



**Review of the
Australian Communications and Media
Authority**

**Invitation for public comment on
Issues Paper, July 2015**

Obesity Policy Coalition's Submission

13 August 2015

Executive Summary

This submission from the Obesity Policy Coalition ('OPC') focuses upon the role the Australian Communications and Media Authority (ACMA), or any new broadcasting agency, should play in protecting children from unhealthy food advertising that may be harmful to them. There is sound evidence that unhealthy food advertising influences children's food preferences, requests and consumption and is a probable causal factor in weight gain and obesity.

The OPC recognises that unhealthy food advertising to children is not a focus of this review. However, it is very concerned that when it comes to unhealthy food advertising, the ACMA is failing to meet the objectives of the *Broadcasting Services Act* 1992 to protect children from advertising that may be harmful to them. The ACMA reviewed its protection of children from unhealthy food advertising during the 2007 – 2009 reviews of the Children's Television Standards and in a 2011 report on the self-regulatory codes applicable to food advertising. However, contrary to submissions from numerous public health and consumer organisations, and powerful evidence about the impact of this marketing, it decided against ongoing monitoring of this type of advertising or strengthening existing restrictions in any meaningful way.

The OPC submits that since these reviews were undertaken, even stronger evidence of the relationship between unhealthy food advertising and children's health has emerged, the national and international policy landscape has changed, the food and advertising industries' self-regulatory codes have been shown to be ineffective to reduce children's exposure to this type of advertising (and have in fact been eroded) and advertising via new and emerging technology has become more insidious and far reaching (with little regulation). Against this backdrop, consumers are clear that they want greater regulation to protect children from this type of advertising. The OPC has advocated to ACMA and others for stronger restrictions on unhealthy food advertising to reduce children's exposure, however despite the developments identified above, no action has been taken.

Accordingly, the OPC submits that that the Department of Communications should take this opportunity to comprehensively review the co-regulatory system applicable to unhealthy food advertising in Australia and in particular, consider whether ACMA is meeting its obligations to inform itself of the evidence and acting to protect children from unhealthy food advertising that may be harmful to them. It should also consider whether the accessibility and efficiency of ACMA's complaints handling procedures may be improved, as well as the benefits of enabling ACMA to commence its own actions for breaches of the codes and standards.

If ACMA is failing to protect children from unhealthy food advertising, the need for a strengthened co- or full- regulatory approach to these issues must be explored.

Introduction

The Obesity Policy Coalition ('OPC') is a coalition between Cancer Council Victoria, Diabetes Victoria and the WHO Collaborating Centre on Obesity Prevention at Deakin University. The OPC advocates for evidence-based policy and regulatory change to address overweight, obesity and unhealthy diets in Australia.

We are grateful for this opportunity to comment on the Australian Government Department of Communications' Review of the Australian Communications and Media Authority – Issues Paper, July 2015. The OPC's interest in this review relates to the term of reference regarding the future objectives and function of the Australian Communications and Media Authority (ACMA). In particular, its objectives and functions to protect children from advertising that may be harmful to them.

In this context, we submit that the ACMA is failing to meet its obligations under the *Broadcasting Services Act 1992* and international policy to protect children from unhealthy food advertising that may be harmful to them. It submits that the Department of Communications (DoC) and ACMA should review the co-regulatory system applicable to unhealthy food advertising in Australia and in particular, consider whether ACMA is meeting its obligations to inform itself of the evidence and protect children from this type of advertising. The DoC should also consider whether ACMA's complaints handling procedures may be improved to ensure more transparent, efficient and meaningful outcomes.

1. Background

(a) The problem of unhealthy food advertising to children

There is a vast amount of food advertising to children on television in Australia, most of which is for unhealthy products.¹ Food advertisers also frequently target children with integrated campaigns run across a range of channels, including children's magazines, websites, outdoor media, direct mail, digital engagement, email and food packaging.² Promotional techniques used by food companies to target children include offers of 'premiums' with products, such as free toys and competitions, endorsements by popular children's personalities or characters, 'tie-in' promotions of products with children's films 'advergames' (computer games) on food company websites, and children's clubs on food company websites.³ Leading advertisers spend a fortune on advertising, with McDonald's, Nestle and Mars spending \$74.1m, \$59.4m and \$32.9m respectively in 2013.⁴

As discussed in further detail below, there is substantial and compelling evidence that food advertising influences children's food preferences, requests and consumption, and is a probable causal factor in weight gain and obesity. It also undermines healthy eating messages from parents, schools and government. This is of serious concern when nearly a quarter of Australian children are overweight and obese. Food advertising to children also raises serious ethical concerns, as children do not have the cognitive capacity to understand and resist the influence of advertising.⁵

(b) ACMA's current role in relation to unhealthy food advertising to children

Under the *Broadcasting Services Act 1992* (the Act) the ACMA has wide reaching powers to monitor, and introduce a code or standards to restrict, unhealthy food advertising to children.

