

Submission to the Statutory Review of the Online Safety Act 2021 – Issues Paper

June 2024



About FARE

The Foundation for Alcohol Research and Education (FARE) is the leading not-for-profit organisation working towards an Australia free from alcohol harms.

We approach this through developing evidence-informed policy, enabling people-powered advocacy and delivering health promotion programs.

Working with local communities, values-aligned organisations, health professionals and researchers across the country, we strive to improve the health and wellbeing of everyone in Australia.

To learn more about us and our work visit www.fare.org.au.

You can get in touch via email at info@fare.org.au

FARE is a registered charity, and every dollar you give helps fund projects keeping our communities healthy and safe. You can make a tax-deductible donation at: www.fare.org.au/donate.

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Executive summary

Everyone should be able to enjoy the benefits of being able to work, learn and play safely online. This can happen when we have safe online environments that support, rather than undermine people's health and wellbeing.

However, currently people are tracked, profiled and targeted with advertising for harmful and addictive products, such as alcohol, gambling, e-cigarettes and unhealthy food, when they are online.^{1, 2, 3, 4} Online platforms, including social media platforms, use data-driven recommender systems and algorithmic models to enable advertisers to prey on people who are most likely to buy their products, and to hyper-personalise advertising based on intimate insights into their lives, including their behaviour, characteristics and vulnerabilities.^{5, 6, 7, 8}

By design, the people most likely to be targeted with advertising for alcohol and other addictive and harmful products are people most at risk of harm, such as people experiencing alcohol use disorders or dependence.^{9, 10, 11, 12} The predatory online advertising of these products not only targets and exploits people's vulnerability, but is also likely to exacerbate it – by pressuring people to increase their use of addictive products.

The below-the-line and ephemeral nature of online advertising also means that children and young people can be targeted with harmful advertising out of sight. Research shows that online platforms track and profile Australian children, enabling them to be targeted with online advertising for alcohol and other addictive and harmful products.^{13, 14}

Online advertising of alcohol has damaging impacts on the health and wellbeing of children, individuals and the broader community, driving increased use and harms from alcoholic products. Alcoholic products cause almost 6,000 Australian deaths each year,¹⁵ and more than 200 diseases and conditions.¹⁶ Alcohol is also a trigger and exacerbating factor in family violence,^{17, 18, 19, 20} and is estimated to be involved in between 23% and 65% of all police reported family violence incidents nationally.²¹

For children, exposure to alcohol advertising increases the likelihood that they will start drinking alcohol at a younger age and go on to drink at high-risk levels.²² Alcohol use by children and young people increases their risks of injury and other harms to their health and wellbeing, including interfering with brain development, accidents, injury and self-harm, and developing alcohol use disorders or dependence later in life.²³

In these ways, online advertising of harmful and addictive products is creating an unsafe online environment that harms Australians' health and wellbeing – especially for people most at risk of harm such as children and people experiencing alcohol use disorders or dependence.

The wellbeing and safety of Australians must be prioritised over commercial profits from online platforms' harmful advertising practices. This is a major regulatory gap that is not addressed under the *Online Safety Act 2021* (Act), or Australia's regulatory system more broadly.

To ensure the Act is meeting its objects of improving and protecting the online safety of Australians, new measures are needed to address the significant harms to Australians from online advertising of harmful and addictive products. These measures should include clear obligations for online platforms to ensure people are not targeted with harmful online advertising and for all harmful advertising on their platforms to carry evidence-based warnings. In accordance with the United Nations Convention on the Rights of the Child, and the best interests of the child principle, online platforms must be required to ensure children are not targeted with harmful online advertising, and platforms that children access are free from harmful online advertising.

Recommendations

Recommendation Number	Terms of Reference Issues / Issues Paper Questions	Recommendation
1	Terms of Reference 1 Issues Paper Question 1	Expand the scope of online harms addressed by the Act to include harmful online advertising.
2	Terms of Reference 4 Issues Paper Questions 3, 21, 30	Regulate harmful online advertising under a new scheme in the Act.
3	Terms of Reference 4 Issues Paper Questions 3, 21, 30	Define harmful online advertising to include advertising or promotion of addictive and harmful products (including alcohol), and brands or businesses associated with those products.
4	Terms of Reference 4 Issues Paper Questions 3, 21, 30	Require online platforms to ensure that platforms children can access are free from harmful advertising.
5	Terms of Reference 4 Issues Paper Questions 3, 21, 30	Require online platforms to ensure people are not targeted with harmful advertising on their platforms, and that opt-in consent is required to be shown marketing for harmful product advertising.
6	Terms of Reference 4 Issues Paper Questions 3, 21, 30	Require online platforms to ensure all harmful advertising on their platform includes an evidence-based warning.
7	Terms of Reference 5 Issues Paper Questions 21, 22	Introduce a statutory duty of care for online platforms, which includes duties to: <ol style="list-style-type: none"> a) ensure advertising systems, practices and content are not harmful to people who use the platforms, and b) design online platforms that are accessed by children to operate in children’s best interests and not be harmful to children.
8	Issues Paper Question 17	Regulate harmful advertising by imposing obligations on online platforms with significant penalties for breaching the obligations, rather than relying on removal or remedial notices.
9	Issues Paper Question 18	Significantly increase financial penalties under the Act to ensure they act as effective deterrents for large multi-national online platforms, according to the scale of their profits.
10	Issues Paper Question 24	Introduce measures requiring online platforms to provide: <ol style="list-style-type: none"> a) clear explanations about how algorithms and recommender systems are used to make

