



**Commercial Television Industry Code of Practice
Free TV Australia
Invitation for Public Comment
(March 2015)**

Obesity Policy Coalition's Submission

1 April 2015

Executive Summary

This submission from the Obesity Policy Coalition ('OPC') focuses upon the role that the Commercial Television Industry Code of Practice ('CTICP') should play in restricting unhealthy food advertising to children. 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, the OPC is concerned by Free TV Australia's proposal to remove the only clauses in the CTICP (clauses 6.20, 6.23 and 6.24) that relate to unhealthy food advertising to children. It strongly disagrees with Free TV Australia that these matters are adequately dealt with by the Children's Television Standards and advertising industry codes.

The OPC is of the view that the removal of these clauses would be backward step in the protection of children. It would further deplete the capacity of the CTICP to meet the objectives of the *Broadcasting Services Act 1992* ('the Act'), namely to protect children from harmful advertising and ensure advertising accords with community standards. It would also be inconsistent with international policy urging meaningful restrictions on this type of advertising and urging government leadership and oversight in this area. The CTS and food and advertising industry codes alone are inadequate to protect children from unhealthy food advertising, particularly on television. These standards and codes do not limit the volume of unhealthy food advertising to children on television or many of the techniques or practices most commonly used to reach children.

The Act places an important obligation on the Australian Communications and Media Authority (ACMA) to only endorse a code if it provides appropriate community safeguards for the matters covered by the code. The OPC would therefore strongly urge ACMA to refuse to endorse the proposed CTICP unless amendments are made to ensure that it will reduce children's exposure to unhealthy food advertising and the power of this type of advertising. The CTICP and ACMA have key roles to play; the protection of children cannot be left to industry regulation.

This submission therefore proposes that at the very least, the current restrictions that apply to unhealthy food advertising to children in the CTICP (clauses 6.20, 6.23 and 6.24) be retained and strengthened. The complaints handling procedures in section 7 should also be strengthened. Preferably, and to meaningfully reduce children's exposure to unhealthy food advertising, the OPC proposes that comprehensive amendments should be made to address the volume of unhealthy food advertising on television and the marketing techniques most commonly used to reach children.

If a co-regulatory approach capable of protecting children from this type of advertising cannot be achieved, a regulatory approach will be required.

1) Introduction

The Obesity Policy Coalition ('OPC') is a coalition between Cancer Council Victoria, Diabetes Australia – 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.

The OPC is grateful for this opportunity to participate in Free TV Australia's review of the Commercial Television Industry Code of Practice ('CTICP'). The OPC's interest in this review relates to the role the CTICP should play in regulating unhealthy food advertising to children. In particular, the OPC is concerned by the proposal to remove the few provisions of the CTICP that apply to unhealthy food advertising to children. The OPC does not agree with Free TV Australia's suggestion that children are adequately protected by the Children's Television Standards ('CTS') and advertising industry codes because the evidence shows otherwise.

Taking into account the objectives of the *Broadcasting Services Act 1992* ('the Act'), and the inadequacy of the CTS and industry codes to protect children from this type of advertising, the OPC urges that Free TV Australia at the very least retain and strengthen the clauses in the CTICP that relate to unhealthy food advertising to children. To meaningfully reduce children's exposure to unhealthy food advertising on television, comprehensive restrictions on the volume of unhealthy food advertising and the marketing techniques used to reach children will be required.

2) The problems of unhealthy food advertising and promotion to children.

Poor diet and elevated Body Mass Index are the two leading contributors to burden of disease in Australia, ahead of smoking.¹ 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.² 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.³

The World Health Organization, 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.⁴ The World Health Organisation has conclusively recognised that a relationship exists between children's exposure to unhealthy food advertising and harmful food behaviours and health outcomes.⁵ 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.⁶ In 2009, the National Preventative Health Taskforce 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.⁷

¹ Institute for Health Metrics and Evaluation, Global Burden of Disease Country Profile data for Australia (2014), available at www.healthmetricsandevaluation.org

² Australian Bureau of Statistics 4338.0 – Profiles of Health, Australia, 2011-2013, Overweight and obesity.

