Exposing the Charade

The failure to protect children from unhealthy food advertising
Prepared by the Obesity Policy Coalition

The Obesity Policy Coalition (OPC) is a partnership between the Cancer Council Victoria, Diabetes Australia - Victoria, VicHealth and the World Health Organization Collaborating Centre for Obesity Prevention at Deakin University. The OPC is concerned about the rates of overweight and obesity in Australia, particularly in children.

Acknowledgements

The Obesity Policy Coalition is grateful for the assistance of its coalition partners in the preparation of this report.

Suggested citation

# Table of contents

5 Executive summary

7 Chapter 1 Background

9 Chapter 2 Three of the key failures

9 Failure one – the codes are seriously flawed

15 Failure two – administration and enforcement of codes are inadequate

18 Failure three – codes have not reduced children’s exposure to unhealthy food advertising

19 Chapter 3 Time for effective action

21 Conclusion

22 Appendix 1
Summary of reviews on the effects of food promotion on children

23 Appendix 2
Co- and self-regulation of food advertising in Australia

26 Appendix 3
Examples of recent ASB and ACMA decisions

32 References
Childhood overweight and obesity is a serious public health problem in Australia with potentially devastating consequences for individuals, families, communities and Australian governments.

There is clear and robust evidence that children’s exposure to unhealthy food advertising influences their food choices, has a negative influence on their diets, and is contributing to increasing rates of childhood overweight and obesity.

The food and advertising industries have been permitted to self-regulate under a range of codes they developed, but these codes are nothing other than an elaborate window dressing. It is a clever public relations strategy designed to deceive governments and the public into believing industry is working to reduce the marketing of unhealthy food to children. The reality is, these industry-devised restrictions provide little or no protection to children and families.

The codes are overly complicated, so parents and other consumers who are motivated to complain about breaches in food advertising to children face a system that is so tricky to navigate it requires a vast reserve of time, patience and diligence.

In the few cases where food industry advertisements have been found to be in breach of the codes, there are no commercial sanctions.

The food industry has been given ample opportunity to demonstrate that it is capable of reducing children’s exposure to unhealthy food advertising through self-regulation, and has failed at every turn.

This report by the Obesity Policy Coalition explores the limitations of the system in relation to the industry codes and their operation, highlighting:

- **Major loopholes**
  - the codes do not apply to all food advertisers
  - 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
  - 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
  - many forms of promotion and media are not covered
  - not all age groups of children are covered
  - the criteria for nutrition and healthy dietary choices are vague and unclear

- **Self interest dictates**
  - the scheme relies entirely on complaints from the public
  - the Advertising Standards Board’s (ASB) decisions are inconsistent with the Australian Communications and Media Authority’s position on brand promotion and premium offers
  - key claims have been dismissed or ignored by the ASB
  - the ASB’s decisions are completely out of step with prevailing community standards

- **The fox is in charge of the hen house**
  - there is a blatant conflict of interest in self-regulation which clearly undermines its effectiveness
  - there are no meaningful sanctions for breaches
  - 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. This report demonstrates that the voluntary codes the food and advertising industries are operating within do not even come close to adequately regulating how unhealthy food is marketed to children. Effective regulation would support the efforts of parents and the investment by national, state and local governments to encourage healthy eating and active living.

The food industry has been given every chance: government must step in to protect children from the influence of unhealthy food marketing. This action is supported by leading international and domestic health agencies, as well as the Australian public.

Overweight, obesity and unhealthy diets are the major cause of preventable disease. Failure to act now will lead to an escalation in the serious public health consequences of these diseases, as well as increasing their already significant economic and social costs.
What is the problem?

Our current generation of children are likely to die at a younger age than their parents due to an unprecedented increase in diet-related chronic disease.¹

Childhood overweight and obesity has dramatically increased since the 1980s, with 25% of Australian children now estimated to be overweight or obese.² The latest data shows that this prevalence has remained at this high level over recent years.³ Many of these children suffer from negative psychological, social and physical impacts such as bullying, low self-esteem, social isolation, and reduced quality of life. These children also have a much greater chance of becoming obese adults, and consequently face increased risks of developing chronic diseases such as diabetes, heart disease and cancer. Such diseases are already burdening Australia’s strained public health system and, if left unchecked, will continue to increase. Urgent action is needed now to prevent and reduce rates of overweight and obesity in children.

A key driver of poor diets in children is exposure to unhealthy food advertising.⁴ Children are being targeted by advertisers using sophisticated campaigns integrated across a range of communications platforms including television, billboards, point of sale, cinemas, sponsorship and also through social media such as Facebook and YouTube. There is sound evidence that this advertising influences children’s food preferences, purchase requests and consumption, leading to poor diets and overweight and obesity.⁵ A summary of the literature reviews on the effects of unhealthy food advertising on children is provided in Appendix 1.

Unhealthy food advertising to children also raises serious ethical issues, as young children in particular cannot properly understand or interpret advertising messages, or recognise that their intent is to persuade rather than entertain or inform, making them particularly vulnerable to this influence.⁶ Recently UNICEF launched the

Chapter 1

Background

Children’s Rights and Business Principles, which have been established, in part, to minimise the negative impacts of business on children and include recommendations around marketing and advertising practices.⁷

Australian children are offered little real protection from the relentless promotion of unhealthy food, the majority of which is the opposite of what is recommended as part of a healthy diet. This drives demand for the very types of processed foods that children should not be eating regularly, such as chips, snacks, confectionery, fast food, soft drinks and cakes. In fact, we know that these “extra” foods make up too great a part of children’s diets—which already contain too few fresh fruits and vegetables.

What has the Government done so far?

Australia has been very slow to act in a decisive way to protect children from the commercial pressures to eat unhealthy food. Some limited restrictions on food advertising to children can be found in the Children’s Television Standards (CTS), the Commercial Television Industry Code of Practice (CTI Code), the Australian Association of National Advertisers’ (AANA) Code for Advertising and Marketing Communications to Children (Children’s Code) and the AANA Food and Beverages Advertising and Marketing Communications Code of 2009 (Food Code). These codes are discussed in more detail in Appendix 2.

However, these restrictions provide very little genuine protection to children. They do not adequately limit the volume of unhealthy food advertising reaching children or curb the powerful marketing techniques used by food companies to influence children such as free toy offers, competitions or brand promotion through the sponsorship of children’s sport.
In 2008, Australia’s National Preventative Health Taskforce (ANPH Taskforce) reviewed the evidence and received submissions on appropriate measures to address overweight and obesity. It concluded that a critical element in a comprehensive strategy to address the problem should be to reduce the marketing of unhealthy food and beverages to children and others. More specifically, the ANPH Taskforce recommended that legislation be introduced if the self-regulatory codes failed to phase out the marketing of energy-dense, nutrient-poor food on free-to-air and pay TV before 9pm, as well as the techniques most commonly used to market unhealthy food across all media, within four years.9

In response to the ANPH Taskforce’s recommendation, the Federal Government encouraged the processed food industry to take action. Further self-regulation was introduced in 2009 under the Australian Food and Grocery Council’s Responsible Children’s Marketing Initiative (RCMI) and the Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children (QSRI). These are discussed in more detail in Appendix 2. These initiatives added extra layers of complexity to the current self-regulatory scheme. In recognition of the level of community concern about unhealthy food advertising to children, the Government also committed to “monitor the impact of these initiatives to ensure their effectiveness in reducing children’s exposure to advertising of energy-dense, nutrient-poor foods and beverages.”10 Consequently, the Australian Communications and Media Authority (ACMA) released a monitoring report in 2012 on the effectiveness of the RCMI and QSRI.11 ACMA concluded that there was no evidence of a significant reduction in the level of children’s exposure to unhealthy food advertising on free-to-air television since the initiatives were introduced. It also recognised that community concerns remain about unhealthy food advertising to children despite the initiatives’ introduction.

Who supports Government regulation?

The Obesity Policy Coalition (OPC) believes that legislation is urgently needed in Australia to protect children from the detrimental effects of unhealthy food advertising. The OPC has published a blueprint, *A comprehensive approach to protecting children from unhealthy food advertising and promotion*12, which outlines how such legislation should operate. The proposal contained in the blueprint is consistent with the recommendations of the World Health Organization, the United Nations Special Rapporteur, and the ANPH Taskforce that children’s exposure to unhealthy food advertising be reduced.