		<p>predictions, recommendations, or decisions about advertising content sent to individuals, and</p> <p>b) accessible data and information about advertising delivered on their platforms through a publicly accessible archive of advertising content.</p>
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Introduction

FARE welcomes the opportunity to provide a submission to the Statutory Review of the *Online Safety Act 2021* (Act). FARE's concern in relation to online safety is the harm caused by online advertising of addictive and harmful products, primarily online alcohol advertising. Our submission addresses the following matters to be considered by the Statutory Review of the Act as set out in the Terms of Reference, and the following questions in the Issues Paper:

1. Objects of the Act and harmful online advertising

- **Terms of Reference 1:** The overarching objects in section 3 of the Act
- **Issues Paper question 1:** Are the current objects of the Act to improve and promote online safety for Australians sufficient or should they be expanded?

2. Measures to address harmful online advertising

- **Terms of Reference 4:** Whether additional arrangements are warranted to address online harms not explicitly captured under the existing statutory schemes
- **Issues Paper question 3:** Does the Act regulate things (such as tools or services) that do not need to be regulated, or fail to regulate things that should be regulated?
- **Issues paper question 21:** Should the Act incorporate any of the identified international approaches?
- **Issues paper question 30:** To what extent is the Act achieving its object of improving and promoting online safety for Australians?

3. Additional issues

Duty of care and best interests of the child

- **Terms of Reference 5:** Whether the regulatory arrangements, tools and powers available to the Commissioner should be amended and/or simplified, including through consideration of:
 - the introduction of a duty of care requirement towards users (similar to the United Kingdom's *Online Safety Act 2023* or the primary duty of care under Australia's work health and safety legislation) and how this may interact with existing elements of the Act
 - ensuring industry acts in the best interests of the child.
- **Issues Paper question 21:** Should the Act incorporate any of the international approaches identified? If so, what should this look like?
- **Issues Paper question 22:** Should Australia place additional statutory duties on online services to make online services safer and minimise online harms?

Penalties and enforcement powers

- **Issues Paper question 17:** Does the Act need stronger investigation, information gathering and enforcement powers?
- **Issues Paper question 18:** Are Australia's penalties adequate and if not, what forms should they take?

Transparency and access to data

- **Issues Paper question 24:** Should there be a mechanism in place to provide researchers and eSafety with access to data?

1. Objects of the Act and harmful online advertising

This section of the submission addresses:

- **Terms of Reference 1:** The overarching objects in section 3 of the Act.
- **Issues paper question 1:** Are the current objects of the Act to improve and promote online safety for Australians sufficient or should they be expanded?

Recommendation 1: Expand the scope of online harms addressed by the Act to include harmful online advertising.

FARE supports the objects in section 3 of the *Online Safety Act 2021* (Act): to improve and promote online safety for Australians. We believe everyone should be able to learn, work and play safely in online environments. However, we are concerned that the current scope of the Act is not sufficiently broad to ensure Australians are protected from the range of harmful material online.

Currently the Act takes a narrow interpretation of online safety, and is only directed to protecting Australians from the most extreme online harms, including cyber-bullying, cyber-abuse, and exposure to abhorrent, offensive, or high-impact violent and sexual material.

While FARE strongly supports measures to keep Australians safe from these online harms, we believe the Act must protect people from a broader range of harmful online material to effectively meet its objects of improving and promoting online safety for Australians.

This must include introducing effective measures to protect Australians from the harms caused by online advertising of harmful and addictive products, including alcohol. These harms are discussed below in section 2.

2. Measures to address harmful online advertising

This section of the submission addresses:

- **Terms of Reference 4:** Whether additional arrangements are warranted to address online harms not explicitly captured under the existing statutory schemes.
- **Issues Paper Question 3:** Does the Act regulate things (such as tools or services) that do not need to be regulated, or fail to regulate things that should be regulated?
- **Issues paper question 21:** Should the Act incorporate any of the identified international approaches?
- **Issues paper question 30:** To what extent is the Act achieving its object of improving and promoting online safety for Australians?

Online advertising of addictive and harmful products

Online platforms, including social media platforms and search engines, have designed sophisticated marketing systems, which use data-driven recommender systems and algorithmic models to enable advertisers to target people, and hyper-personalise advertising based on intimate insights into their lives, including their characteristics, predispositions and behaviour.^{24, 25, 26, 27}

Online platforms enable advertisers of harmful and addictive products, including alcohol companies, to use these systems to target advertising to the people most likely to buy and spend the most.^{28, 29, 30} To ensure the advertising has the maximum influence on the people they target, online platforms enable advertisers to

optimise and personalise the advertising, including through ‘dynamic’ advertising – automatically tailoring the promotion, price and product based to what a person will be most susceptible to.³¹

This means that people are targeted in a way that hones in on their individual susceptibility and in the case of targeting for harmful and addictive products like alcohol, this means that people most at risk of harm, including people experiencing alcohol use disorders or dependence, are targeted the most, with advertising most likely to prompt them to buy and use more alcohol.³² Additionally, advertising is personalised specifically to prey on these vulnerabilities, and identify moments when people are particularly vulnerable, compounding its harmful effects. This advertising not only disproportionately targets people experiencing vulnerability and exploits their vulnerability, but is also likely to create or increase vulnerability – by pressuring people to increase their use of addictive products.