³ Access Economics. The growing cost of obesity in 2008. Diabetes Australia: Canberra, 2008.

⁴ 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>

⁵ Ibid.

⁶ 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 Behaviour (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

⁶ B Kelly et al, Monitoring food and non-alcoholic beverage promotions to children (2013) 14 *Obesity Reviews* (Suppl 1) 59.

⁷ Final report of the Preventative Health Taskforce (2009) Australia: the Healthiest Country by 2020, available at <http://www.preventativehealth.org.au/>

3) The amount of unhealthy food advertising on television in Australia.

Despite the increasing time spent by children on online devices, watching DVDs or using other play back devices, children continue to spend the majority of their viewing time watching live free to air television.⁸ Television remains the primary vehicle for advertising to children, and the most effective medium for reaching large numbers of children.⁹ While there may have been some decline in the numbers of children watching television over the past decade, in 2013 children aged 0-14 continued to watch approximately one hour and 26 minutes of free to air television per day.¹⁰ An average of 528,000 children (aged 0 – 14) continued to watch television between the peak viewing times of 7pm and 8pm.¹¹ While a high proportion of young children aged 0-4 watch ABC 4 Kids compared to other channels, children aged 5-12 years are watching mostly movies and general entertainment programs with family appeal (such as feature films and reality programs) across multiple free to air channels.¹² While the top 5 television programs among children in 2013 attracted average audiences of 314,000 children (The Block, The X Factor, The Voice, My Kitchen Rules and Toy Story 3), the five most popular dedicated children’s programs attracted only 178,000 viewers (Room on the Broom, Shaun the Sheep, Ben and Holly, Peppa Pig and How Many More minutes Until Christmas [all on ABC 4 Kids]). Viewing data obtained by the OPC for the period 8 February to 15 March 2015 demonstrates that this trend has continued, with the 10 most popular programs among children (0-12 years) during that period including predominantly reality TV shows and movies, with very large numbers of children watching television after 7pm:

Top 10 programs among children aged 0-12 years [Free to air TV, Australia, 8 February – 21 March 2015]			P 0-12 years	
			Tarps	000s
1	TOY STORY THAT TIME FORGOT	Network 7	7.11	191
2	M-FINDING NEMO	Network 7	6.78	182
3	M-DR SEUSS THE LORAX	Network 7	6.77	182
4	MY KITCHEN RULES-MON	Network 7	6.72	180
5	MY KITCHEN RULES-WED	Network 7	6.7	180
6	MY KITCHEN RULES-TUE	Network 7	6.41	172
7	I'M A CELEBRITY...GET ME OUT OF HERE! THE WINNER ANNOUNCED	Network 10	6.29	169
8	MY KITCHEN RULES-THU	Network 7	6.21	167
9	CHARLIE AND THE CHOCOLATE FACTORY -EV	Network 9	5.98	161
10	MY KITCHEN RULES-SUN	Network 7	5.48	147

Courtesy of Mitchell & Partners.

Television is considered by marketers to be the ‘cornerstone of an integrated campaign’, a medium that is ‘able to target all demographics’ and the ‘best way to reach grocery buyers with children.’¹³ Television also tends to be the focus of marketing campaigns that integrate a number of different media platforms. For example, McDonald’s advertisement for Happy Meals often feature movie-tie ins and have directed children to the Happy Meal website where they can play games, download colouring pages and engage in other arts, crafts and fun activities.¹⁴

⁸ Regional Tam, OzTam, Nielsen, Australian Multi-Screen Report, Quarter 3, 2014. Available at

http://www.oztam.com.au/documents/Other/Australian%20Multi-ScreenReport%20Q3%202014%20FINAL_2.pdf

⁹ ACMA. Use of electronic media and communications: Early childhood to teenage years. Australian Government. 2009. Available at http://www.acma.gov.au/WEB/STANDARD/pc=PC_311824; Olds et al, 2006, cited in Handsley, E., Nehmy, C., Mehta, C. & Coveney J.

