child voice overs and references to or implications reminiscent of a number of children’s games or television programs directed to young children. The Board considered that these advertisements were directed primarily to children because the overall impact of the advertisement, in the Board’s view, was an advertisement that had children under 12 as its primary target audience. The Board recognises that children of this age are unable to make purchasing decisions on their own but considered that this is not relevant to whether or not the content of the advertisement is directed primarily to children.

By contrast, a number of other advertisements containing cartoon images or licensed characters (Kraft Chips Ahoy 0229/11, featured cartoon images of biscuits driving a car, with an adult voice over, music that was popular with a generation of people who would now be parents) and Smiths Chips 0190/13 (with a popular child's toy as the main character) were likely to be attractive to children because of the cartoon or character image. However the Board considered that these advertisements were not directed primarily to children because the cartoon or licensed character images were presented in a context that was more clearly a reference to adults and/or the advertisement also included nutritional or compositional information about the product in a manner that was likely to be of more interest to adults.

Following its review of previous cases the Board reiterated that including a licensed character or cartoon or fantasy images will not of itself mean that an advertisement is directed primarily to children. It is essential for the Board to consider all elements of the advertisement and to make a decision based on how all of the elements of the advertisement interact, and the overall impression that they make, in determining whether an advertisement is clearly directed primarily to children.

The Board noted the theme of the advertisement under consideration is sharing biscuits (the advertised product) and presents a variety of situations where sharing a biscuit leads to a different (better) outcome than might be expected based on the initial image of the cartoon character. Specifically the Board noted that the advertisement presents a number of fairy tale or fantasy characters and, after sharing a biscuit, they end up behaving better than you would expect eg: vampire ends up leaving his castle and going for a drive with a woman with blonde hair, the big bad wolf takes the three little pigs out on a boat and a giant octopus does not sink the boat. The Board considered that this theme is not a complex theme and, in the Board's view, older children would easily understand the theme. The Board considered that the different outcomes may not be understood by young children but that they would certainly understand the theme of sharing.

The Board also considered the visuals in the advertisement. This advertisement consists solely of cartoon images. In the Board's view the cartoon characters are directed to children and are likely to be very attractive to children as the characters in the advertisement are very similar or referable by children to well-known children's programs or stories. The Board considered that the vampire character is likely to be seen by younger children as similar to a Sesame Street character and that older children would relate to a vampire given the current popularity of youth fiction around vampires. Similarly, in the Board's view the three little pigs and big bad wolf are easily recognised and part of a well-known children's fairy tale.

The Board noted that in its initial decision it had referred to the images being 'stylised' and more likely to be attractive to adults and teenagers. The Board noted, upon further consideration, that the imagery is not dissimilar to a number of cartoon programs that are directed to non pre-school children and broadcast in children's viewing times. For example programs such as Adventure Time, which is PG rated but highly popular with a broad range of children in the age range 7-12 years. The Board noted the advertiser's reference to Metro Train's 0245/13. The Board considered that that advertisement was clearly not directed primarily to children due to the adult themed context of the advertisement (safety around trains and a range of other adult situations). In the current advertisement by contrast, there are recognisable characters engaging in activities that are familiar to children.

The Board noted that the AFGC RCMI applies to children under 12 and considered on this occasion and with further viewing that the images are no more stylised than many popular children's programmes and would be very attractive to children of all ages, in particular those at the upper end of the RCMI age range.

The Board also noted that it had initially decided that 'The rapid appearance and disappearance and fast montage of characters increased the likelihood that children would not have a suitable amount of time to recognise and connect with the particular fairy tale or characters'. Upon reconsideration the Board considered that children, again most likely those at the older age range of the RCMI are used to such images and that this would not affect the attractiveness of the advertisement to this older age group.

The Board noted the music in the advertisement and noted that it is a short form of a longer song sung by 'Owl City' produced in America. While this is a song that is not recognisable from other products or mediums, the Board considered that it is a very happy, catchy song that would be attractive to both adults and children.

The Board noted the report from a consultant psychologist included by the advertiser who considered that the advertisement would not be easily understood by younger children and that the level of complexity in the advertisement could be considered to be in line with concepts understandable by 11-15 year olds. The Board considered that, based on its own members' experiences with children, the advertisement would be attractive to children under the age of 11. All members of the Board agreed that the advertisement would be attractive to children as a result of the catchy music, cartoon and fantasy images and scenarios and the theme (at its most simplistic) of sharing biscuits.

The Board noted the advertiser's comments that the advertisement has general appeal due to the abstract nature of the animals, the pace of the scenarios, the alternative endings to the situations and the lack of script of voiceover and use of electronica music act.

The minority of the Board agreed broadly with the advertiser's statements and considered that, although attractive to children, the overall impression of the advertisement is equally directed to an older audience.

The majority of the Board considered however that the advertisement is more than just attractive to children and is clearly directed primarily to children. The Board considered, for the reasons outlined above regarding the characters, music and themes that the advertisement is likely to be enjoyed by a general audience but considered that it is most attractive to and clearly directed primarily to children.