The below-the-line and ephemeral nature of online advertising means that companies selling harmful and addictive products can target their advertising to children and young people out of sight. Research has found that online platforms use marketing systems to track and profile children, enabling companies to target children with highly tailored online advertising for alcohol and other addictive, harmful products, using data about their interests and behaviour.^{33, 34, 35}

This includes research which found that Meta tags children as interested in harmful products such as alcohol and gambling^{36, 37} and approves targeting of children with sponsored content promoting these products.³⁸ Meta’s profiling of children for targeted advertising has also been demonstrated by leaked Meta documents, which revealed that Meta gathered psychological insights on almost two million children in Australia and New Zealand to sell targeted advertising, including monitoring children in real-time to identify their mood, and whether they felt ‘overwhelmed’ or ‘anxious’.³⁹

Harms from online alcohol advertising

FARE’s primary concern is the harm caused by online alcohol advertising. Alcohol is an addictive substance that causes substantial harm to Australians. Almost 6,000 people die and more than 144,000 people are hospitalised from the use of alcoholic products every year.⁴⁰ Alcohol use causes more than 200 diseases and conditions,⁴¹ contributing to 4.5% of Australia’s total disease burden.⁴²

In addition to the harm to people who use alcohol, alcohol has broader harmful impacts in the community. Research indicates that almost half of all Australians (around 10 million people) have been harmed from another person’s alcohol use.⁴³

Among the harmful impacts of alcohol is its role as a trigger and exacerbating factor in family violence. Australian and international research has established a clear association between alcohol use and the frequency and severity of family violence.^{44, 45, 46} Between 23 per cent and 65 per cent of police reported family violence incidents in Australia are estimated to involve alcohol.⁴⁷

Online alcohol advertising is a key driver of alcohol harms. Research shows that exposure to alcohol advertising leads to increased use of alcoholic products,⁴⁸ and that Australians are bombarded with alcohol advertising when they are online.⁴⁹ A 2023 study by FARE and The University of Queensland of alcohol advertising online found that almost 40,000 distinct alcohol advertisements were published on Meta platforms alone over a 12 month period, an average of 765 alcohol advertisements per week.⁵⁰

This has harmful impacts for the whole community, but presents heightened risks for children and young people, and people experiencing alcohol dependence, high-risk alcohol use or other harms from alcohol.

Harms to children and young people

Children and young people should be able to safely enjoy the benefits of online environments, free from harmful influences. However, research shows Australian children are targeted with and exposed to online alcohol advertising when they are on social media and other online spaces.

This includes a recent Australian pilot study that has developed methods to capture advertisements young people are exposed to online. The study found that on average children were targeted with at least one gambling ad and six alcohol ads on a day they went online. One teenager in the study was targeted with 14 alcohol ads over a typical 2-hour period they spend online. Alcohol ads included youth-oriented content, for example ads for lamington and cake flavoured vodka ready-to-drink products and alcoholic hot chocolates, and included interactive buttons prompting young people to 'learn more' about these alcoholic products (see examples below).⁵¹ A recent study with young Victorians found that 67% of adolescents saw alcohol advertising when they were online.⁵²



Recent research by the Victorian Health Promotion foundation (VicHealth) investigated data-driven online advertising of harmful products to Victorian children and young people aged 16-25 years. The research found that 194 advertisers uploaded data about the children and young people to Meta, which then generated 787 advertising interests about them. Meta assigned an average of 6.3 alcohol-related advertising interests to the participants (e.g., 'alcohol', 'bars', 'beer'), including 41 alcohol-related advertising interests to five participants who were under the age of 18. In addition, two alcohol retailers uploaded data about a participant under the age of 18 years old. As a result, the children and young people were frequently targeted by social media advertising for harmful and addictive products, including alcohol and gambling. Of the 54 participants who were younger than 18, over half reported being targeted with alcohol advertisements on social media either regularly (17.2%) or sometimes (41.4%).⁵³ Research has also found that Meta charges approximately \$3 for alcohol advertising to be sent to 1,000 Australian children aged 13-17 years old.⁵⁴

In addition to data-driven targeting of children and young people, alcohol companies use celebrities and social media influencers, and peer-to-peer marketing to reach children and young people with advertising for alcohol products and brands that friends have liked.⁵⁵

Online alcohol advertising has damaging impacts on children's health and wellbeing. A large body of research has established that children and young people's exposure to alcohol advertising is associated with them starting to use alcohol at a younger age, and drinking at higher risk levels.^{56, 57, 58, 59} Systematic reviews of research have also specifically found that online marketing of alcohol, including use of social media influencers, influences young people to have positive attitudes to alcohol and to use alcohol, and is likely to increase harms.^{60, 61} An Australian study found that young people who 'like' or follow alcohol marketing pages on social media are more likely to use alcohol at high-risk levels.⁶²