‘Media, public health and law: a lawyers primer on the food advertising debate’, Media and Arts Law Review (2007) 12, 87-106.

¹⁰ 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. Available at http://www.acma.gov.au/theACMA/Library/researchacma/Research-reports/childrens-television-viewing-research?utm_medium=email&utm_campaign=Content+the+key+to+kids+TV&utm_content=Content+the+key+to+kids+TV+CID_8a2dca1d88a26bc3ccf0bfc120ffd85&utm_source=SendEmailCampaigns&utm_term=Childrens%20Television%20Viewing

¹¹ Ibid.

¹² Ibid.

¹³ Free TV Australia 2006 *Media Buyers Survey*, available from <http://www.thinktv.com.au>, accessed 26 August 2007.

¹⁴ See McDonald’s Happy Meal website at <http://www.happymeal.com.au/> (accessed 17 March 2015).

Children are exposed to an enormous amount of food advertising on Australian free-to-air television.¹⁵ Unhealthy Food and beverage advertising is twice as common during children's viewing hours compared to adult viewing times.¹⁶ Children watching television during the weekday afternoon timeslot are subjected to approximately 14 food ads per hour.¹⁷ For children (aged 5-12 years) watching the average of 2-3 hours of television daily, this means they are subjected to between 28-42 food advertisements every day. Australian studies of the extent and nature of food advertising on television during children's viewing hours have reported that a range of between 55% and 81% of food advertisements are for unhealthy foods (mainly confectionery or fast foods).¹⁸

While the food and advertising industries purport to be committed to 'responsible' advertising to children pursuant to industry developed codes, these restrictions provide very little protection to children.¹⁹ In particular, self-regulation has not been shown to be effective in reducing children's exposure to unhealthy food advertising in any meaningful way.²⁰ This is consistent with findings internationally that adherence to industry codes is unlikely to meaningfully reduce children's exposure to unhealthy food marketing given their narrow application, weak definitions and lack of enforceability or penalties.²¹

4) Free TV Australia and ACMA's obligations under the Broadcasting Services Act 1992 and international policy.

Section 6 of the CTICP currently imposes restrictions on advertising certain potentially harmful products or services (e.g. alcohol, condoms and betting or gambling), and includes provisions dealing with advertising directed to children. However the only provisions that relate to unhealthy food advertising to children are clauses 6.20, 6.23 and 6.24. The OPC is of the view that the removal of these clauses would further deplete the capacity of the CTICP, Free TV Australia and ACMA to meet their obligations to protect children from harmful advertising under the *Broadcasting Services Act 1992* and international policy.

a) *Broadcasting Services Act 1992*

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'.²² To achieve this objective, codes of practice may be developed for sections 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

¹⁵ Zuppa, J., Morton, H., Mehta, K. Television food advertising: counterproductive to children's health? A content analysis using the Australian Guide to Healthy Eating (2003) 60 *Nutrition and Dietetics* 78-84; Chapman, K., Nicholas, P., & Supramaniam, R. 'How much food advertising is there on Australian television?' (2006) 21 *Health Promotion International* 172-180; Hill, J., & Radimer, K. A content analysis of food advertisements in television for Australian children (1997) 54 *Australian Journal of Nutrition & Dietetics*, 174-181; Kelly, B., Smith, B., & King, L. Television food advertising to children: the extent and nature of exposure (2007) 11 *Public Health Nutrition* 1234-40; Neville, L., Thomas, M., & Bauman, A. 'Food advertising on Australian television: the extent of children's exposure.' *Health Promotion International*, 2005, 20, 105-112; Choice. *Food Advertising to Children: Who's the Biggest Loser?* NSW. Australia. March 2009.