The World Health Organization, after reviewing all the available research on the relationship between food marketing and children’s diets, recommended that governments of Member States lead the development of a comprehensive approach to reduce children’s exposure to unhealthy food marketing (including by addressing the frequency and power of marketing) and eliminate it from children’s settings.13 The United Nations Special Rapporteur specifically examined the impact of self-regulation in his *Report on the Right to Food* submitted in December 2011.14 The Report concluded that industry codes cannot substantially reduce the large volume and high impact of marketing unhealthy foods and beverages to children and recommended that countries introduce regulations as the most effective way to reduce the marketing of unhealthy foods to children.

In addition, there is strong public support in Australia for legislation restricting unhealthy food advertising to children, and not just from parents. A recent survey of Australian adult grocery buyers found that 83% of participants supported a ban on advertising unhealthy foods at times when children watch TV.15 Support for this position is also echoed by the key public health groups in Australia, including the Australian Medical Association, Cancer Council Australia, Diabetes Australia, Public Health Association of Australia, VicHealth and the National Heart Foundation.
The food industry’s self-regulatory scheme has failed to reduce children’s exposure to unhealthy food advertising and its harmful effects in three key ways.

The codes overseeing the marketing of food to children are complex and much effort is required to understand them in order to lodge a meaningful complaint about a breach. This is significant because action can only be taken following a complaint. Complaints are heard by industry panels that, experience shows, often draw conclusions that are well out of step with community standards. In the few instances where advertisers are found to have breached the codes there are no penalties beyond a polite request to withdraw or modify the advertisement. These requests are commonly ignored.

**Failure one – the codes are seriously flawed**

**Codes are extremely complex**

The current regulatory framework that covers food advertising to children is made up of a complex and inconsistent mix of limited government regulation, broadcasting industry and government co-regulation and advertising and food industry self-regulation (refer to Appendix 2). There are a total of seven different codes that are potentially relevant to unhealthy food advertising to children. They are as follows:

- **Government regulation and co-regulation – administered by Australian Communications and Media Authority (ACMA)**
  - The Children’s Television Standards 2009 (CTS) only apply to advertising on free-to-air television and not to other types of media. The CTS contains limited restrictions on the amount and content of advertising during the small number of hours set aside on weekdays for children’s television programs that are classified ‘P’ for pre-school and ‘C’ for children.
  - Commercial free-to-air television broadcasters have also developed the Commercial Television Industry Code of Practice 2010 (CTI Code).
  - Complaints under the CTS are made to ACMA, the government’s communications regulator, and complaints regarding the CTI Code are made to the broadcaster in the first instance, and then to ACMA.

- **Self-regulation by subscription television broadcasters**
  - Advertising on subscription television is self-regulated by the Australian Subscription Television and Radio Association (ASTRA) under the ASTRA Subscription Broadcast Television Codes of Practice (ASTRA Codes).
  - Complaints under the ASTRA Codes are made to the broadcaster in the first instance, and then to ACMA.

- **Self-regulation by the advertising industry – administered by the Advertising Standards Board (ASB)**
  - The Australian Association of National Advertisers (AANA) has developed a Code for Advertising and Marketing Communications to Children (Children’s Code) and a Food and Beverages Advertising and Marketing Communications Code of 2009 (Food Code).
  - The ASB determines complaints under the Children’s Code and Food Code.

- **Self-regulation by the food industry – administered by the ASB**
  - The Australian Food and Grocery Council has developed the Responsible Children’s Marketing Initiative (RCMI) and the Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children (QSRI).
  - The ASB determines complaints under the RCMI and QSRI.
Which of these codes applies in a given situation depends on the type of media used, whether the advertiser is a signatory to the relevant code, and on the precise wording of the code. This makes the self-regulatory scheme virtually impossible for consumers and complainants to navigate. A cynic might suggest it has deliberately been designed to be confusing. While the codes give the appearance of covering a wide range of media and advertising, and seem to promote healthy dietary choices and healthy lifestyles, there are fundamental flaws in the structure, wording and definitions used in codes. This means that in practice, the codes have a very narrow application and are extremely limited in their effect.

Codes do not apply to all food advertisers

Only food companies and advertisers that voluntarily subscribe to the food industry codes are bound by them. For example, major companies that have not signed up to the QSRI include Donut King, Krispy Kreme and Domino’s Pizza.

Consumers must search the Australian Food and Grocery Council’s website to find out which companies are signatories to the RCMI and the QSRI. This creates confusion as to which companies are covered by which code.

Codes only cover advertising content that is “directed primarily to children”

The Children’s Code, Food Code, RCMI and QSRI use narrow definitions and require that the content of an advertising or marketing communication must be “directed primarily to children” to be covered by the relevant code. The ASB has also applied a narrow interpretation in determining whether the content of an advertisement is “directed primarily to children”.

For example, the ASB has held that a number of food advertisements or promotions featuring children or children’s activities are not “directed primarily to children” on the basis that some words in the advertisement are used to address parents or the main grocery buyer, or that the advertisement is intended to evoke adults’ nostalgia for childhood, or that the product advertised is equally enjoyed by adults. Consequently, the codes only apply to advertisements very specifically directed to children and do not cover advertisements that may appeal to both children and adults.

Examples of advertisements which the ASB has held are not directed primarily to children include:

- Kellogg’s LCMs TV advertisements, featuring schoolchildren playing games and betting on the flavour of an LCM bar in a child’s lunchbox. The ASB held that the advertisement was directed to the main grocery buyer, namely parents responsible for preparing children’s lunch boxes.16

A similar view was reached in relation to a more recent Kellogg’s LCM Strawbubbles bar TV advertisement, featuring school children in a schoolyard throwing food to seagulls, with one boy taking an LCM bar from his lunchbox and throwing a piece into the air and the other children squabbling over it. The ASB also held that the advertisement was directed to the main grocery buyer.17
Smarties website, featuring brightly coloured images of Smarties with a colouring-in competition open to children 3–10 years old. The ASB held that the marketing material was designed for adults and the colouring sheet was for parents to give to their children.\(^{18}\)

Kraft Oreo’s TV advertisements, one featuring two primary school boys in a schoolyard with children playing in the background, where the boys play a game involving pulling apart Oreos and nominating the girl that the other boy will have to marry. The ASB held that the advertisement was not directed primarily to children and was directed to the main grocery buyer.\(^{19}\)

A similar view was reached in relation to a more recent Kraft Oreo Double Stuff TV advertisement featuring a girl and her younger brother at their kitchen table, playing games with Oreo Double Stuff cookies. The ASB held that the advertisement was not directed primarily to children and was directed to the main grocery buyer.\(^{20}\)

Hungry Jack’s Kids Club website, which promoted Hungry Jack’s Kids Meals, with information about Kids Club parties and games with pictures for children to download and colour-in. The ASB held that this section of the website was directed to parents to encourage them to have their children’s birthday party at Hungry Jack’s.\(^{21}\)

RCMI and QSRI use narrow definitions of media “directed primarily to children”

A point of difference between the Children’s Code and Food Code on the one hand, and the RCMI and QSRI on the other, is that the Children’s Code and Food Code are only concerned with advertising content “directed primarily to children” and are not concerned with the media in which the advertisements appear (i.e. they do not restrict unhealthy food advertising in children’s television programs or in a children’s magazine, provided the content of the advertisement itself is not clearly targeting children).

In contrast, the RCMI and QSRI also restrict the placement of advertisements in media that is “directed primarily to children”, even if the content of the advertisement itself is not clearly aimed at children. In the case of television, this means P and C programs, some G programs, and – up until mid-2013 – programs where more than 50% of the audience is children under 12. As children only constitute a small proportion of the general population, there are very few TV programs (particularly outside ABC TV) where children constitute more than 50% of the audience. On 1 November 2012, amendments were announced to reduce the 50% threshold to 35% from mid-2013. This means that TV programs where children under the age of 12 make up more than 35% of the audience, will be covered by the definition of media “directed primarily to children”.

Even with this reduced threshold, very few programs that are popular among children are captured. The OPC obtained viewing data for the 20 most popular programs among children (aged 0–12 years) for the period 14 to 29 August 2012. Of these programs, only three attracted an audience share of greater than 50% children (namely Justine Clarke: Songs to make you smile, Bananas in Pyjamas and Shaun the Sheep, all broadcast on ABC TV which has no advertisements). All other programs attracted an audience share of between 8% and 20% children.