A key objective of the Act is 'to ensure that providers of broadcasting services place a high priority on the protection of children from exposure to program material (including advertising material) which may be harmful to them'.⁶ To achieve this objective, codes of practice may be developed for sections

¹ Kelly B, Chapman K, King L, Hebden L. Trends in food advertising to children on free-to-air television in Australia. *Australian and New Zealand Journal of Public Health* 2011; 35(2): 131-134

² For more information, see the OPC's Policy Briefs on [Food Advertising to Children](#) and [Advertising unhealthy products to children through advergames, online activities, apps and social media](#).

³ *Ibid*

⁴ Australia's Top Advertisers. *Ad News*, 21 March 2014.

⁵ Kunkel D, Wilcox BL, Cantor J, Palmer E, Linn S & Dowrick P. Report of the APA Task Force on Advertising and Children. Washington DC: American Psychological Association, 2004.

⁶ *Broadcasting Services Act 1992* (Cth), ss. 3(1)(j) and 6.

of the broadcasting industry (in consultation with ACMA, and taking into account any relevant research conducted by ACMA) that relate to:

- ensuring that the protection of children from exposure to program material which may be harmful to them is a high priority; and
- preventing the broadcasting of programs that, in accordance with community standards, are not suitable to be broadcast by the section of the industry.⁷

ACMA may only endorse a code if it is satisfied that the code provides appropriate community safeguards for the matters covered by the code.⁸

The standards and codes that currently apply to unhealthy food advertising to children are the Children's Televisions Standards (CTS) and the Commercial Television Industry Code of Practice (CTICP). However as discussed below, there is strong evidence that these standards and codes are inadequate to protect children from this type of advertising. There are also indications from government that these standards and codes are in the process of being amended, with existing restrictions on unhealthy food advertising possibly being removed. While a number of food and advertising industry self-regulatory codes also apply to unhealthy food advertising in Australia, there is substantial evidence that these too are inadequate to protect children from this type of advertising and are being eroded. The limitations of these standards and codes are discussed in further detail below.

Under the Act, if the ACMA is satisfied there is convincing evidence that a Code is not operating to provide appropriate community safeguards relating to broadcast advertising, it must exercise its power to determine an appropriate standard. While the OPC has advocated via recent reviews of the CTS and CTICP, as well through letters to and meetings with ACMA, for stronger or new codes or standards to protect children from this type of advertising, no action has been taken.

2. ACMA's previous reviews of its codes and co-regulatory system regarding unhealthy food advertising to children

The ACMA's reviews of advertising regulation in recent years have included the 2007-2009 review of the CTS⁹ ('CTS Review') and a 2011 report on the present system of self-regulation by industry.¹⁰ On each occasion the ACMA decided against revising provisions relating to the regulation of advertising to children in any meaningful way. The ACMA has acknowledged, however, there is limited evidence of the effectiveness of the industry initiatives.¹¹

(a) The ACMA's 2009 CTS review

In its report on the CTS review, the ACMA declined to take action, despite receiving 53 submissions in response to its draft Children's Television Standard in 2008, 45 of which advocated stronger regulation of food advertising to children on television.¹² The ACMA considered that the lack of consensus on the definition of 'unhealthy food', posed a barrier to effective regulation. The ACMA noted the UK's more stringent advertising restrictions¹³ were not suitable for Australia because they

⁷ *Broadcasting Services Act 1992* (Cth), s. 123(3)(b) and 123(2)(a).

⁸ *Broadcasting Services Act 1992* (Cth), s. 123(4)(b)(1)

⁹ Australian Government, Australian Communications and Media Authority; Review of the Children's Television Standards 2005; Final report of the review, August 2009

¹⁰ ACMA, 2011, above n 29

¹¹ Australian Government, Australian Communications and Media Authority, 'Industry self-regulation of food and beverage advertising to children' - ACMA monitoring report, December 2011

¹² *Ibid* at 9

¹³ Ofcom has banned advertisements for HFSS foods and beverages in and around all programs of particular appeal to children under the age of 16, broadcast at any time of day or night on any channel, including subscription television broadcasting, from 1 January 2008. See detailed explanation by Rayner M, Scarborough S of British Heart Foundation Health Promotion Research Group, Department of Public Health, University of Oxford and Lobstein T of International Obesity Task Force, London The UK Ofcom Nutrient Profiling Model Defining 'healthy' and 'unhealthy' foods and drinks for TV advertising to children, October 2009 available at <http://www.dph.ox.ac.uk/bhfhprg/publicationsandreports/acad-publications/bhfhprgpublished/nutrientprofilemodel>

were based on a Nutrient Profile Scoring Criterion ('NPSC') that was not implemented in Australia.¹⁴ This is no longer a barrier, with the NPSC method ratified in 2012 by Food Standards Australia and New Zealand ('FSANZ') for the purposes of assessing health claims on food products.¹⁵ A modified NPSC has also been developed to support the Health Star Rating system. The nutrients and ingredients used to inform this profiling system are based on evidence underpinning the 2013 Australian Dietary Guidelines. A process has also been developed for addressing any anomalies that arise for particular products.¹⁶