¹⁶ Zuppa, J., Morton, H., Mehta, K. 'Television food advertising: counterproductive to children's health? A content analysis using the Australian Guide to Healthy Eating.' (2003) 60 *Nutrition and Dietetics* 78-84; Choice. *Food Advertising to Children: Who's the Biggest Loser?* NSW. Australia. March 2009.

¹⁷ Neville, L., Thomas, M. and Bauman, A. Food advertising on Australian television: the extent of children's exposure (2005) 20 *Health Promotion International*, 105-112.

¹⁸ Chapman, K., Nicholas, P., & Supramaniam, R. How much food advertising is there on Australian television? (2006) 21 *Health Promotion International*, 172-180; Neville, L., Thomas, M., & Bauman, A. Food advertising on Australian television: the extent of children's exposure (2005) 20 *Health Promotion International*, 105-112; Zuppa, J., Morton, H., Mehta, K. 'Television food advertising: counterproductive to children's health? A content analysis using the Australian Guide to Healthy Eating (2003) 60 *Nutrition and Dietetics*, 78-84.

¹⁹ Lumley J, Martin J, Antonopoulos N. *Exposing the Charade – The failure to protect children from unhealthy food advertising*. Obesity Policy Coalition, Melbourne, 2012, available at <http://www.opc.org.au/downloads/positionpapers/exposing-the-charade.pdf>

²⁰ Australian Government, Australian Communications and Media Authority, 'Industry self-regulation of food and beverage advertising to children' - ACMA monitoring report, December 2011.

²¹ Galbraith-Emami S, Lobstein T. The impact of initiatives to limit the advertising of food and beverage products to children: a systematic review (2013) 14(12) *Obesity Reviews* 960-74

²² *Broadcasting Services Act 1992* (Cth), ss. 3(1)(j) and 6.

- preventing the broadcasting of programs that, in accordance with community standards, are not suitable to be broadcast by the section of the industry.²³

ACMA may only endorse a code if it is satisfied that the code provides appropriate community safeguards for the matters covered by the code.²⁴ ACMA is also required to ensure that different levels of regulatory control are applied according to the degree of influence that different types of broadcasting services are able to exert in shaping community views in Australia.²⁵ Television, acknowledged by the drafters of the Act to be “highly persuasive and ubiquitous”, must require a greater degree of regulatory intervention than other media.²⁶

The current provisions of the CTICP that relate to advertising to children are grossly inadequate to protect children from unhealthy food advertising which may be harmful to them (see discussion below). However removing these few existing provisions entirely represents a concerning step back from parliament’s clear intention that codes protect children from advertising of this nature, particularly on TV.

This step backwards would also fail to accord with community expectations. There is a high level of support for restrictions on unhealthy food advertising, particularly on TV.^{27, 28, 29, 30} A national survey conducted by Cancer Council Victoria in 2008 found that 91% of consumers were in favour of the government introducing stronger restrictions to reduce the amount of unhealthy food advertising seen by children, with 79% strongly in favour. It also found that 88% of consumers believe that the government should ban advertising of unhealthy food at times when children watch television, with 73% strongly supporting a ban. Consumers are also fed up with the tactics used by food companies to influence children to ‘pester’ their parents for unhealthy food products. For example, it demonstrated that 91% of consumers believe the government should regulate the use of toys and giveaways to market unhealthy food and drink to children, as well as the use of popular personalities or characters, with approximately half believing the practice should be stopped completely. A further national survey conducted by Cancer Council Victoria in 2012 found similar results, with 87% of respondents supporting restriction on unhealthy food advertising that targets children on free to air television and 77% supporting a ban on unhealthy food advertising at times when children watch TV.³¹

To enable the CTICP to even begin to meet the objectives of the Act, that children be protected from material that may be harmful to them and that material accord with community expectations, the existing provisions relating to advertising to children (clauses 6.20, 6.23 and 6.24) need to be strengthened. Removing these provisions would clearly contravene the objectives of the Act.