Programs watched by the highest numbers of children (which are shown in evening viewing periods) are rarely covered by the RCMI and QSRI because these programs usually also have high numbers of adults in the audience. Children represent only a small proportion of the total population – according to the Australian Bureau of Statistics, children aged under 15...
years constituted only 18.8% of the whole population in 2011. Thus while large numbers of children may be present in the home-viewing audience (e.g. during programs such as Junior Masterchef, X Factor, The Voice and Australia’s Funniest Home Videos) they may nevertheless comprise only a small percentage of the total viewing audience when large numbers of adults are also watching. Restrictions on advertising placement on TV and in other media will only be effective in reducing children’s exposure to unhealthy food advertising if they include media that attracts large numbers (rather than large percentages) of children.

Because of the current requirement in the RCMI and QSRI that children must constitute more than 50% of the audience, or the program must be directed primarily (i.e. specifically and only) to children to be covered by these codes, programs that appeal to families are not covered. Specifically the ASB has held that programs such as Junior Masterchef, The Simpsons, Modern Family, Dancing with the Stars, Home and Away and Australia’s Got Talent, whilst appealing to children, were programs aimed at a family audience and therefore not covered.

For example, in 2010 the OPC made a complaint to the ASB about advertisements for Streets Magnum ice-creams which appeared during Junior Masterchef, Modern Family and The Simpsons. The OPC provided television viewing data showing that Junior Masterchef was the highest rating program for children under 12 in August to September 2010, followed by Modern Family, and that The Simpsons was also among the top 10 highest rating TV programs for children under 12. Despite this evidence, the ASB held that these programs did not have an audience of ‘predominantly’ children and were directed to adults and families.

Advertisements for a range of unhealthy food have been shown during these programs, including McDonald’s, Hungry Jack’s, KFC, Domino’s Pizza, Snickers, Mars and Twix Bars, Coca-Cola, Fanta, V Energy Drink, Red Bull, Smiths Crisps, and Streets Magnum and Nestle Drumstick ice-creams.

More recently, the ASB rejected a complaint about the broadcast of a Kraft’s Chips Ahoy (choc-chip cookies) animated television advertisement during the animated movie Happy Feet. The ASB found that the advertisement did not breach the RCMI because it was broadcast at 9pm when the MA (mature audience) classification applied, and so the audience of the program was not predominantly children and the program was not directed primarily to children (despite the program commencing earlier in the evening). The ASB further found that whilst the animated nature of the advertisement would be attractive to children, the advertisement was directed to parents.

Many forms of promotion and media are not covered

The Children’s Code, Food Code, RCMI and QSRI do not cover a range of promotion techniques and media used to target children, such as:

- **Brand advertising to children** – they only apply to advertising which actually features food or beverage products. Examples of brand advertising include McDonald’s Little Athletics activities, McDonald’s Mac Pack Sporting Program and Cadbury’s Wouldn’t It Be Nice TV advertisements (featuring animated chocolate characters).

This is in stark contrast with the position ACMA has taken in relation to the CTI Code, where ACMA has expressed the view that brand promotion does in fact constitute the promotion of products and services.
Promotions on product packaging, for example:
- Nesquik Shrek the Third cereal boxes
- Coco Pops cereal boxes with Coco Pops monkey
- Billabong, Blue Ribbon and Paddle Pop ice-cream packs with cartoon characters
- Milo cereal with a cricketer on the box

In addition to not covering brand advertising and product packaging, the RCMI and QSRI also do not cover:

Sponsorship of children’s sport, such as:
- KFC Queensland Junior Bulls cricket clinics and KFC Sydney Junior Winter Cricket Twenty20 competition
- Milo sponsorship of kids’ cricket, Milo in2cricket, Milo T20 Blast
- Cottee’s Five-a-side football

- McDonald’s Mac Pack Sporting Program, Hoop Time junior basketball program with Basketball Victoria, Swimming Queensland junior swimming program, the South Australian National Football League junior development program, and sponsorship of Little Athletics in New South Wales, Queensland, Victoria, Tasmania, Western Australia and South Australia.

Under the QSRI, signatories must not give away food or beverage products or vouchers to children as awards or prizes at children’s sporting events unless those products meet the nutrition criteria in the appendix to the QSRI. Despite this, brand promotion for unhealthy food products continues.

Further, the definition of what is a “children’s sporting event” may be interpreted narrowly to only cover events specifically aimed at children, so that signatories can still give away vouchers for unhealthy food and beverage products to children at other types of sporting events or sessions. For example, it is unclear whether training sessions or sporting events that feature (or appeal to) both adults and children are covered.
The RCMI does not cover:

- Confectionery fundraising in schools, for example:
  - Cadbury fundraising – www.fundraising.com.au

- Outdoor media (e.g. billboards), for example:
  - The ASB held that a Coco Pops Splash into Chocolatey Fun! billboard was not covered.\(^\text{28}\)

- Direct/viral marketing to children (post, email, SMS sent by food companies to children), for example:
  - Hungry Jack’s sends food vouchers, birthday cards and other promotional material to members of its Birthday Club website, which is open to children under 12.

The QSRI does not cover:

- Free toys with fast food meals, because the ASB has held that toys offered with children’s fast food meals are integral parts of the meals, and thus not “premium offers” covered by the QSRI. Toy promotions held not to be covered include:
  - McDonald’s Happy Meal toys (e.g. Ice Age\(^\text{429}\), Cartoon Network\(^\text{30}\), Box of Fun toys\(^\text{31}\))
  - Hungry Jack’s Kids Club Meal toys (e.g. Snoopy toys\(^\text{32}\), Sponge Bob Square Pants\(^\text{33}\), Simpsons\(^\text{34}\), Iron Man 2\(^\text{35}\), Golden Compass toys\(^\text{36}\))

![Image of Happy Meal toys](image1.png)

![Image of Couch Toys](image2.png)
Not all age groups of children are covered

There are a range of ages covered in the Codes, for example the CTS and CTI Code apply to children aged 13 and younger and the Children’s Code and the Food Code apply to children aged 14 and younger. The RCMI applies to children aged 11 and younger, while the QSRI applies to children 13 and younger.

The different age-ranges that are considered to be ‘children’ in the codes mean that not all children are protected from the influence of unhealthy food advertising, creating unnecessary confusion and complexity. There is evidence that up to the age of 15–17 years, children generally remain vulnerable to the possibly harmful effects of food advertising and require protection from its influence.37 There is also a link between exposure to food advertising and weight gain and obesity in children and adolescents of all ages.38 Obese children have a 25–50% chance of becoming obese adults, and this rate increases to 78% for obese adolescents.39

Criteria for nutrition and healthy dietary choices are unclear

The RCMI does not provide a single set of nutrition criteria for assessing products but instead refers to “established scientific or Australian government standards.” As there are no agreed national standards for foods that “represent healthy dietary choices”, each company sets its own criteria. For example, Nestle, Kellogg and Kraft each use their own criteria, while Arnott’s and Simplot use New South Wales school canteen criteria, and some companies use a combination of criteria. These various criteria are very difficult to locate and interpret, making it virtually impossible for consumers to determine whether or not a product is a “healthy choice” according to the manufacturer’s criteria.

The QSRI contains an appendix which sets out the nutrition criteria for assessing children’s meals. The criteria state that the meal must be comprised of at least a main and a beverage, and should reflect “general principles of healthy eating as defined by credible nutrition authorities”. The criteria further states that the meal must not exceed certain energy limits for defined age groups (e.g. 2080 kJ per meal for 4–8 year olds) and must not exceed specified limits for saturated fat, sugar and sodium per 100 kJ (note that the limit for fat applies only to saturated fat and not to total fat). This complexity makes it very difficult to calculate whether a meal complies with the criteria or not.

Failure two – administration and enforcement of codes are inadequate

The flaws and inconsistencies in the codes are exacerbated by failures in the process under which the self-regulatory scheme operates. Complaints about food companies’ advertisements to children are often dismissed by the ASB which adjudicates the complaints, even though public opinion and external agencies have come down hard against food industry advertising practices.

The scheme relies entirely on complaints from the public

The self-regulatory scheme relies entirely on complaints from the public to identify breaches. Advertisements are not independently vetted or monitored for compliance. As previously noted, the scheme is extremely difficult to navigate, with seven overlapping codes containing complicated clauses and definitions. Each of the codes applies in different ways to food advertising to children – to different advertisers and products, to different types of advertising and media, and to different age groups of children. This makes it virtually impossible for members of the public to understand which code and provision to complain under, and which regulatory body to lodge the complaint with. The lack of successful public complaints through the system should not be seen as proof the codes are working well, rather that the complaints mechanism is extremely complex and difficult to navigate.