The ACMA also declined to take action in 2009 because a literature review prepared for the Authority failed to demonstrate a causal relationship between advertising of unhealthy foods and overweight and obesity.¹⁷ This review was seriously flawed and failed to consider some of the major key reviews of the evidence prepared for the World Health Organization (WHO) on the impact of unhealthy food marketing on children. It also failed to give adequate consideration to the ethical need to protect children from this type of advertising. As discussed below, a substantial amount of evidence has emerged in the interim regarding the influence of food advertising on children and their right to be protected from it. As a result of this evidence, the WHO has resolved that member states, including Australia, should take action to reduce the exposure of children to unhealthy food marketing.

In light of these considerations, the ACMA adopted the 2009 position of the House of Representatives Standing Committee on Health and Ageing, which was that self-regulation should be tested before further regulation was considered.¹⁸

(b) The ACMA's 2011 Monitoring of Industry Self-Regulation

Following the 2009 report, the ACMA conducted 'monitoring' into the efficacy of the self-regulatory system. It reviewed studies that had monitored industry self-regulation of food and beverage advertising to children, and noted there was 'limited research on the effectiveness of industry initiatives' and also 'limited evidence of the benefits of restricting food and beverage advertising'. The ACMA's 2011 report noted:

"Taking into consideration the limited research on the effectiveness of the industry initiatives, the limited evidence of the benefits of restricting food and beverage advertising and the absence of national standard nutrition criteria, the ACMA will not be moving to develop new television standards on food and beverage advertising to children."

"The ACMA will continue to investigate complaints about advertisements during children's programs, including food and beverage advertisements. However, the ACMA does not propose to conduct further monitoring of the RCMI and QSRI initiatives."¹⁹

We consider this proposal not to undertake further review is not consistent with ACMA's role to inform itself and ensure broadcasting regulations provide appropriate community safeguards in the ever-changing media and policy climate.

3. What has happened since these reviews and why ACMA is failing to achieve its objectives to protect children from exposure to advertising material which may be harmful to them?

¹⁴ Australian Communications and Media Authority 'Children's Television Standards Review' Issues Paper, June 2007 at 26

¹⁵ Food Standards Australia New Zealand (2013) *Australian New Zealand Food Standards Code*, schedule 4, standard 1.2.7

¹⁶ For more information, see the Health Star Rating system website at

<http://healthstarrating.gov.au/internet/healthstarrating/publishing.nsf/content/home>

¹⁷ Brand J (2007) *Television Advertising to Children* – Independent literature review undertaken for the Australian Communications and Media Authority.

¹⁸ The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Health and Ageing: 'Weighing it up – Obesity in Australia', May 2009

¹⁹ ACMA, 2011, above n. 29

Since the above reviews, significant evidence has emerged regarding the association of unhealthy food advertising with childhood overweight and obesity, there have been numerous developments in the national and international policy landscape, the few provisions that purport to protect children in the food and advertising industry codes have been further eroded and there is evidence of plans to further limit the few protections provided in the CTS and CTICP. All of this is occurring while consumers are clearly stating that they stronger protections for children from this type of advertising.

(a) Developments in evidence regarding the association between food advertising and childhood overweight and obesity

The WHO, Australia's Preventative Health Taskforce and numerous public health groups and experts have urged the introduction of effective controls on unhealthy food advertising as part of a comprehensive approach to reducing the risks of poor diet and weight gain.²⁰ Since 2010, the WHO has conclusively recognised that a relationship exists between children's exposure to unhealthy food advertising and harmful food behaviours and health outcomes.²¹ Systematic reviews of the evidence in Australia and internationally clearly demonstrate that unhealthy food advertising influences children's food preferences, requests and consumption and is a probable causal factor in weight gain and obesity.²²

Poor diet and elevated Body Mass Index are the two leading contributors to burden of disease in Australia, ahead of smoking.²³ Rates of overweight and obesity remain high across age groups and demographics, including among children. In 2011-12, around a quarter of all Australian children aged 5-17 years (24% of boys and 27% of girls) were either overweight or obese.²⁴ The total costs of obesity in Australia are also high. In 2008 they were calculated to be \$58.2 billion, comprising \$8.3 billion in financial costs and \$49.9 billion in net costs of lost wellbeing.²⁵

In its Final Report to the review of the Children's Television Standards in 2009, the ACMA acknowledged that it is not a health agency and does not have expertise in the evaluation of evidence of the health impacts of unhealthy food advertising. It must therefore be guided by the WHO's findings, and the findings of numerous systematic reviews, that a causal relationship exists between exposure to advertising, unhealthy food choices and poorer health outcomes.