(b) International policy obligations

Free TV Australia and ACMA should also act in a manner consistent with the approach taken by the Australian Government to these issues in key international fora. 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 Non-communicable Diseases (NCDs) 2013-2020.³² 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.³³

²³ *Broadcasting Services Act 1992* (Cth), s. 123(3)(b) and 123(2)(a).

²⁴ *Broadcasting Services Act 1992* (Cth), s. 123(4)(b)(1)

²⁵ *Broadcasting Services Act 1992* s.4

²⁶ *Broadcasting Services Bill Revised Explanatory Memorandum 1992*

²⁷ 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.

²⁸ Morley B. *National Community Survey of TV Food Advertising to Children*. Centre for Behavioural Research in Cancer, Cancer Council Victoria. 7 May 2007.

²⁹ 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.

³⁰ Choice. *Little bellies, big problems: How parents, industry and government can solve Australia’s childhood obesity crisis*. 2007.

³¹ Cancer Council Victoria (2012), unpublished data.

³² 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.

³³ 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.

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 unhealthy food marketing. They specifically recognise that this exposure begins in childhood, underpinning the importance of taking legislative and regulatory measures to protect children from its adverse impacts. Specifically, the GAP involves accelerating implementation of the 2010 WHO Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children ('WHO recommendations'), including mechanisms for monitoring children's exposure.

The WHO recommendations aim to support member states (including Australia) to formulate policy mechanisms to reduce both children's 'exposure' to unhealthy food marketing and the 'power' of this marketing. It urges governments to take the lead in the development of policy and provide leadership, through a multi-stakeholder platform, for implementation, monitoring and evaluation. At the very least, a co-regulatory approach is required to meaningfully restrict unhealthy food advertising. It cannot be left to self-regulation. In addition, ACMA recognises 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.³⁴ It must therefore also be guided by the WHO's conclusive finding, and the findings of numerous systematic reviews (as identified above), that a causal relationship exists between exposure to advertising and harmful food behaviours and health outcomes.

The OPC is of the very strong view that ACMA should not endorse a code that fails to meet the obligations to protect children under the Act or that is inconsistent with international policy to protect children from this type of advertising. As discussed below, the CTS and industry codes are inadequate to provide the protections necessary.

5) The Children's Television Standards and industry codes cannot alone protect children from harmful advertising.

The OPC strongly disagrees with Free TV Australia's view that that the CTS and advertising industry codes provide adequate protection to children from harmful advertising, particularly unhealthy food advertising. No evidence has been provided by Free TV Australia in support of this view and there is a significant amount of evidence to the contrary.

Children's Television Standards ('CTS')

The OPC recognises that the CTICP operates alongside the CTS which 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).³⁵ As discussed above, 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.

The OPC urges Free TV Australia to recognise that restrictions on advertising that may be harmful to children are required not only during dedicated children's programming. They should apply to all advertising content directed to children and all advertising broadcast during peak children's viewing times (i.e. 4 – 9pm).

Food and advertising industries' self-regulatory codes

While positive steps by the food and advertising industries to protect children from unhealthy food advertising should be welcomed, Free TV Australia 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.

³⁴ ACMA. *Review of the Children's Television Standards 2005 - Final report of the review*. August 2009. Available at www.acma.gov.au

³⁵ 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.

These Codes and initiatives are highly ineffectual and evidence of why government leadership is required, particularly on TV. For example:

- the codes do not limit the volume of unhealthy food advertising to children on TV
- 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 of the techniques and practices most commonly used to advertise unhealthy food to children are not covered
- not all age groups of children are covered
- the criteria for nutrition and healthy dietary choices are vague and unclear

As discussed above, an even greater degree of regulatory intervention is required for television, compared to other media. These platform-neutral codes are grossly inadequate to protect children from the wealth of unhealthy food advertising on television, particularly at the times when the highest numbers of children are watching.