ASB decisions on brand promotion are inconsistent with ACMA’s position

The ASB has consistently held that the Children’s Code, Food Code, RCMI and QSRI do not apply to brand promotion and only apply to the advertising of actual food and/or beverage products.40 The fact that brand promotion is not covered by these codes represents a major deficiency in the self-regulatory scheme.

On the other hand, ACMA has taken a different approach under the CTI Code, recently expressing the view that brand promotion can constitute product promotion. In relation to the television program It’s a Knockout sponsored by McDonald’s, ACMA expressed the view that the references to McDonald’s during the program, including McDonald’s characters, the
'golden arches' and advertising slogans were all associated with the McDonald's brand, with the aim of promoting the products sold. ACMA found that: "The references to McDonald's in the program...constitutes the promotion of, or increases the public awareness of, the McDonald's brand, which because of the McDonald's wide brand recognition, allows people to associate the McDonald's references with the commercial products and services it offers, such that ultimately this increases sales of McDonald's products and services."41

Whilst ACMA's view on brand promotion is encouraging, the ASB has not demonstrated any willingness to change its position on brand promotion under the industry codes.

ASB decisions on premium offers are inconsistent with ACMA's position

The ASB has held that toys offered with fast food meals are not premium offers (i.e. gifts intended to induce purchase of a product) because the toys are an "integral part" of the meals. As such, the promotion of these offers is not considered to breach the QSRI (or the Children's Code or Food Code).

This is inconsistent with ACMA's decision under the CTS, which held that toys offered with McDonald's Happy Meals do constitute "premium offers" because a toy may be a premium regardless of whether it is part of the advertised meal, and it is clear that the toys are intended to induce purchase of Happy Meals.42 In that case, however, ACMA found that the broadcaster had not breached the relevant provision of the CTS because the toy was of lesser importance than, or incidental to, the main product being advertised (the food items). In an earlier decision regarding a television advertisement for Nestle Milo Cereal, ACMA found that a free CD offered in the advertisement was a "premium offer" that formed a substantial part of the product being advertised, and that the broadcaster had breached the CTS.43

ASB decision inconsistent with ACCC's determination in Coca-Cola campaign

In 2008, the ASB rejected a complaint from the Australian Dental Association about Coca-Cola's Myth Busting campaign in which Coca-Cola claimed that it is a myth that Coke "rots your teeth", "makes you fat" and is "packed with caffeine". The ASB held that the campaign was not misleading or deceptive in breach of the Food Code.44

Specifically, the ASB held that the statement “myth: rots your teeth” was not misleading because “most members of the community are becoming aware that good dental hygiene recommends teeth cleaning after consumption and that this component of the advertisement stresses the importance of good dental hygiene.” This was despite the fact that the Australian Dental Association submitted extensive evidence to the ASB that consumption of drinks such as Coca-Cola contributes significantly to dental decay and that the advice provided by Coca-Cola about dental health was misleading.

The ASB also held that the claim that it is a myth that Coca-Cola is “packed with caffeine” was not misleading because the advertisement was not suggesting that there is no caffeine in the product, just that there is less than people think. The ASB did not consider whether the claim that it is a myth that Coca-Cola “makes you fat” was misleading. Whilst the ASB did “express some concern” with “the advertising of the product in a manner that suggested that mothers should approve of the product for their children”, it held that this did not breach community standards because “the advertisement did not suggest excessive consumption of the product”.

In contrast, the Australian Competition and Consumer Commission (ACCC) considered that the claims made by Coca-Cola in the campaign had the potential to mislead and deceive consumers and that the advertisements were “totally unacceptable”.45 The ACCC determined that the advertisement had the potential to mislead consumers by representing that:

- Coca-Cola cannot contribute to weight gain and obesity
- Coca-Cola cannot contribute to tooth decay
- a can of Diet Coke contains half the amount of caffeine of a cup of tea, and
- a responsible parent can include Coca-Cola in a family diet without any regard to the potential for weight gain or tooth decay.
The (then) Chairman of the ACCC, Graeme Samuel, said that the ACCC was “immediately concerned about the misleading messages [the Coca-Cola campaign] was likely to send to consumers and in particular, to mothers who are the decision makers about family nutrition”. The ACCC obtained court enforceable undertakings from Coca-Cola that it would cease making the claims, would publish corrective advertising in every publication in which the myth-busting advertisement was published, and would agree to have its trade practices compliance procedures externally reviewed.

**ASB fails to consider key claims**

The ASB often fails to expressly consider key claims made in complaints. For example, in the complaint made by the OPC about the broadcast of Kraft’s Chips Ahoy (choc-chip cookies) animated television advertisement during the animated movie *Happy Feet*, the ASB only considered whether the advertisement was broadcast in *Happy Feet* and ignored the allegation that the advertisement also aired on television during *Power Rangers* and *Fantastic Four*, programs the OPC claimed were directed primarily to children.46

In relation to the OPC’s complaint regarding McDonald’s Mac Pack TV advertisement and website (refer to Appendix 3), the ASB failed to address the OPC’s claim that brand promotion constitutes product promotion, and did not consider the evidence demonstrating the position taken by ACMA on this issue – namely that the promotion of the McDonald’s brand also constitutes the promotion of McDonald’s products and services.47

**ASB’s decisions inconsistent with prevailing community standards**

While the ASB purports to restrict advertising that is contrary to “prevailing community standards”, its decisions are often far removed from community expectations and preferences relating to food advertising to children. As noted above, while the ASB did not consider the Coca-Cola Myth Busting advertisement to breach prevailing community standards, the ACCC found the advertisement “totally unacceptable”.

In another example, the OPC complained that a series of Nutri-Grain advertisements contravened prevailing community standards by highlighting the nutritional characteristics perceived to provide health benefits (such as high in protein and calcium) while failing to acknowledge the other characteristics (high sugar and low dietary fibre content) that mean Nutri-Grain is an unhealthy food overall. The ASB did not accept that the advertisement breached community standards, taking the view that community standards do not currently expect that an advertisement for a food product will list all, most, or even the most significant elements of a food. It took the view that consumers only expect that the information presented is accurate, and that complete information about the product will be found in store or on the label and packaging material. The ASB failed to expressly consider public opinion data provided by the OPC which demonstrated that over 70% of consumers opposed unbalanced food/brand sponsorship of children’s sports, advertisements that encourage pester power (such as promotions for toys in fast food meals) and unhealthy food advertising during peak children’s viewing times on TV.48 This data is discussed in further detail on page 20.
Failure three – codes have not reduced children’s exposure to unhealthy food advertising

Research has found there is no evidence the current system has reduced children’s exposure to unhealthy food advertising. There is no independent monitoring of food industry advertisements designed to appeal to children. In the few cases where advertisements have been deemed in breach of the codes, there were no financial penalties.

Inherent conflict of interest in self-regulation

There is an inherent conflict between food advertisers’ commercial interests (to advertise in a manner that is effective to sell products) and the public interest (to protect children from advertising of unhealthy products). Self-regulation is incapable of protecting children because food advertisers lack sufficient incentive to develop, comply with or enforce effective restrictions on unhealthy food advertising.

It is worth noting that the ASB Board of Directors includes people who hold executive positions with major advertising and food companies. The ASB is funded by advertisers via a levy that is applied to their advertising spend.

No meaningful sanctions for breaches

According to the ACCC’s Guidelines for developing effective voluntary industry codes of conduct, one of the key requirements for a voluntary code to be effective is that it must impose commercially significant sanctions for non-compliance such as fines, corrective advertising, and/or expulsion from the industry association. The food industry’s self-regulatory scheme fails to meet this key requirement because the codes do not impose any commercially significant sanctions on advertisers who commit breaches.

Instead, the ASB can only request advertisers to modify or withdraw offending advertisements. This is meaningless because advertisements have often finished running by the time the ASB makes determinations. Consequently, there are no effective deterrents against breaching the voluntary codes.

For example, Hungry Jack’s continued to advertise its Kids Club Meal to children after the ASB twice held that the meal breached the QSRI nutrition criteria. The ASB was unable to enforce its determinations, or impose any sanctions on Hungry Jack’s for its repeated breaches of the QSRI. The ASB may also refuse to consider complaints about an advertisement that has finished running or that has been withdrawn after a complaint has been filed.

No independent monitoring or evidence that self-regulation has reduced children’s exposure to unhealthy food advertising

There is a lack of independent monitoring of the self-regulatory scheme and whether it is having any impact on reducing children’s exposure to unhealthy food advertising.