(b) Developments in international and national policy landscape

As the statutory agency charged with responsibility for monitoring, informing and regulating the advertising of unhealthy foods and drinks to Australian children, the OPC submits the ACMA should also be acting in a manner consistent with the approach taken by the Australian Government domestically and in key international fora to address obesity as a risk factor for disease.

²⁰ World Health Organization. Set of recommendations on the marketing of foods and non-alcoholic beverages to children. Geneva: World Health Organization, 2010. Available at http://whqlibdoc.who.int/publications/2010/9789241500210_eng.pdf ; Final report of the Preventative Health Taskforce (2009) Australia: the Healthiest Country by 2020, available at <http://www.preventativehealth.org.au/> ; MacKay S, Antonopoulos N, Martin J, Swinburn B. A comprehensive approach to protecting children from unhealthy food advertising. Obesity Policy Coalition, Melbourne, 2011, available at <http://www.opc.org.au/paper.aspx?ID=foodadvproposal&Type=policydocuments#.VQDp47ccSUK>

²¹ Ibid.

²² Cairns et al, Systematic reviews of the evidence on the nature, extent and effects of food marketing to children. A retrospective summary (2013) 62 *Appetite* 209; Boyland E J and Halford J C G, Television advertising and branding; Effects of eating behaviour and food preferences in children (2013) 62 *Appetite* 236; Jennifer Harris et al, Priming Effects of Television Food Advertising on Eating Behavior (2009) 28(4) *Health Psychology* 404; G Cairns, K Angus and G Hastings, The extent, nature and effects of food promotion to children: A review of the evidence to December 2008, Geneva: World Health Organisation, 2009; G Hastings et al. Review of the research on the effects of food promotion to children (Final report), Prepared for the Food Standards Agency, 22 September 2003; B Kelly et al, Monitoring food and non-alcoholic beverage promotions to children (2013) 14 *Obesity Reviews* (Suppl 1) 59; Shin-Yi Chou, Inas Rashad and Michael Grossman, Fast-Food Restaurant Advertising on Television and Its Influence on Childhood Obesity (2005) 51 *Journal of Law and Economics* 599

²³ B Kelly et al, Monitoring food and non-alcoholic beverage promotions to children (2013) 14 *Obesity Reviews* (Suppl 1) 59.

²⁴ Institute for Health Metrics and Evaluation, Global Burden of Disease Country Profile data for Australia (2014), available at www.healthmetricsandevaluation.org

²⁵ Australian Bureau of Statistics 4338.0 – Profiles of Health, Australia, 2011-2013, Overweight and obesity.

²⁶ Access Economics. The growing cost of obesity in 2008. Diabetes Australia: Canberra, 2008.

In 2009, the Australian government's Preventative Health Taskforce (PHT) considered that the evidence was sufficiently compelling to justify restricting the volume of unhealthy food advertising on television in Australia, as well as the marketing techniques most commonly used by food advertisers to target children.²⁶ The OPC was disappointed that on the same day the Taskforce's recommendations were announced, the ACMA announced the new CTS and confirmed its view that there was inadequate evidence of a link between food advertising and obesity to justify taking action to introduce general restrictions on unhealthy food advertising.²⁷ Clearly there had been no communication between ACMA and what was at the time, Australia's peak preventative health agency.

The Taskforce took the view that: "Phasing out the marketing of unhealthy foods during peak viewing periods and during periods when children and young people are watching television would help to reinforce and normalise healthy eating for Australian children, and enable them to make healthier food choices".²⁸ It found that "on balance, the weight of evidence of the negative effects of inappropriate food advertising on children's knowledge, attitudes, food preferences and consumption is now sufficiently compelling to recommend ameliorative action".²⁹

Accordingly, the Taskforce recommended:

"Phase out the marketing of energy-dense nutrient-poor (EDNP) food and beverage products before 9pm, on free-to-air and Pay TV, and phase out premium offers, toys, competitions and the use of promotional characters, including celebrities and cartoon characters, used to market EDNP foods and beverages to children within four years by:

- Developing and adopting an appropriate set of definitions and criteria for determining EDNP food and beverages.
- Monitoring and evaluating the impact of voluntary self-regulation in reducing children's exposure to unhealthy food advertising
- Identifying any shortfalls within the current voluntary approach, and addressing this through the introduction of a co-regulatory agreement; monitor, evaluate and report on effectiveness of co-regulation
- Introduce legislation within four years if these measures are not demonstrated to be effective."

Six years on, the impact of the self-regulatory codes has not been adequately monitored or evaluated and there is no evidence that children's exposure to unhealthy food advertising has been reduced in any meaningful way.