The National Health and Medical Research Council's *Australian guidelines to reduce health risks from drinking alcohol* recommend that children and young people under 18 years should not drink any alcohol due to the risks of injury and other harms to their health, including interfering with brain development, accidents, injury and self-harm, and developing alcohol use disorders or dependence later in life.⁶³

Harms to people experiencing or most at risk of alcohol harm

The alcohol industry's business model relies on selling high volumes of alcohol to people who use alcohol at high-risk levels. In 2019 alcohol companies sold the most alcohol to the heaviest drinking 5% of the Australian population, with this group using more than a third (36.1%) of all the alcohol consumed in Australia (drinking almost eight standard drinks per day) and the heaviest drinking 10% of the population accounted for more than half (54.1%) of all alcohol consumed (drinking almost four standard drinks per day).⁶⁴ As many as 10% of Australians who use alcoholic products are likely to meet the criteria for alcohol dependence.⁶⁵

Online platforms' marketing systems are designed to ensure the people who are most targeted with alcohol advertising are those who buy the most alcohol.⁶⁶ This means the people most targeted by online alcohol advertising are often people experiencing alcohol dependence, high-risk alcohol use, or other harms from alcohol.⁶⁷ For example, an Australian study found that alcohol companies target Australians who drink at high-risk levels with more frequent alcohol advertising promoting home delivery of alcohol than people who drink and low-risk levels.⁶⁸

In addition, the advertising is designed and personalised to exploit their vulnerability, and to influence them to make impulsive purchases. Compounding this, research has found that people experiencing problems with alcohol are more attentive to marketing cues, which in turn leads to increased cravings for alcohol.⁶⁹

Online platforms' marketing systems enable alcohol companies to develop highly personalised, data-driven alcohol marketing campaigns that target specific demographics and behavioural profiles, including high frequency of alcohol use. Alcohol companies collect and analyse data about people each time they shop, browse or search for alcohol online, including from companies' websites and loyalty programs, which they use to develop consumer insights and profiles. Online platforms are deeply integrated with alcohol companies, allowing these businesses to seamlessly and extensively profile and track people, and develop intimate insights into their behaviours and susceptibilities. Online platforms use data from alcohol companies to generate 'custom' audiences of the most 'valuable' existing customers – those who buy and spend the most on alcohol. They then generate 'lookalike' audiences of potential new customers with similar characteristics. Alcohol companies use these audiences to reach people who are most likely to buy alcohol. They then optimise and personalise discounting and promotions, and hyper-target consumers with advertising based on their interests, preferences, characteristics and purchase history, pushing them to spend more to increase their profits.⁷⁰

Alcohol companies are investing heavily in these digital marketing methods, which they know drive higher use of alcoholic products than traditional forms of marketing.⁷¹ For example, alcohol and gambling corporation Endeavour Group's EndeavourX Initiative uses an AI-powered personalised marketing engine to drive increased sales of alcohol products.⁷² This is fuelled by extensive data, including data collected on 6.2 million Australians through their My Dans program alone,⁷³ and is trained to find and target people who are most likely to click through an advertisement to buy alcoholic products.⁷⁴

Targeted online advertising by alcohol retailers often includes a button, such as 'Buy now' or 'Shop now' to prompt immediate alcohol purchases. For example, 2023 research by FARE and The University of Queensland found that most alcohol advertisements on Meta platforms contained a direct link to the advertiser's website through buttons, with two-thirds of alcohol retailer advertisements including a 'Shop Now' button.⁷⁵ Another recent Australian study found that the vast majority (84%) of social media alcohol advertisements contain buttons encouraging people to interact with them, and over a third (39%) of all advertisements contain a button directing people to an online platform where alcohol is sold.⁷⁶

This is coupled with alcohol retailers relentlessly promoting rapid alcohol delivery, with many companies offering delivery in less than 30 minutes. Rapid alcohol delivery amplifies the harm from predatory targeted alcohol advertisements, pushing people to buy alcohol impulsively from their phones at the touch of a button and have it delivered in fast timeframes.

Predatory online alcohol advertising linked with rapid alcohol delivery is a highly dangerous model of alcohol marketing and supply, which causes serious harms, including deaths. In 2021, Jimmy Brings was investigated by the NSW alcohol regulator over the death of a 49-year-old man. Jimmy Brings delivered the man nearly daily deliveries of wine and spirits. The company sold him \$24,000 worth of alcohol across almost 300 orders, often multiple bottles a day, in the three years prior to his death. On one occasion, he placed an order before placing the exact same order 10 minutes later.⁷⁷

Shanna Wan, CEO of Sober in the Country, and Local Hero – Australian of the Year in 2022, spoke to FARE about the unsafe online environment created by online alcohol marketing for her community (see story below).

Another community member, Alex Bagnara spoke to FARE about her close friend who died from kidney failure that was secondary to alcohol-related liver disease. Alex believes her friend's alcohol use intensified when he started to have alcohol delivered during the COVID-19 pandemic lockdowns through a company that delivers alcoholic products in as little as 20 minutes and spoke about the contribution of online alcohol advertising and sale to the harms faced by her friend (excerpts below, see her full story [here](#)).