In December 2011, ACMA released a monitoring report on industry self-regulation under the codes. In this report, ACMA examined independent peer-reviewed research conducted by the University of Sydney (in conjunction with Cancer Council NSW) on rates of food advertising by AFGC companies across four days in 2009, and by fast food advertisers across four days in 2010, as well as the AFGC’s own compliance monitoring report, using three months of food advertising data from 2010. ACMA concluded that the impact of the initiatives is unclear. It found no evidence of a significant reduction in the level of children’s exposure to food advertising on free-to-air television since the codes were introduced. It also concluded that community concerns remained about food advertising to children despite the introduction of the codes.

ACMA stated that it did not propose to conduct any further monitoring of the RCMI and QSRI initiatives. There may be potential for the Australian National Preventive Health Agency to take over or lead the future monitoring of unhealthy food advertising to children.

In the meantime, there has been a further independent study published by the University of Western Australia (in conjunction with Cancer Council NSW, SA Health and Medical Research Institute and the University of Adelaide). This study reviewed food advertising broadcast during children’s viewing times (C periods) on free-to-air TV in five major Australian cities from 1 September 2010 to 31 October 2010. It found that advertising for unhealthy food was shown during C periods. This included advertisements featuring premiums, competitions and the use of popular characters, potentially in breach of the co-regulatory scheme. It also noted that C periods are not the time when most children are watching TV and that the current co-regulatory arrangements are therefore not effective in eliminating children’s exposure to unhealthy food marketing during children’s peak viewing times. It concluded that it may be time to identify alternative means of protecting children from unhealthy food advertising.
Self-regulation has failed: legislation is needed

It is clear that the food and advertising industries’ voluntary codes have comprehensively failed on all three counts of content, process and effectiveness. The OPC believes that legislation is urgently needed to protect children from the detrimental effects of unhealthy food advertising. The OPC’s Blueprint for regulation in this area outlines the key features that would be needed for such legislation to be effective.

Legislation needs to:
- apply comprehensively to unhealthy food product and brand advertising directed to children in all forms, media and locations;
- apply to advertising of unhealthy food products, which should be identified using a single common criteria, such as Food Standards Australia New Zealand nutrient profiling scoring criteria;
- apply to advertising of food brands (unless one or more healthy food products is the dominant feature of the advertising);
- minimise children’s exposure to unhealthy food (product and brand) advertising to the greatest extent possible (and not just restrict unhealthy food advertising that specifically targets children);
- apply to marketing to children under the age of 16;
- prohibit unhealthy food (product and brand) advertising on free-to-air television on weekdays from 6–9am and 4–9pm, and weekends and school holidays from 6am–12pm and 4–9pm (times when significant numbers and/or a significant proportion of children are likely to be watching, and during G classification periods);
- be regularly monitored for compliance so that identification of breaches of the legislation is not entirely dependent on complaints from the public;
- be administered and strictly and actively enforced by an agency that is independent of industry and that is given a range of enforcement powers, including the power to seek significant penalties for breaches; and
- be regularly reviewed and evaluated to ensure that it is effective for reducing children’s exposure to unhealthy food advertising, and that it covers emerging media, technologies and advertising techniques.

The OPC considers that legislation that incorporates the above elements would be far more effective at reducing children’s exposure to unhealthy food advertising than the current failed self-regulatory scheme.
Strong support for Government regulation

If the Government introduces such legislation, Australia would join a growing number of countries – including the UK, Sweden, Norway and Quebec, Canada – to have implemented regulations that offer some protection to children from unhealthy food advertising. Such action would also reflect the recommendations of the World Health Organization, the United Nations General Assembly, the United Nations Special Rapporteur’s Report on the Right to Food, and the ANPH Taskforce.53

Comprehensive legislation in this area is also supported by the Australian public. In 2010, Cancer Council Victoria surveyed 1,521 adults nationally to measure public acceptability of obesity prevention policy proposals.54 Amongst other things, it found that an overwhelming majority thought that children should be protected from unhealthy food advertising, with just over 90% of grocery buyers believing the government should regulate unhealthy food advertising on free-to-air TV, and 83% in favour of a ban on unhealthy food advertising at times when children watch TV. A high level of support for restrictions on unhealthy food advertising in non-broadcast media was also found, with 89% supporting restrictions on unhealthy food advertising on children’s websites and 71% supporting restrictions on unhealthy food sponsorship of children’s sports.
This report demonstrates that the existing complex scheme of industry self-regulation of food advertising in Australia has comprehensively failed to protect children from the influence of unhealthy food advertising.

Self-regulation is inherently incapable of improving over time, since unhealthy food advertisers will not voluntarily submit to regulation that is designed to limit the sales and consumption of unhealthy food products. The conflict of interest is just too great. Consequently, there is a need for a fundamental shift in the way unhealthy food advertising is regulated in Australia.

Australian governments have a clear responsibility to act to protect children from the negative influence of unhealthy food advertising on their diets and health. Evidence shows that legislation to restrict unhealthy food advertising would be one of the most effective and cost-effective interventions to address the childhood overweight and obesity crisis. Legislation would have the direct benefit of minimising children’s exposure to unhealthy food advertising and would support other strategies to improve children’s diets, nutrition and health – such as physical activity and nutrition programs in schools, and encouraging food companies to produce healthier children’s products. Current government-funded initiatives, such as the National Partnership Agreement on Preventive Health and the Obesity Prevention and Lifestyle program in South Australia which promote healthy eating messages to children and parents, are being undermined by the high level of sophisticated marketing for unhealthy foods that is targeting children.

By acting now, Australian governments could ensure that the rights and health of Australian children are protected and that they are given the best chance of having a healthy start to life. As part of a multi-strategic approach as recommended by the World Health Organization, legislation to restrict unhealthy food advertising to children would help prevent further increases in rates of diabetes, cancer and heart disease and the associated social and economic costs of these diseases to the Australian community.
## Appendix 1

### Summary of reviews on the effects of food promotion on children

<table>
<thead>
<tr>
<th>Review</th>
<th>Cairns et al. (2009)(^56) (updating Hastings et al. (2006)(^57) and Hastings et al. (2003)(^58)) (Systematic review)</th>
<th>Livingstone (2006)(^59)</th>
<th>US Institute of Medicine (2005)(^60) (Systematic review)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Finding – effect of food promotion on children</strong></td>
<td>Modest evidence that food promotion influences food preferences</td>
<td>Modest direct effect on children's food preferences (also likely to have indirect effect)</td>
<td>Strong evidence: influences children to prefer high-calorie and low-nutrient foods and beverages</td>
</tr>
<tr>
<td><strong>Influences food preferences</strong></td>
<td>Strong evidence that food promotion influences children's food purchase-related behaviour</td>
<td>Evidence not reviewed</td>
<td>Strong evidence: influences children to request high-calorie and low-nutrient foods and beverages</td>
</tr>
<tr>
<td><strong>Influences purchase requests</strong></td>
<td>Modest evidence that food promotion influences children's food purchase-related behaviour</td>
<td>Modest direct effect on children's food choices/eating habits (also likely to have indirect effect)</td>
<td>Strong evidence that food advertising influences children's short-term consumption</td>
</tr>
<tr>
<td><strong>Influences consumption</strong></td>
<td>Small but significant correlation between television viewing and diet quality, obesity and blood cholesterol levels. Research examining associations between food promotion and food related health outcomes has found ‘modest but consistent evidence that the link is causal’. The effects of food advertising are independent of, and just as significant as, other influences on food preferences, requests and consumption and diet and health status.</td>
<td>Modest but consistent association between overall television exposure and weight/obesity. This applies among children and teenagers.</td>
<td>Moderate evidence that food promotion influences the ‘usual dietary intake’ of children aged 2–5 years, with weaker evidence for those aged 6–11 years. Strong evidence that exposure to television advertising is associated with adiposity in children aged 2–11 years and teens aged 12–18 years. Food promotion is a ‘likely contributor’ to less-healthful diets.</td>
</tr>
</tbody>
</table>
Appendix 2

Co- and self-regulation of food advertising in Australia

a) Government regulation and co-regulation – administered by ACMA

The Australian Communications and Media Authority (ACMA) developed the Children's Television Standards 2009 (CTS) pursuant to its powers under the Broadcasting Service Act 1992 (Cth). The CTS only applies to advertising on free-to-air television and not to other types of media. The CTS contains general restrictions on the amount and content of advertising during children's television programs and periods (those classified ‘P’ for pre-school and ‘C’ for children), and one specific provision on food advertising which prohibits advertisements which contain misleading or incorrect nutritional information.