Internationally, Australia recently co-sponsored a unanimously adopted resolution in the World Health Assembly to endorse the Global Action Plan (GAP) for the Prevention and Control of Noncommunicable Diseases 2013-2020.^{30,31} The GAP builds upon the Political Declaration adopted by Australia and the 192 Member States of the UN at the General Assembly's landmark High-Level Meeting on NCDs in 2012.³²

Both the Political Declaration and the GAP recognise the critical importance of reducing the level of exposure of people to modifiable risk factors such as marketing of unhealthy products, and

²⁶ Final report of the Preventative Health Taskforce (2009) Australia: the Healthiest Country by 2020, available at <http://www.preventativehealth.org.au/>

²⁷ ACMA. *Review of the Children's Television Standards 2005 - Final report of the review*. August 2009. Available at www.acma.gov.au

²⁸ Ibid, Final Report of the Preventative Health Taskforce, pg 122

²⁹ Ibid, Final Report of the Preventative Health Taskforce, pg 125

³⁰ World Health Assembly, Sixty-Sixth Session, *Follow-up to the Political Declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Noncommunicable Diseases*, 25 May 2013 (A66/A/CONF./1) 2013.

³¹ WHO, 2013, above n. 3

³² United Nations General Assembly, Sixty-Sixth Session, *66.2 Political Declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases*, 24 January 2012, (A/Res/66/2), 2012.

specifically recognise that this exposure begins in childhood, underpinning the importance of taking legislative and regulatory measures to protect children from adverse impacts of marketing. Specifically, the GAP involves accelerating implementation of the 2010 WHO Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children, including mechanisms for monitoring children's exposure.³³ Those Recommendations guide efforts by States to design new and/or strengthen existing policies on food marketing communications to children in order to reduce the impact on children of marketing of foods high in fats, trans-fatty acids, free sugars, or salt.

The impact of the WHO recommendations and the GAP on ACMA's regulatory activities relating to food advertising to children is two-fold. First, as the leading international authority on public health, of which Australia is a member state, the WHO's finding that a relationship has been demonstrated between exposure to advertising and harmful food behaviours and health outcomes should be accepted as conclusive.³⁴ Secondly, as the statutory body endowed by Parliament with powers to regulate television advertising, the ACMA should act consistently with Australia's international policy commitments and should give effect to the WHO's recommendations by prioritising restriction of advertising of unhealthy foods to children.

Furthermore, declining to conduct further monitoring in Australia is no longer tenable for a number of reasons. Firstly, the Australian Government has recently acknowledged that evidence suggests the system has not been successful.³⁵ Secondly, the South Australian government has also conducted analyses suggesting the voluntary codes have failed to reduce children's exposure to the marketing of EDNP foods and beverages.³⁶ The South Australian Government therefore developed proposed reforms to industry self-regulation, which would provide greater protection of children within the self-regulatory system, however these were not adopted. This highlights the need for the ACMA to conduct independent monitoring and regulation.³⁷ Thirdly, in the past the ACMA has expressed the view that monitoring of food advertising in so far as it impacts children's health is a matter to be undertaken by the Australian National Preventative Health Agency (ANPHA). However, the ANPHA is now dissolved and under the *Broadcasting Services Act* (Act), the ACMA is charged to monitor the broadcasting industry in pursuit of the objects of the Act. One of the ACMA's key responsibilities in pursuit of the objects of the Act is to ensure that providers of broadcasting services place a high priority on the protection of children from exposure to program material which may be harmful to them including advertising and sponsorship material.³⁸

(c) Evidence of the failures of industry self-regulatory codes, including erosion by the food and advertising industries of these codes

While positive steps by the food and advertising industries to protect children from unhealthy food advertising should be welcomed, ACMA and the broadcasting industry should not look to the Australian Association of National Advertisers' (AANA) or the Australian Food and Grocery Council's (AFGC) codes to satisfy itself that children are adequately protected from unhealthy food advertising on television and in other media.

The AFGC 'Responsible Children's Marketing Initiative' (RCMI) was released on 1 January 2009. It applies to food and beverage advertising (not including fast food advertising) 'directed primarily to'

³³ WHO (2010), above n. 4

³⁴ Ibid.

³⁵ The Australian Government responses to the House of Representatives Standing Committee on Health and Aging report: 'Weighing it up: Obesity in Australia', February 2013

³⁶ Government of South Australia (SA Health) (2012) Discussion paper on food marketing to children, prepared for the national seminar on food marketing to children Adelaide, South Australia 9 May 2012

³⁷ Ibid

³⁸ As discussed in Australian Government, Australian Communications and Media Authority *Review of the Children's Television Standards 2005*; Report of the Review, 2008 at 6

children under 12 by food companies that are signatories. The Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children (QSRI) was released on 1 August 2009. It applies to fast food advertising 'directed primarily to' children under 12 by fast food companies that are signatories. These voluntary codes purport to ensure that food advertising 'directed primarily to children' represents healthier choices.

Other self-regulatory codes (the AANA Food and Beverages: Advertising and Marketing Communications Code and the AANA Code for Marketing and Advertising Communications to Children) contain some (ineffectual) restrictions on the content of advertisements (e.g. ads must not aim to undermine parents in their role of guiding diet and lifestyle choices), but do not impose general restrictions on unhealthy food advertising to children.