“I can’t begin to tell you how frequently I hear from people in my community who are trying to stay sober, but they are seeing this avalanche of alcohol advertising coming at them on social media. It is absolutely overwhelming.

Young people and people who are in detox and early recovery are really struggling with the ads they are seeing online.

They’re being targeted by algorithms, and they don’t even know how it is happening. It’s insidious, it’s constant, and there’s no getting away from it.

When these ads are linked to rapid online delivery, bringing alcohol into people’s homes in less than 30 minutes, they are even more harmful. People are seeking help for alcohol dependency and then in their face is an ad saying, ‘I can bring this to your door’.

I know a lady who died recently, she drank herself to death in her own home, and that grog was being delivered to her religiously. It’s just devastating.”

Shanna Whan

CEO Sober in the Country / Local Hero – Australian of the Year 2022



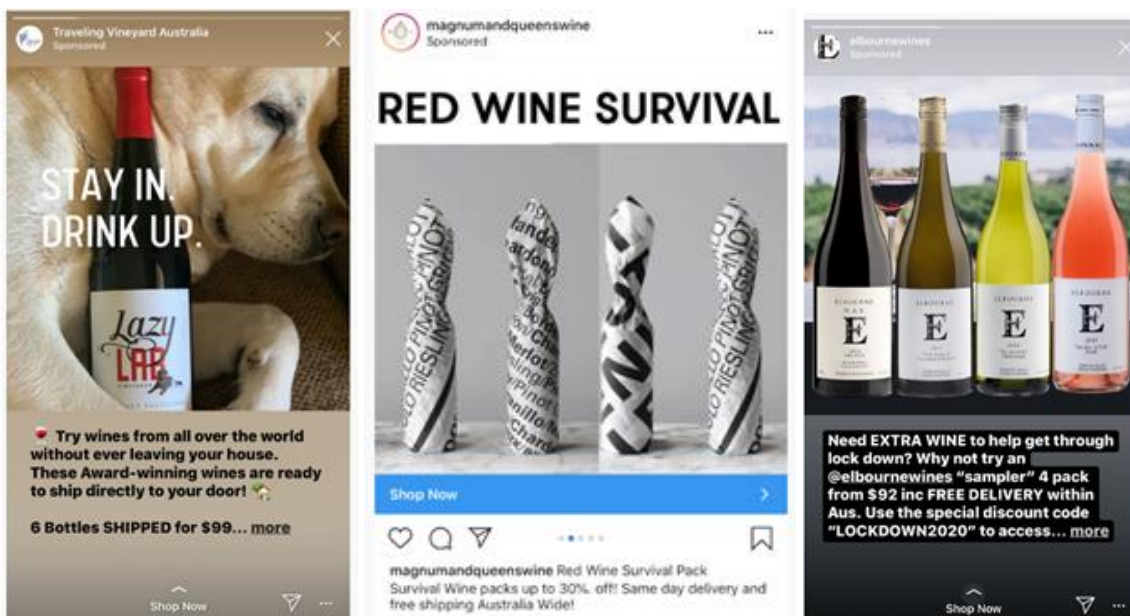
“I think the availability of fast delivery alcohol, and the targeted ads he was shown on social media, contributed to my friend’s death.”

“Alcohol companies would send him push notifications with special deals and reminders, when he was in a really vulnerable state.”

“They would deliver him alcohol with little or no vetting. I am sure that there were times when he was sold alcohol online, while already intoxicated – and that if he had gone into a licensed premises, he may have been denied service.”

Alex Bagnara

The COVID-19 pandemic provided an unfortunate example of how online platforms have been used for harmful alcohol advertising. During a time when the Australian community were experiencing heightened levels of isolation, anxiety, and economic uncertainty,⁷⁸ alcohol companies used online platforms to profit from Australians when they were doing it tough to promote alcoholic products as a way to cope and feel better during the pandemic (see examples below).⁷⁹ Advertising alcohol in this way was extremely harmful, as scientific evidence shows that alcohol use can contribute to increased stress, anxiety, and depression in the long-term and increased risk of attempted suicide.^{80, 81} Further, this advertising went directly against the evidence-based NHMRC Australian Guidelines to Reduce Health Risks from Drinking Alcohol, which state that alcohol should not be used to cope with stress and anxiety, as it can amplify these problems.⁸¹



When FARE asked the community to share how they have been impacted by alcohol companies' marketing during the pandemic, the volume of alcohol advertising, and the harmful sentiments promoted in this advertising, were reflected in comments by the community.

"I've noticed an increase in alcohol advertising on Spotify, for example Smirnoff vodka. As someone who has been proudly sober for 12 years, I wish I could opt out of certain kinds of ads appearing in my playlists as this makes listening to music, something I usually use to soothe me, triggering."

"I have noticed a huge increase in ads for alcohol on social media and streaming websites - even SBS on demand of all places. I have found them disgusting and blatant. My Mother has an alcohol dependence and to see this type of explicit advertising at a particularly vulnerable time for her and many people is beyond unethical."

"I get numerous ads on social media promoting alcohol every day. It's a disgrace."