The majority of the Board considered that the advertisement is particularly directed to older children and not pre-schoolers. In the view of the majority of the Board this particular advertisement is clearly directed primarily to children, noting that the RCMI applies to advertising to children under 12 years and that there are various different stages of child development.

The Board determined that the advertisement was clearly primarily directed to children under 12.

The Board therefore determined that the advertisement was advertised in children's media

and that the RCMI did apply.

The Board noted that as the advertisement is directed primarily to children it must comply with the Advertising Messages requirements of the AFGC RCMI. The AFGC, RCMI requires that:

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

And

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 scientific or government criteria
- physical activity

The Board first considered whether the product is a healthy dietary choice.

The Board noted the advertiser's response that the advertised product, Oreos, do not meet the requirements of the company action plan for a healthier dietary choice.

On the basis of the confirmation by the advertiser that the product does not meet the criteria for a healthier choice product, the Board considered that the advertisement breached the AFGC RCMI.

The Board determined upon reconsideration that the advertisement did not meet the advertising messaging requirements, specifically the requirement that the product represents healthy dietary choices, of the AFGC RCMI and upheld the complaints.

## ADVERTISER'S RESPONSE TO IR DETERMINATION

Mondelez International is committed to marketing its products responsibly, which includes strict policies around the marketing of its products to children. Not only are we a founding signatory to the AFGC's RCMI, but also follow the AANA codes and our own strict internal policy.

Our view

We were disappointed and surprised to hear that the Board has decided to overturn its initial decision, following the independent review and subsequent deliberation.

We are adamant that the TVC was not created to be directed to children.

We took a very considered approach when creating the TVC to ensure it was directed primarily to main grocery buyers and had 'general appeal' through the theme, language and visuals.

To verify that the TVC was responsible, we enlisted the guidance of an external expert, child psychologist, Andi Green, who worked with us to ensure the advertisement did not have primary appeal to children. With Andi Green's evidence before it, the Board initially agreed with our view: "that the overall tone of the advertisement had an adult feel and was not clearly directed to children under 12 and did not breach the provisions of the AFGC RCMI."

#### The Board's reasons

We supported the Board's initial determination and agreed with its reasons. We were then surprised that the Board's clear and unequivocal view was superseded by a majority view. The Board's reasons drew on "its own members' experiences with children" and perceptions of what content would be attractive or not to children. It did not refer to any new evidence.

We were also surprised at the Independent Reviewer's conclusion that the Board failed to adequately explain or articulate its reasons for determining key issues. The Independent Reviewer noted the critical need for consistency, integrity and credibility in the Board's decisions. In our view, the initial decision displayed each of those qualities.

We are troubled by the failure of the decision to make clear the reason for the leap between reaching the conclusion, based on members own experiences with children, that the TVC might appeal to older children, to the conclusion that the TVC was clearly directed primarily to children.

#### Impact of final determination

We note the Board's ultimate finding that the use of licensed character or cartoon or fantasy images will not itself mean that an advertisement is directed primarily to children. We also note the Board's decision that the advertisement complies with clause 2.1 of the AANA Code and:

"that there is nothing contrary to community standards in the manner in which the product is promoted in this particular advertisement."

We are further encouraged that the Board did not overturn this conclusion despite the

Complainant's request to do so.

We believe it is clear that this decision is about this advertisement and not a decision about animation itself and we reiterate that we sought to employ a style of animation and production that appealed primarily to the main grocery buyer.

Animation is a widely used form of communication in a broad variety of media and has cross&shy;generational appeal. There are a number of popular animated television shows and movies that are

clearly directed at adult viewership -and we think our TVC is one. We remain deeply concerned that the Board sees this TVC as having direct and primary appeal to children under 12.

The range of characters, animation styles, visual and musical techniques to which children are exposed in 2013 is very wide. But it is clear from the ultimate decision of the Board that being "attractive to children" is not analogous to being "clearly directed primarily to children."

The ruling clearly doesn't rule out animation as a legitimate form of advertising and we disagree with the interpretation of the styles and production techniques used in our TVC and reiterate that the advertisement was directed at the main grocery buyer.

We feel it is very important for the industry to understand where the line currently lies between something of 'general appeal' and something that is "clearly directed primarily to children".

In the first instance, the Board determined that the communication activity was not clearly directed primarily to children. It did so with the help of compelling evidence and in the light of precedent. We believe it was a consistent, credible decision made with integrity.

As noted above, upon review, but with no change to the evidence, the Board reversed its decision.

Working with the ASB

We are keen to engage with the Board to continue our mutual commitment to maintaining high standards for marketing in our industry.

We respectfully disagree with the ultimate decision. We believe that it is important to maintain the key elements of consistency, credibility and integrity in the Board's decisions. It is our hope that the issues raised by this decision will be explored in an open dialogue for the ultimately benefit of consumers, the industry and our business.

We will be in contact with the Board as well as the AANA regarding actions to be taken in response to the decision.