Commercial free-to-air television broadcasters have also developed the Commercial Television Industry Code of Practice 2010 (CTI Code) as required under the Broadcasting Services Act. The CTI Code extends the application of parts of the CTS to advertisements shown outside pre-school and children's programming periods. It provides that television advertisements directed to children for food or beverages should not encourage or promote an inactive lifestyle and unhealthy eating or drinking habits, and must not contain misleading or incorrect nutritional information.

Compliance with the CTS and the CTI Code are licence conditions that apply to all Australian free-to-air commercial television broadcasters (note that the CTS and CTI Code do not apply to subscription television). Complaints regarding breaches of the CTS are made directly to ACMA, whereas complaints regarding breaches of the CTI Code are made to the broadcaster in the first instance, and then to ACMA if the complainant is not satisfied with the broadcaster's response.

b) Self-regulation by subscription television broadcasters

Advertising on subscription television is self-regulated by the Australian Subscription Television and Radio Association (ASTRA) under the ASTRA Subscription Broadcast Television Codes of Practice (ASTRA Codes). Whilst the ASTRA Codes purport to restrict advertising to children, in reality they restrict very few advertising techniques and only on channels that broadcast advertising during blocks of programming aimed specifically at children (currently, the Disney Channel, Nickelodeon, Cartoon Network and Boomerang TV). Complaints regarding breaches of the ASTRA Codes are made to the broadcaster in the first instance, and then to ACMA if the complainant is not satisfied with the broadcaster's response.

c) Self-regulation by the advertising industry – administered by the ASB

The Australian Association of National Advertisers (AANA) established the current national scheme for self-regulating the conduct of advertisers and marketers in 1998. The Australian Standards Board (ASB) determines complaints about food advertising under the AANA scheme. The AANA scheme includes two codes of practice that are relevant to food advertising to children: the AANA Code for Advertising and Marketing Communications to Children updated in 2009 (Children's Code) and the AANA Food and Beverages Advertising and Marketing Communications Code of 2009 (Food Code).

The Children’s Code and the Food Code apply to food advertising (except for product labels and packaging) directed to children aged 14 and younger in most types of media. The Children’s Code and the Food Code apply to “Advertising or Marketing Communications to Children”, which is defined as:

“Advertising or Marketing Communications which, having regard to the theme, visuals, and language used, are directed primarily to Children and are for Product.”
The Children's Code and the Food Code contain several restrictions on the content of “Advertising or Marketing Communications to Children” – for example, advertisements must not aim to undermine parents in their role of guiding diet and lifestyle choices, must not promote or encourage inactive lifestyles or unhealthy eating habits, must not feature premiums that are not integral elements of the products, must not mislead or deceive children in relation to any nutritional or health claim, and advertisements must not imply that a product will give them a particular advantage over other children.

Whilst the Children's Code and the Food Code create the impression of limiting advertising of unhealthy food to children, in practice these codes have been narrowly applied by the ASB. The ASB has adopted a very literal interpretation of these Codes, particularly in relation to whether an advertisement is “directed primarily to children”. Consequently, food advertisers are not often found to be in breach. Further, neither the Children's Code nor the Food Code contains any restriction on the amount, timing or placement of unhealthy food advertising in media or in settings in which children are likely to be present. Thus these Codes have not meaningfully reduced children's exposure to the large volume of unhealthy food advertising in media across Australia.

d) Self-regulation by the food industry – administered by the ASB

In response to Government encouragement, in 2009 the processed food industry released two further voluntary initiatives that relate to food advertising to children: the Australian Food and Grocery Council’s Responsible Children’s Marketing Initiative (RCMI) and the Quick Service Restaurant Industry (QSRI) Initiative for Responsible Advertising and Marketing to Children. Only food companies that are signatories to these initiatives are bound by them. A new version of the QSRI took effect on 1 November 2012 which brought its scope into closer alignment with the scope of the RCMI. Unless otherwise stated, references to the QSRI in this paper are to the 1 November 2012 version. The RCMI and QSRI purport to ensure that food advertising “directed primarily to children” represents “healthier choices”. As with the Children's Code and Food Code, complaints about the RCMI and the QSRI are determined by the ASB.

Companies who are signatories to the RCMI and QSRI must also abide by the Children’s Code and the Food Code. All four of these codes use a similar definition of “Advertising or Marketing Communications to Children” which means that they apply to advertising and marketing content that is “directed primarily to children” (note that the codes use different age limits for the definition of children). Unlike the Children’s Code and the Food Code, the RCMI and QSRI also capture advertising placement if the advertisement is broadcast in media that is “directed primarily to children”. However, the application of this does not cover the highest rating children's programs because definition of when media is “directed primarily to children” under the RCMI and QSRI is quite narrow which means that the coverage of programs in which the advertisement is placed is very limited.
RCMI

The RCMI applies to food and beverage advertising (not including fast food advertising) directed primarily to children under 12 by food companies that are signatories (the current signatories are Campbell Arnott’s, Cereal Partners Worldwide, Coca-Cola, Ferrero, Fonterra, General Mills, George Weston Foods, Kellogg’s, Kraft, Lion, Mars Snackfood, Nestle, Patties, PepsiCo, Sanitarium, Simplot, and Unilever).

Signatories to the RCMI agree not to advertise food and beverage products to children under 12 in “media” unless:

- “those products represent healthy dietary choices, consistent with established scientific or Australian government standards”; and
- “the advertising and/or marketing communication activities reference, or are in the context of, a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages good dietary habits (consistent with established scientific or government criteria) and physical activity.”

“Media” is defined in the RCMI as:

- “television, radio, print, cinema and third-party internet sites where the audience is predominantly children and/or having regard to the theme, visuals and language used are directed primarily to children.” In November 2012, it was announced that this will be amended to include company owned websites by mid-2013.

- “In regards to television, this includes all P and C programs, all programs where more than 50% of the audience is children under 12 years, plus those G rated programs that meet the criteria above as being designed for children”. In November 2012 it was announced that this would be amended to 35% by mid-2013.

In order for the RCMI to apply, either the content of the advertisement or the media in which it is placed must be “directed primarily to children”. If one of these requirements is met (and the advertisement is for a food or beverage product) then the advertisement must promote a healthy food or beverage choice and a healthy lifestyle. The advertisement must also comply with restrictions imposed by the RCMI on the use of popular children’s personalities and characters, premium offers, product placement and the use of products in interactive games, and limited restrictions on advertising in schools. These restrictions do not apply if the advertisement is consistent with the healthy dietary choices and healthy lifestyle messaging requirements referred to in the RCMI.

QSRI

The QSRI applies to fast food advertising content directed primarily to children under 14 by fast food companies that are signatories (the current signatories are McDonald’s, KFC, Pizza Hut, Hungry Jack’s, Oporto, Red Rooster and Chicken Treat).

Signatories to the QSRI agree that advertising and marketing for fast food and beverage products directed primarily to children under 14 must:

- “represent healthier choices, as determined by a defined set of nutrition criteria for assessing Children’s meals (see Appendix 1)”;
- “represent a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages:
  - good dietary habits, consistent with established scientific or government criteria; and
  - physical activity.”

The “medium” which the QSRI applies to includes television, radio, newspapers, magazines, outdoor billboards and posters, emails, interactive games, cinema and internet sites. It does not apply to in-store point of sale material, labels, or packaging of products.

Like the RCMI, “Advertising or Marketing Communications to Children” is defined in the QSRI as “Advertising or Marketing Communications which, having regard to the theme, visuals and language used, are directed primarily to Children and are for food and/or beverage products”. Since 1 November 2012, the QSRI has also covered the placement of fast food advertising in media that is “directed primarily to children”. Media covered by the QSRI (including TV) is directed primarily to children if it attracts an audience share of greater than 50% children. Changes were announced to reduce this threshold to 35% from mid-2013. In relation to TV only, a program is also directed primarily to children if it is a C or P rated program, or a G rated program directed primarily to children.