Alcohol companies' targeting of people with advertising that is tailored specifically to appeal to them, designed to influence them to make impulsive purchases, and sent directly to the palm of their hand through their devices, makes it difficult for people who want to avoid or reduce alcohol use.

A survey by FARE and VicHealth conducted with 220 people seeking to reduce alcohol, gambling and unhealthy foods found that over 90% of participants were concerned about online advertising for the

products they are trying to reduce and 83% felt that seeing marketing for these products makes it harder for them to reduce their use or consumption of these products. Participants indicated they would prefer to see less or no online advertising for the products they are trying to reduce (between 89% and 96%) and 42% stated unprompted that they want to see better regulation of this advertising.⁸²

“I struggle with alcohol and have struggled with gambling in the past so when I see [online advertisements], I sometimes get tempted and triggered...The constant bombardment with the marketing is wearing down my resilience.” – FARE Survey Participant

“I am an alcoholic and I feel targeted with marketing that promotes alcohol despite choosing preferences within browsers not to see alcohol.” – FARE Survey Participant

Community support for measures to address online alcohol advertising

There is strong community support for measures to keep Australians safe from online alcohol advertising.

In a nationally representative survey commissioned by FARE, over three quarters of Australians agreed that products with an age restriction should not be advertised or placed where children would be exposed to them.⁸³ Similar support was observed in a national survey conducted in 2023, which found that 74% of Australians support laws that protect children and young people from seeing alcohol advertisements when they are online.⁸⁴

In another nationally representative survey, 82% of Australians indicated concern about digital platforms collecting their personal data that alcohol companies can then use for marketing purposes, and three in four Australians (76%) agreed that alcohol companies should not be allowed to collect their data online and use it to target them with alcohol marketing.⁸⁵

Similar public concern and sentiment has been observed in representative surveys of Australians living in Queensland, South Australia and the Australian Capital Territory, in which between 72% and 75% of people agreed that data on people’s activity online should not be collected or used to market alcoholic products. These surveys also showed that the majority of people agree that alcohol companies should not be allowed to send push notifications to a person’s phone prompting them to purchase alcohol (77%-84%) and that there should be strong penalties for alcohol companies that advertise to people who have opted out of this advertising (78%-87%).^{86, 87, 88}

International approaches to harmful online advertising

The need for government regulation to address harms from online advertising is being recognised internationally, particularly the need to protect children from these harms.

In 2023, the United Kingdom (UK) Government announced its intention to introduce a new regulatory framework for online advertising, building on and complementing its Online Safety Act 2023. The Government identified harmful digital marketing as a regulatory gap between online safety, privacy and competition and consumer protection regulations in the UK, and the UK Government’s Online Advertising Programme consultation specifically identified advertising for alcohol, gambling and unhealthy foods as harmful advertising content.⁸⁹

As part of its Online Advertising Program reforms, the UK Government has announced that it will introduce legislation to protect children and young people from the content, targeting and placement of advertising for products that are illegal to be sold to them, including alcohol, gambling and e-cigarettes.⁹⁰

Article 28 of the European Union’s Digital Services Act, which came into effect in 2022, requires online platforms not to engage in any targeted advertising based on profiling of a person (by processing their personal data), where they are reasonably certain the person is a minor.⁹¹

Rights and best interests of the child

Article 13 of the United Nations Convention on the Rights of the Child states that the best interests of the child is the primary consideration in actions and decisions concerning children.

In the General Comment on children’s rights in relation to the digital environment, the United Nations Committee on the Rights of the Child set out that the best interests of the child should be “a primary consideration when regulating advertising and marketing addressed to and accessible to children,” and that businesses should be prohibited by law from “profiling or targeting children of any age for commercial purposes on the basis of a digital record of their actual or inferred characteristics, including group or collective data, targeting by association or affinity profiling.”⁹²

New measures in the Act to keep Australians safe from harmful online advertising

Recommendation 2: Regulate harmful online advertising under a new scheme in the Act.

Recommendation 3: Define harmful online advertising to include advertising or promotion of addictive and harmful products (including alcohol), and brands or businesses associated with those products.

Recommendation 4: Require online platforms to ensure that platforms children can access are free from harmful advertising.

Recommendation 5: Require online platforms to ensure people are not targeted with harmful advertising on their platforms, and that opt-in consent is required to be shown marketing for harmful product advertising.

Recommendation 6: Require online platforms to ensure all harmful advertising on their platform includes an evidence-based warning.

The health, wellbeing and online safety of children, individuals and the community should be higher priorities than the profits of online platforms and companies selling addictive and harmful products.

Harmful online advertising is a significant online harm that is not regulated under the Act. This is a major gap in the Act, and Australia’s regulatory system more broadly – other than with respect to tobacco advertising, which has been prohibited in Australia since 1992, including all forms of online tobacco advertising or promotion.

The issues we raise in this consultation are similar to those we have raised in recent Australian Government consultations on the review of the Privacy Act, the Basic Online Safety Expectations, the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill, and the Australian Competition and Consumer Commission’s Digital platform services inquiry 2020-2025. However, other legislative instruments are all currently limited in their capacity to comprehensively address the issue of Australians’ online safety from advertising of addictive and harmful products.