The application of these codes is limited in numerous respects, causing them to be highly ineffectual and evidence of why government leadership is urgently needed. For example:

1. The codes do not limit the volume of unhealthy food advertising to children on TV
2. The codes do not apply to all food advertisers
3. The codes only cover advertising *content* that is "directed *primarily* to children" – they do not prevent advertising for unhealthy foods that appeal to both children and adults
4. The Responsible Children's Marketing Initiative and Quick Service Restaurant Initiative use narrow definitions of *media* that are "directed *primarily* to children" but do not prevent unhealthy food advertising during family TV programs – such as reality shows and TV talent quests – that are watched by the greatest number of children
5. Many of the techniques and practices most commonly used to advertise unhealthy food to children are not covered
6. Not all age groups of children are covered
7. The criteria for nutrition and healthier dietary choices are determined by food companies and are vague and unclear – Paddle Pops and Coco Pops are both considered 'healthier' dietary choices under these initiatives
8. The scheme relies entirely on complaints from the public
9. The Advertising Standards Board's (ASB) decisions are inconsistent with the ACMA's position on brand promotion and premium offers
10. The ASB's decisions are completely out of step with prevailing community standards
11. There are no meaningful sanctions for breaches
12. There is no evidence that self-regulation has reduced children's exposure to unhealthy food advertising

There is a simple reason the processed food industry pays for advertisements directed at children: to sell more products. It is therefore unrealistic to expect the industry to voluntarily submit to regulations designed to reduce children's consumption of unhealthy food. Indeed, advertisers' only real incentive to self-regulate is to deflect government regulation that would genuinely achieve this effect. As recent Australian experience has shown, the food industry will only develop and comply with voluntary codes to the extent they create a façade of responsible conduct and are useful as a public relations tool. The voluntary codes the food and advertising industries are operating within do not even come close to adequately regulating the techniques used to market unhealthy food to children.

For more detailed information, we encourage you to see the OPC's [Exposing the Charade – The Failure to Protect Children from Unhealthy Food Advertising](#).³⁹ This report explores the failures and limitations of the self-regulatory codes and the inadequate administration and enforcement of the codes. It also highlights a number of marketing campaigns that have been the subject of ASB and ACMA decisions and outlines why government led restrictions are urgently needed.

It is also concerning that the coverage of these codes is being constantly wound back. For example, a new AANA Practice Note released in April 2014 (without consultation or government oversight) appears to have limited when an advertisement will be "directed to children" and therefore subject to the AANA Codes. In January 2014, the criteria applied under the AFGC's Responsible Children's Marketing Initiative to determine whether a food product is a "healthier dietary choice" appropriate for

³⁹ Available at <http://www.opc.org.au/downloads/positionpapers/exposing-the-charade.pdf>

marking to children was amended to require only that promotions directed to children feature “healthier” products (rather than “healthy” products, as required from 2009 to 2013).

Oversight by government is clearly needed to ensure transparency and accountability in the development and maintenance of the codes in this area. Government determined definitions on ‘directed to children’ and ‘healthier dietary choices’ will also be vital to ensure meaningful application.

(d) Limitations of the CTS and CTICP and intentions to wind back

The CTS and CTICP apply only to advertising on television and provide few protections for children from unhealthy food advertising.

The CTS are primarily concerned with ‘programs for children’ (includes advertising and sponsorship matters). The CTS, however, only applies during and immediately before and after C and P periods and programs (generally no more than 1 hour per day, mainly between 4pm and 5pm) which have very low ratings. Only small numbers of children actually watch television between 4pm and 5pm on weekdays (on average, approximately 200,000 children aged 0-14 years), compared to the very large numbers of children that watch television between 6pm and 7pm on weekdays (on average, approximately 528,000 of children aged 0-14 years).⁴⁰ The most popular programs among children aged 5 years and above are reality TV shows and feature movies. Given the significant numbers of children that watch television outside of C and P periods and programs, the CTS is clearly not exhaustive of the restrictions required around advertising to children under the Act. We understand that the CTS may be reviewed later this year and are concerned that wind back of these protections may be proposed.

The only clauses of the CTICP that relate to unhealthy food advertising (clauses 6.20, 6.23 and 6.24) are of little utility.⁴¹ However, the OPC is very concerned by Free TV’s proposal to remove these clauses from the Code, leaving the protection of children to the CTS and industry codes alone. For the reasons identified above, we strongly disagree with Free TV Australia’s suggestion in its consultation paper that children are adequately protected by the Children’s Television Standards and food and advertising industry codes.