If the QSRI applies, signatories must also comply with restrictions imposed on the use of popular personalities and licensed characters, on product placement, the use of products in interactive games, the use of premium offers, giving away food and beverage products or vouchers at children’s sporting events, and in relation to advertising in schools. However, these restrictions do not apply if the advertising of the food and beverage products is consistent with the healthier choices and healthy lifestyle messages referred to in the QSRI, and if the products meet the nutrition criteria in the appendix to the QSRI.
Appendix 3

Examples of recent ASB and ACMA decisions

Below are some examples of recent decisions by the ASB and ACMA which illustrate the difficulties associated with making a complaint (i.e. identifying which code and provision to complain under, and who to complain to) and the ASB’s absurd determinations.

a) Kraft Double Stuff Oreo cookies – TV advertisement

A TV advertisement for Oreo Double Stuff cookies broadcast in 2012 featured a girl and her younger brother sitting at a kitchen table with Oreo cookies on a plate. Offering one to her brother, the girl explains how to twist and lick it, and her brother says ‘Dunk it!’ The cookie opens and an extra dollop of cream lands on the cookie. The voiceover says ‘Dunk it!’.

The OPC submitted a complaint to the ASB on the basis that the advertisement breached the RCMI because:

- The advertisement is directed primarily to children.
- Double Stuff Oreo cookies are a snack product of primary appeal to children and they do not represent a healthy dietary choice consistent with established scientific or Australian government standards.
- The advertisement has been shown during programs such as Dancing with the Stars, Home and Away and Australia’s Got Talent which are watched by high numbers of children.

In response, Kraft submitted that the advertisement did not breach the RCMI because:

- It was directed primarily to the main grocery buyer who would appreciate the light-hearted portrayal of children’s games; “mum” has a voyeuristic presence watching her children, and she has double the fun watching the children.
- It is recognised that Oreo cookies are a treat and therefore the product has been advertised in accordance with the RCMI, and appropriate consumption is portrayed by placing three biscuits for sharing between two children.

The ASB dismissed the complaint and held that:

- Although children would relate to the children in the ad, the language, voiceover and visuals of the advertisement were not directed primarily to children but rather to the main grocery buyer. For the same reasons, the Children’s Code did not apply.
- The RCMI did not apply because the advertisement was not shown during programs where more than 50% of the audience was under 12 – it was shown during G-rated programs such as Dancing with the Stars, Home and Away and Australia’s Got Talent. Whilst these programs have appeal to children, they are not programs directed primarily to children.

- The Food Code did apply. The ASB considered whether the advertisement breached the provisions in the Food Code which require that advertisements must not undermine the importance of a healthy or active lifestyle, and must not encourage excess consumption. The ASB held that the advertisement did not breach these provisions because the promotion of a product which may have a particular nutritional composition is not, of itself, encouraging unhealthy eating habits or an inactive lifestyle. Further, the advertisement suggested that the product be consumed as a treat after school, with only three biscuits on a plate between two children, and did not encourage excessive consumption.

This demonstrates the ASB’s narrow application of whether advertising content and placement is directed primarily to children.
b) Kellogg’s LCM Strawbubbles bars – TV advertisement

A TV advertisement broadcast in 2012 featured primary school children in a schoolyard throwing food to seagulls. One boy takes an LCM bar from his lunchbox and throws a piece into the air and the other children squabble over it.

The OPC submitted a complaint to the ASB on the basis that the advertisement breached:

- The RCMI, because it was clearly directed primarily to children and LCM Strawbubbles Bars do not represent a healthy dietary choice consistent with established scientific or Australian government criteria. The advertisement did not promote a healthy lifestyle as the children stopped their basketball game to grab the LCM bar thrown into the air. The advertisement was also broadcast during programs watched by high numbers of children, including *Dancing with the Stars* and *The Big Bang Theory*.

- The Food Code, because it was misleading – the advertisement highlighted that the LCM bars are made with puffed grains of rice and contain no artificial flavours or colours (creating the impression that they are healthy), while failing to mention that they are high in sugar and energy and unhealthy overall. Children would perceive the product to be healthy and suitable for regular inclusion in their lunchbox.

In response, Kellogg’s submitted that:

- The RCMI did not apply because the advertisement was not primarily directed to children and was aimed at the adult main grocery buyer. The advertisement was intended as a humorous take on children’s hungry behaviour, designed to resonate with parents and carers.

- None of the programs during which the advertisement was aired were designed for children or of primary appeal to children. For most of the programs the proportion of viewers aged 14 years and younger was less than 25%. Therefore the RCMI did not apply.

- For the same reasons, the Food Code did not apply. If it did apply (which was denied) the advertisement does not make any nutrition benefit claims regarding the product. The focus of the advertisement is on taste not nutrition, and it shows children in a playground engaged in physical activities.

- LCMs are referred to as a “treat” so excessive consumption is not encouraged. The LCM bar is shown in a lunchbox with a variety of other foods emphasising its role as a treat food within the context of a varied diet.

The ASB dismissed the complaint and held that:

- The RCMI did not apply because the advertisement was not shown during programs where the audience was predominantly children or programs directed primarily to children. The advertisement was directed to the main grocery buyer, namely parents responsible for preparing children’s lunch boxes. For these reasons, the Children’s Code also did not apply.

- The advertisement did not breach the Food Code because advertising a snack is not contrary to prevailing community standards, it does not undermine a balanced diet or healthy lifestyle, and it does not encourage excess consumption as there is only one LCM bar in the lunch box.
c) Chupa Chups website and app
In 2012 Chupa Chups launched a website and app promoting a competition to win one of three trips to rollercoaster theme parks around the world. The app involved a cartoon rollercoaster game where fun characters had to collect as many Chupa Chups as possible. The website and app were linked to each other to encourage competition entry.

The OPC submitted a complaint to the ASB on the basis that the website and app breached the Food Code premiums provision (for the promotion of the competition to children) and the restrictions on encouraging children to consume excessive amounts of a product (the more Chupa Chups consumed the further participants advanced in the game, and each Chupa Chup consumed gave a code for entry into the website competition). The relevant Food Code provisions were:

- Advertising or marketing communications to children shall not feature ingredients or premiums unless they are an integral element of the children’s food and beverage products being offered (clause 3.6).
- Advertising or marketing communications to children shall not improperly exploit children’s imaginations in ways which might reasonably be regarded as being based upon an intent to encourage those children to consume what would be considered, acting reasonably, as excessive quantities of the children’s food or beverage products (clause 3.2).

In response, the advertiser submitted that:

- The website and app did not fall within the definition of “advertising or marketing communication” and therefore the Food Code did not apply.
- If the website and app are covered by the Food Code (which was denied), they do not breach the relevant provisions because the website and app are not directed primarily at children:
  - Chupa Chups are not primarily a children’s product and are enjoyed by consumers of all ages and many adults.
  - The major prize is a family trip, which appeals to consumers over 14 years.
  - The “Chuck” character on the website is aimed at 14 to 19 year olds.
- It was not their intention to encourage excessive consumption of the product and no reasonable child would be encouraged to do as after watching the website and app.
- The average child would not consider the website as being mainly for the competition rather than the Chupa Chup product, and the app is not a premium.

The ASB dismissed the complaint about the website and held that:

- Company owned websites are covered by the Food Code.
- The microsite on the Chupa Chups website was directed primarily to children (being children aged 10 and older), however the website itself was not directed primarily to young children as it is too complex for them to read and interact with.
- Chupa Chups is a product that, whilst having strong appeal to children, has broad appeal. Therefore Chupa Chups is not a product of principal appeal to children.
As Part 3 of the Food Code (which includes the premium clause) requires that both the advertisement be directed to children and the product be a “children’s food or beverage product”, Part 3 of the Food Code does not apply (and the ASB therefore did not consider whether the website and app were “premiums”). For these reasons, the Children’s Code also does not apply to the website.

Part 2 of the Food Code does apply (which also includes an excessive consumption clause). However, the advertisement does not promote excessive consumption as it makes no reference to the frequency of consumption and the overall impression of the advertisement is not a message that condones excessive consumption.

The ASB also dismissed the complaint about the app, finding that although apps are covered by the code, Chupa Chups is not a product of principal appeal to children and the advertisement did not promote excessive consumption. It found that while the object of the game was to collect as many virtual lollipops as possible, the person playing the game would not be encouraged to eat excessive amounts themselves. In making its findings, the ASB did not expressly consider the OPC’s argument that the app encouraged excessive consumption by encouraging children to buy and consume more and more real Chupa Chups to obtain codes (from lollipop sticks) that enable them to customise their roller coaster ride and progress in the game.

This demonstrates the ASB’s narrow application of the provisions and its failure to properly consider the OPC’s arguments.

d) McDonald’s It’s a Knockout – game show TV program

In the TV game show program It’s a Knockout, McDonald’s advertising was displayed throughout each episode, in which teams competed in a round-robin of games. The hosts promoted McDonald’s, one of the teams was called “Team Maccas” and the show featured McDonald’s characters (such as Ronald McDonald, Grimace and Hamburglar) in the arena and studio audience.