The eSafety Commissioner has previously noted that harmful and targeted advertising, including advertising relating to alcohol and gambling, is a cross-cutting online harm concerning various government departments and regulators that raises regulatory concerns.⁹³

The extensive profiling and targeting of children with harmful advertising on online platforms is harmful to children, undermines their rights, and is inconsistent with the best interests of the child principle. Children should be protected from these practices, including targeting with or exposure to online advertising for alcohol, a product that it is dangerous for children, and illegal to sell to children.

Additionally, people should be protected from data processing and advertising practices on online platforms that disproportionately target people experiencing vulnerabilities to alcohol and other harmful and addictive products, and that exploit and exacerbate those vulnerabilities.

Measures to protect children and individuals from harmful online advertising

To address this regulatory gap, the Act should introduce new measures that create obligations for online platforms to practise ‘safety by design’ by ensuring they do not enable harmful advertising practices on their platforms.

These measures should be designed to ensure:

1. Online platforms that children can and do access are free from harmful advertising.
2. People (including children) are not targeted with harmful online advertising.
3. People are not shown harmful product advertising online unless they provide opt-in consent to do so.

Targeting should include:

- presenting or directing harmful advertising to a person based on their data or information, or group or collective data or information, or
- personalising or tailoring advertising based on a person’s behaviour, characteristics, preferences, interests, or vulnerabilities.

Harmful online advertising warnings

In addition, online platforms should be required to ensure all harmful online advertising carries clear evidence-based warnings about the advertised product or platforms.

People should have the right to clear information and warnings about harmful and addictive products when they are advertised or promoted to them. Substantial research, including research on tobacco and alcohol health warnings, has found that health warnings increase people’s understanding of the risks from harmful and addictive products.^{94,95}

Health labels on both alcoholic products, and in the bars, bottle shops and casinos where alcohol and gambling use takes place is a well-established norm. This includes mandatory pregnancy health warnings which are required on the labels of alcohol products.⁹⁶

Warnings are already required on online advertising for some harmful or high-risk products. Health warnings have been required on tobacco products nationally since 1973, and were required on tobacco advertising in some jurisdictions from 1987⁹⁷ until tobacco advertising was comprehensively prohibited in Australia in 1992.⁹⁸

Since March 2023, interactive wagering and betting services, such as online or telephone betting, have been required to include nationally consistent taglines in their advertising warning people about the risks and harms from gambling, informed by behavioural research.⁹⁹

Mandatory statements and health warnings are also required to be included with online advertising for certain therapeutic goods including with social media advertising.¹⁰⁰

Online platforms have voluntarily introduced disinformation and COVID-19 labelling systems over the last three years, demonstrating that harmful online advertising warnings could be readily implemented.

There is strong support among Australians for health warnings on alcohol advertising. Representative surveys of Australians living in Queensland, South Australia and the Australian Capital Territory have shown strong support for health warnings on alcohol advertisements, with 78%-84% of people agreeing that health warnings should be shown on all alcohol advertisements online.^{101, 102, 103}

Regulation of harmful online advertising in the Act

Measures to address harmful online advertising should be included in the Act, rather than relying on industry codes. Industry codes have been demonstrated to be ineffective for addressing harmful online advertising, and major online platforms have shown they will not take responsibility to prevent harms in the absence of government regulation due to their vested commercial interests.

For example, leaked Meta research and documents have demonstrated Facebook is aware of how its platforms harm its users, including children, but it refuses to take meaningful actions to prevent harms from online marketing because this would conflict with its business objectives.^{104, 105}

In July 2021, before the release of the UK's Age Appropriate Design Code, Facebook announced that it would "only allow advertisers to target ads to people under 18 (or older in certain countries) based on their age, gender and location."¹⁰⁶ Following these claims, an investigation by Reset Australia found that Facebook continues to harvest children's data, such as their browsing histories and other online activities, through the Facebook pixel.¹⁰⁷

In Australia, research has consistently found that self-regulatory alcohol advertising codes are ineffective and unenforceable.^{108,109} This includes the Alcohol Beverages Advertising Code (ABAC), which is developed and administered by the alcohol industry. Research has found that ABAC is ineffective at reducing exposure to alcohol advertising by the people most at risk of harm from alcohol use, including young people.^{110,111}

The failure of industry codes to effectively prevent online harms was acknowledged in the Australian Government consultation on the Basic Online Safety Expectations, which raised the need for government regulation to ensure safe online environments. The National Preventative Health Strategy 2021-2030 also states that public health policies must be protected from influence by vested and commercial interests.¹¹²

3. Additional issues

Duty of care and best interests of the child

This section of the submission addresses:

- **Terms of Reference 5:** Whether the regulatory arrangements, tools and powers available to the Commissioner should be amended and/or simplified, including through consideration of:
 1. the introduction of a duty of care requirement towards users (similar to the United Kingdom's *Online Safety Act 2023* or the primary duty of care under Australia's work health and safety legislation) and how this may interact with existing elements of the Act,
 2. ensuring industry acts in the best interests of the child.
- **Issues Paper question 21:** Should the Act incorporate any of the international approaches identified? If so, what should this look like?
- **Issues Paper question 22:** Should Australia place additional statutory duties on online services to make online services safer and minimise online harms?