For more information regarding the OPC’s concerns, please refer to the [OPC’s submission to Free TV Australia’s review of the CTICP](#). We also wrote to ACMA on 1 May 2015 to highlight our concerns and urged ACMA to refuse to endorse the code unless amendments were made to ensure that it meaningfully reduced children’s exposure to unhealthy food advertising. We asked ACMA to exercise its powers to review the operation of the existing codes and standards and to determine an appropriate standard (if it agrees the existing protections are inadequate). We also wrote to the Communications Minister Turnbull on 1 May 2015, asking that he intervene to ensure that the ACMA refuse registration of the proposed code and to require the ACMA to take action to monitor unhealthy food advertising on television. We received a acknowledgment from ACMA and have not yet received a response from the Minister’s office. We understand that Free TV Australia’s review of the CTICP has been delayed as it received thousands of submissions, many advocating for stronger restrictions to reduce children’s exposure to unhealthy food advertising on TV.

A copy of the OPC’s letters to ACMA and Minister Turnbull are attached in **Schedules 1 and 2 respectively**.

(e) New and emerging technologies

The CTS, CTICP and industry codes are ineffective to control the exposure of children to innovative digital marketing campaigns.

⁴⁰ ACMA, Children’s television viewing - Research Overview (with Attachment A - Children’s television viewing: community research 2014, and Attachment B - Children’s television viewing: analysis of audience data 2001 - 13), March 2015. Commonwealth of Australia.

⁴¹ See OPC’s submission to Free TV Australia’s review of the CTICP, 1 April 2015. Available at <http://www.opc.org.au/paper.aspx?ID=free-tv-aust-review-commercial-tv-code-practice&Type=submissions#.VcFs0Lcw-Uk>

A range of new marketing platforms and techniques using the internet, tablets, smart phones, Apps and games are increasingly being used by the food and beverage industries to reach children. Distinct from traditional forms of marketing such as television and print media, digital advertising holds particular advantages for advertisers because it: -

- can achieve repetitive and sustained engagement of children, who may play a game for as long as they like, whenever they like⁴²;
- is interactive and involves children in branded communication, playing games, entering competitions and interacting on social networking sites; and
- may engage children in powerful peer-to-peer viral marketing, involving “sharing” with friends.

These characteristics, coupled with the high uptake of Apps, devices and online activities by children, make online and social media marketing strategies cost effective and potent forms of marketing in Australia.

Despite the consensus among peak public health agencies that children should be protected from advertising for unhealthy products, there remains a notable lack of regulation designed to limit children’s exposure to unhealthy food and drink marketing online and through new media. Currently, children are only protected in some new and emerging media through the food and advertising industry codes, and as discussed above, these codes have limited application.

For more information regarding the trends in new media marketing to children of food and beverages in Australia, the impact of online and new media marketing on children’s brand attitudes, food preferences and diets and policy options to reduce children’s exposure to this marketing and improve their health, please see the [OPC Policy Brief: Advertising unhealthy products to children through advergames, online activities, apps and social media - The need for policy reform.](#)

(f) Public opinion data

There is a high level of support for restrictions on unhealthy food advertising, particularly on TV.^{43, 44, 45, 46} For example, a national survey conducted by Cancer Council Victoria in 2012 found that 87% of respondents supported restrictions on unhealthy food advertising that targets children on free to air television and 77% supported a ban on unhealthy food advertising at times when children watch TV.⁴⁷ More than half of the respondents also supported regulations to restrict:

- unhealthy food marketing in children’s magazines;
- the use of unhealthy food products in games and competitions on websites aimed at children;
- the use of email or SMS messages to market unhealthy food to children after they have provided their contact details;
- the use of unhealthy food products or brands shown in movies or TV shows;
- the use of unhealthy food products or brands developing apps that are appealing to children.

⁴² These points are taken from Kaye Mehta et al, ‘Marketing Food and Beverages to Children, on three internet platforms: company websites, popular websites and social network sites – Children and Food Marketing Project Report to SA Health’ Flinders University, April 2010

⁴³ Morley B, Martin J and Dixon H. *Obesity prevention policy initiatives: consumer acceptability*. Centre for Behavioural Research in Cancer, The Cancer Council Victoria. December 2008.

⁴⁴ Morley B. *National Community Survey of TV Food Advertising to Children*. Centre for Behavioural Research in Cancer, Cancer Council Victoria. 7 May 2007.

⁴⁵ SA Department of Health Data collected through the SA Health Monitor in 2006, cited in SA Health. *Television advertising and the consumption of unhealthy food and drinks by children – Consultation Paper*. August 2008.

⁴⁶ Choice. *Little bellies, big problems: How parents, industry and government can solve Australia’s childhood obesity crisis*. 2007.

⁴⁷ Cancer Council Victoria (2012), unpublished data.

Furthermore, more than half of the respondents supported restrictions on the techniques used to market unhealthy food advertising. For example, more than half supported regulations to restrict the use of toys and give-aways, the use of popular personalities or characters, the use of competition and the use of discounts or vouchers for unhealthy food at children's sporting events.⁴⁸

4. Procedural issues – complaint process

Our primary concern with the complaints process to ACMA (and under the CTS and CTICP in particular) is that licensees, the Advertising Standards Board (ASB) and ACMA only investigate breaches following complaints by viewers; neither ACMA nor Free TV Australia undertake any monitoring of compliance with the CTICP, and Free TV Australia and ACMA do not commence their own actions against licensees. Therefore, identification of advertisements in breach of the CTICP depends entirely on those who see them.