The OPC submitted a complaint to the broadcaster (in the first instance) and then to ACMA on the basis that the McDonald’s advertising during, and its sponsorship of, the program breached the CTI Code of Practice because:

- The program was mainly directed to children – it has exciting games and themes, fun animals and characters, and was broadcast at a time (Sunday nights 7.30pm) when large numbers of children were likely to be in the audience. Evidence was provided that it was the most watched show among children over the program period.
- The McDonald’s promotions were not presented in discrete segments, so children could not distinguish between program content (It’s a Knockout games and characters) and the commercial content (promotion of McDonald’s).
- The acknowledgments of sponsorship were inadequate to inform children and children would not understand that McDonald’s had paid for the advertising and promotion throughout the program.

ACMA dismissed the complaint, finding that the program did not breach the CTI Code of Practice because:

- It’s a Knockout was not a program mainly directed to children – it was a program of general appeal to both children and adults, the majority of children in the audience were accompanied by an adult, and children were not the central focus of the program.
- The distinction between commercial content and program content was clear, and in particular, an ordinary viewer (adult) would have understood that the advertising and McDonald’s characters were promoting McDonald’s and that McDonald’s were sponsors of the program.

As ACMA did not accept that the program was directed to children, it did not consider the complaint about children’s perceptions of the commercial versus program content. This decision highlights that it is not just the advertising and food industries’ self-regulatory codes that are interpreted narrowly, but that the CTI Code of Practice overseen by ACMA is also interpreted narrowly and limited in its capacity to protect children.
The only positive aspect of this decision was that ACMA addressed at length the McDonald's argument that the promotions were for its brand, not for its products (as no products were shown). As discussed earlier, ACMA found that the brand promotion in the program did in fact constitute a promotion of McDonald's products and services. This is notable, given the food industry's self-regulatory codes purport to relate only to advertising for products, and therefore not to advertising that promotes a brand only, such as a sponsorship promotion.

e) McDonald’s Mac Pack – TV advertisement and website (www.macpack.com.au)

A TV advertisement broadcast in 2012 featured children travelling to, and playing football at the Melbourne Cricket Ground (MCG). The children were dressed in McDonald's sponsored footy uniforms with the well-known McDonald's colours (yellow and red) and the famous ‘golden arches’ displayed.

The OPC submitted a complaint to the ASB on the basis that the advertisement and website breached the QSRI because:

- It is an advertising or marketing communication to children for food and beverages that do not represent healthier choices. The advertisement was clearly directed primarily to children because it features children going to the MCG, running through the McDonald's banner and cheering, and the advertisement is for a competition only open to 8–13 year olds.
- The advertisement was intended to promote, and had the overall effect of promoting, McDonald's food and beverage products. By promoting the McDonald's brand and the well-known ‘golden arches’, the advertisement was promoting all McDonald's food and beverage products. The OPC highlighted the decision of ACMA regarding McDonald's advertising during It's a Knockout (discussed above) that found that promotion of the McDonald's brand (including the McDonald's name, colours, ‘golden arches’ and slogan “I'm loving it”) in the program It's a Knockout constituted a promotion of McDonald's products and services, despite no food being depicted.
- The majority of products sold at McDonald's are high in energy, fat, sugar and/or salt, therefore the advertisement does not represent healthier choices as required by the QSRI.

In response, McDonald's submitted that:

- The QSRI has not been breached because the advertisement is promoting entry into a competition for the McDonald's Mighty Footy Trip (entry is through the website www.macpack.com.au) and does not require the purchase of a product.
- It is not the intention of the advertisement to advertise food and beverage products and there are no products in the advertisement.

The ASB dismissed the complaint and held that:

- The QSRI did not apply, because although the advertisement was directed primarily to children, it was not for a food or beverage product. Rather, the advertisement promoted entry into a competition through the Mac Pack website.
- For the same reasons, the Children’s Code and the Food Code did not apply.

The ASB did not consider the evidence demonstrating the position taken by ACMA in relation to this issue – namely that by promoting the McDonald’s brand and the well-known ‘golden arches’, the advertisement was promoting all McDonald’s food and beverage products. The ASB did not address this crucial and central argument in the complaint. The OPC requested Independent Review of the ASB’s decision. The Independent Reviewer held that there was no substantial flaw in the ASB’s decision and dismissed the appeal.
f) KFC Junior Sign-on for Queensland Cricket TV advertisement

A TV advertisement broadcast in August and September 2012 in Queensland promoted the KFC Junior Sign-On for Queensland Cricket. The advertisement shows a local sporting field where children and adults are playing cricket, whilst other adults and children sit at a long table laden with buckets of KFC chicken and other KFC products. A young boy asks Ian Healy: “Heals, how’d you get so good?” He replies, as a group of children gather around him, “First, I signed up with my local cricket club – go to queenslandcricket.com.au to find out where your local club is.” As he throws a cricket ball to the children, he says “It’s fast, action-packed fun this summer for you and your friends and everyone gets to bat, bowl and field”.

The OPC submitted a complaint to the ASB on the basis that the advertisement and website breached the QSRI because:

- It is an advertising or marketing communication to children for food and beverages that do not represent healthier choices.
- The advertisement was directed primarily to children because it featured children playing cricket and focussed on a young boy asking Ian Healy how he became so good. Children surround Ian Healy as he speaks and he is clearly addressing children who are watching the advertisement when he says “It’s fast, action-packed fun this summer for you and your friends.”
- The vast majority of food and beverage products sold at KFC, including many of those depicted in this advertisement, are high in energy, fat, sugar and/or salt and therefore do not represent healthier choices.

The ASB dismissed the complaint on the basis that KFC had informed them that the advertisement was created and paid for by Queensland Cricket. As Queensland Cricket is not a signatory to the QSRI, the ASB said it was unable to consider the complaint.
References

1] Holman C and Smith F. Implications of the obesity epidemic for the life expectancy of Australians. Report to the Western Australian Public Health Advocacy Institute, 2008. School of Population Health, University of Western Australia, Crawley.


4] Any reference to ‘food’ in this report includes food and beverages unless otherwise stated or indicated by its context.

5] Any references to ‘advertising’ in this report includes any method used to advertise, promote or publicise unhealthy food products or food brands, unless otherwise stated or indicated by its context.


16] ASB Case Number 0345/10 (11 August 2010).

17] ASB Case Number 0228/12 (27 June 2012).

18] ASB Case Number 0414/10 (13 October 2010).
19] ASB Case Number 0363/10 (25 August 2010).
20] ASB Case Number 0225/12 (27 June 2012).
23] ASB Case Number 0438/10 (10 November 2010); ASB Case Number 0225/12 (27 June 2012).
24] ASB Case Number 0438/10 (10 November 2010).
26] ASB Case Number 0324/12 (17 August 2012).
28] ASB Case Number 0045/11 (23 February 2011).
29] ASB Case Number 0039/12 (22 August 2012).
30] ASB Case Number 572/09 (9 December 2009).
31] ASB Case Number 571/09 (9 December 2009).
32] ASB Case Number 0427/10 (27 October 2010).
33] ASB Case Number 573/09 (9 December 2009).
34] ASB Case Number 32/10 (10 February 2010).
35] ASB Case Number 0428/10 (27 October 2010).
36] ASB Case Number 73/08 (9 April 2008).
40] ASB Case Numbers 0324/12 (8 August 2012) and 0338/12 (22 August 2012).
44] ASB Case Number 443/08 (12 November 2008).
45] ACCC, http://www.acc.gov.au/content/index.phtml/itemId/867233/fromItemId/142
46] ASB Case Number 0229/11 (13 July 2011).
47] ASB Case Number 0324/12 (8 August 2012); ACMA Investigation Report No. 2782 of 2012.
49] Australian Competition and Consumer Commission, Guidelines for developing effective voluntary industry codes of conduct, December 2011.
50] ASB Case Numbers 573/09 (9 December 2009), 32/10 (10 February 2010) and 0427 and 0428/10 (27 October 2010).


61] ASB Case Number 0225/12 (27 June 2012).

62] ASB Case Number 0228/12 (27 June 2012).

63] ASB Case Number 0136/12 (24 April 2012).

64] ASB Case Number 0187/12 (13 June 2012).


66] ASB Case Number 0324/12 (8 August 2012).