Recommendation 7: Introduce a statutory duty of care for online platforms, which includes duties to:

- a) ensure advertising systems, practices and content are not harmful to people who use the platform, and**
- b) design online platforms that are accessed by children to operate in children’s best interests and not be harmful to children.**

FARE supports the introduction of a statutory duty of care for online platforms. We believe online platforms should bear legally enforceable responsibilities for designing their platforms to ensure they are safe for users, and implementing appropriate systemic risk assessment and harm mitigation measures to avoid or mitigate harm before it happens. This should include ensuring their advertising systems (including algorithms and recommender systems), practices and content are not harmful, particularly to children and other people at higher risk or experiencing vulnerability, rather than individual users bearing the burden of examining and evaluating data and advertising systems or practices, or an approach focused on removing harmful advertising content after it has been shown to users.

FARE also strongly supports the introduction of a statutory duty for online platforms to design platforms that can be accessed by children in children’s best interests. This would be consistent with Article 13 of the United Nations Convention on the Rights of the Child, under which the best interests of the child must be the primary consideration in actions and decisions concerning children.

This duty should include designing systems, assessing risks, and implementing suitable measures and processes to mitigate the risks of harm to children on online platforms they can and do access, including harm from advertising systems, practices or content. It should include obligations consistent with the advice of the United Nations Committee on the Rights of the Child in its General Comment on children’s rights in relation to the digital environment that businesses should be prohibited by law from “profiling or targeting children of any age for commercial purposes on the basis of a digital record of their actual or inferred characteristics, including group or collective data, targeting by association or affinity profiling.”¹¹³

If a statutory duty of care, including a duty to design platforms in children’s best interests, is introduced, this should include obligations to ensure the following safety outcomes (consistent with the measures recommended in section 2):

1. People (including children) are not targeted with harmful online advertising.
2. Online platforms that children access are free from harmful advertising.

Penalties and enforcement powers

This section of the submission addresses:

- **Issues Paper question 17:** Does the Act need stronger investigation, information gathering and enforcement powers?
- **Issues Paper question 18:** Are Australia’s penalties adequate and if not, what forms should they take?

Recommendation 8: Regulate harmful advertising by imposing obligations on online platforms with significant penalties for breaching the obligations, rather than relying on removal or remedial notices.

Recommendation 9: Significantly increase financial penalties under the Act to ensure they act as effective deterrents for large multi-national online platforms, according to the scale of their profits.

If measures to address harmful online advertising are included in the Act, FARE recommends that these measures should impose clear and direct obligations on online platforms, and significant penalties for

breaching the obligations. They should not rely on a notice and take-down approach, under which the eSafety Commissioner gives notices to online platforms to desist from harmful data processing or advertising practices, or to remove harmful advertising material from their platforms.

This approach is not effective to keep people safe from harmful online advertising, or to deter online platforms from engaging in harmful data processing and advertising practices. The ephemeral nature of online advertising is such that harm will already have been caused by the time the Commissioner issues a notice and an online platform removes the advertising material. In addition, it would not effectively deter online platforms if there were no risk of penalty unless they were to refuse to comply with a notice.

In addition, FARE recommends that the financial penalties under the Act should be significantly increased from their current level. Financial penalties should be more commensurate with those in international jurisdictions to ensure they act as effective deterrents for large multi-national online platforms, according to the scale of their profits.

Transparency and access to data

This section of the submission addresses:

- **Issues Paper question 24:** Should there be a mechanism in place to provide researchers and eSafety with access to data?

Recommendation 10: Introduce measures requiring online platforms to provide:

- a) clear explanations about how algorithms and recommender systems are used to make predictions, recommendations, or decisions about which, and how, specific advertising content is sent to individuals, and**
- b) accessible data and information about advertising delivered on their platforms through a publicly accessible archive of advertising content.**

FARE strongly supports the introduction of mandatory measures and mechanisms to increase the transparency of online platforms' practices to the public, and access to data by researchers, civil society organisations, eSafety and government.

Research by FARE and The University of Queensland on the digital marketing landscape has demonstrated that leading social media platforms fail to make the operations of their advertising models transparent enough for independent observation and monitoring.¹¹⁴

Although online platforms and advertising agencies have access to detailed information about the online advertising and marketing activities they enable, in the absence of regulatory requirements for transparency, they fail to make this information accessible. This means that the true nature and extent of harmful online advertising practices remain largely under the radar and online platforms are not held accountable for the harm their business actions cause.

Regulatory measures compelling transparency and accountability of online platforms are essential for protecting people from harmful online advertising, and prioritising people's health and safety. We recommend the introduction of measures requiring online platforms to make data and information accessible about their practices, including in relation to data processing, algorithms, recommender systems and targeted advertising.

Specifically, online platforms should be required to provide clear and simple explanations about how algorithms and recommender systems are used to make predictions, recommendations, or decisions about which, and how, specific advertising content is sent to individuals.

In addition, online platforms should also be required to provide accessible data and information about advertising delivered on their platforms through a publicly accessible archive of advertising content.

These measures would enable observation, monitoring and research into harmful advertising on online platforms by the public, civil society organisations, researchers, eSafety and government.

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