This is problematic because it is likely to be extremely difficult for most viewers to access and participate effectively in the complaints process, and because many parents are not even aware of the existence of regulations on television advertising to children. The survey conducted by Cancer Council Victoria in 2007 found almost all parents surveyed (92%) supported monitoring of compliance with advertising regulations, rather than reliance on public complaints.⁴⁹ Making a complaint about a television advertisement requires a high level of understanding of the system and the vast array of codes that apply, in addition to motivation, time, resources and perseverance, and in some cases, legal expertise. The system is slow, incredibly complex, and is likely to be extremely difficult for most viewers to understand and access.

Furthermore, by the time a complaint is considered, the advertising campaign will often be finished, providing no deterrence to advertisers or penalty for failures to comply. With respect to complaints about the content of commercials (except those relating to matters covered by the CTS), the complaint is unlikely to reach the ASB until 10 days or up to 40 days of the advertisement being broadcast. The ASB then typically takes up to eight weeks to deal with complaints. By this time the advertisement is likely to have finished running and children will already have been exposed to its harmful effects. Of even more concern, ACMA can typically take up to five months to respond to a complaint. Accordingly, complaints related to matters covered by CTS (i.e. complaints under clause 6.20) may typically not be dealt with until over 6 months from the date of broadcast.

5. Action sought

We are of the view that the objects of the Act in protecting children are not being optimally met by ACMA. In particular, ACMA's passive approval of industry self-regulation, and refusal to strengthen its standards and codes, is not only failing to meet the objectives of the Act, it is also failing to meet the recommendations of related international policy.

In light of these failures and the recent developments explored above, the DoC and ACMA should take this opportunity to comprehensively review the co-regulatory system applicable to unhealthy food advertising in Australia and in particular, consider whether ACMA is meeting its obligations to inform itself of the evidence and protect children from food advertising that may be harmful to them.

The DoC should also consider whether ACMA's complaints handling procedures may be improved to ensure that they are accessible, transparent, efficient and capable of achieving meaningful outcomes. It should also consider the benefits of ACMA monitoring compliance with the standards and codes and having the power to commence actions against licensees.

⁴⁸ Ibid.

⁴⁹ Morley, B.C. *National community survey of TV food advertising to children*, prepared by the Cancer Council Victoria for the Coalition on Food Advertising to Children (funded by Queensland Health), May 2007.

We maintain the very strong view that any system capable of meaningfully reducing children's exposure would need to:

1. Be co-regulatory or regulatory, with strong and independent administration and oversight;
2. Assess the "healthiness" of products objectively, according to current standards (and be consistent with the *Australian Dietary Guidelines 2013*);
3. Define key terms such as "children" and "advertising" so as to provide meaningful protection against harmful content;
4. Apply to all forms of media, including new and emerging media;
5. Apply to all advertisers equally across the food and beverage industries;
6. Be understandable and accessible to the public; and
7. Impose meaningful sanctions as a disincentive to breach.

As a first step, the ACMA should be exercising its powers to comprehensively monitor children's exposure to unhealthy food advertising on television.

If ACMA (and a co-regulatory approach to unhealthy food advertising) continues to fail to protect children from unhealthy food advertising, the need for a full regulatory approach should be investigated.

For more information about the steps that will be needed to meaningfully reduce children's exposure to unhealthy food advertising (through a co- or full- regulatory approach), please refer to the OPC's report: '[A comprehensive approach to protecting children from unhealthy food advertising and promotion](#)'. The report sets out a plan for comprehensive restrictions on all forms of advertising and promotion of unhealthy food and beverages to children. It specifies how the restrictions should operate, the types of advertising and promotion that should be restricted, and proposes definitions for key terms and phrases such as 'unhealthy food' and 'directed to children'. The blueprint has been backed by all leading Australian public health agencies, including the Australian Chronic Disease Prevention Alliance, the Australian Medical Association, and the Coalition on Food Advertising to Children.

6. Conclusion

We thank the DoC for the opportunity to comment on its Issues paper. While we recognise that unhealthy food advertising is not a focus of this review, we strongly believe that ACMA (or any new broadcasting regulator) has a crucial role to play in monitoring children's' exposure and restricting this type of advertising. While advertising restrictions alone will not halt or reverse the rise in childhood obesity and overweight in Australia, the evidence is clear that they will be an essential component to any multi-strategy approach capable of improving diets and reducing the impacts of childhood overweight and obesity in Australia.

Please contact Nicole Antonopoulos, Legal Policy Adviser to the OPC, on (03) 9514 6386 or at nicole.antonopoulos@cancervic.org.au if you have any queries about this submission or require further information.

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