For more information regarding the failings of these codes, see [Exposing the Charade – The Failure to Protect Children from Unhealthy Food Advertising](#).³⁶

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 marketing 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.

(6) Current restrictions on advertising to children in the CTICP should be retained and strengthened.

The current provisions in the CTICP should at the very least be retained and strengthened to provide some meaningful protection to children with respect to the matters they purport to cover. The relevant provisions are contained in section 6 of the current CTICP, specifically clauses 6.20, 6.23 and 6.24 and in section 7, in relation to complaints, enforcement and transparency. The objective of section 6, regarding “the need to limit the exposure of children to material intended for adult viewing”, should also be retained.

(a) Advertising to children

As identified above, the only clauses with relevance to unhealthy food advertising to children are clauses 6.23, 6.20 and 6.24.

Clause 6.23

Clause 6.23 is the only provision of the CTICP that deals specifically with food advertising directed to children and it should be retained and strengthened. It states that advertisements directed to children for food and/or beverages:

- should not encourage or promote an inactive lifestyle (clause 6.23.1);
- should not encourage or promote unhealthy eating or drinking habits (clause 6.23.2);

³⁶ Available at <http://www.opc.org.au/downloads/positionpapers/exposing-the-charade.pdf>

- must not contain any misleading or incorrect information about the nutritional value of the product (clause 6.23.3).

This clause is of little utility in its current form. Clause 6.23.4 defines 'inactive lifestyle' as 'not engaging in any or much physical activity as a way of life', and 'unhealthy eating or drinking habits' as 'excessive or compulsive consumption of food and/or beverages'. This means that clauses 6.23.1 and 6.23.2 have very little, if any, practical effect as they only apply to advertisements that encourage or promote not engaging in any or much physical activity as a way of life, or excessive or compulsive consumption of food and/or beverages. It is difficult to imagine any individual advertisement that would directly encourage or promote either of these things. Presumably, to breach clause 6.23.2 an advertisement would have to show children consuming a product continuously or consuming a huge amount of a product in a single sitting, or suggest that children should do this. Even if such advertisements did exist or were ever likely to be created, it is the cumulative effect of children's exposure to the huge volume of advertisements for unhealthy foods on television that is likely to lead them to consume unhealthy foods excessively or compulsively, not exposure to an individual advertisement that encourages excessive consumption.

The requirement under clause 6.23.4, that food and beverage advertisements must not contain misleading or incorrect information about the nutritional value of a product is also particularly narrow given it is likely to be interpreted as only preventing advertising that contains factual inaccuracies about the content of a certain nutrient in a product. For example, a statement that a product is 90% fat free when in fact it is 70% fat free. To effectively protect children from misleading advertising, this clause should expressly prohibit the use of "selective claims" in unhealthy food advertising on commercial television. That is, the selective promotion of certain nutritional or other characteristics of a products which may be perceived to provide health benefits (such as high calcium content, low fat content, or the presence of certain vitamins or minerals), while failing to disclose other characteristics of a product which makes it unhealthy overall, such as high sugar or low dietary fibre content. It is this type of marketing that is commonly used on television to mislead consumers, and children are particularly susceptible and likely to be misled.³⁷

Furthermore, clause 6.23 only applies to advertisements that are 'directed to children'. The words 'directed to children' are not defined in the CTICP.³⁸ However, an Advisory Note to the CTICP, published by Free TV Australia, sets out a list of factors to be considered by broadcasters in deciding whether an advertisement is 'directed to children' for the purpose of clause 6.23:

- 'the nature of the product or service, and the persons most likely to be interested in that product or service – is the product or service one for which children are the only users or form a substantial part of the market?;
- the theme of the commercial – are adult or children's themes used? ... ;
- the 'story line' and the approach taken in selling the product or service – is the story line aimed at children? ... ;
- the visuals used in the commercial – are the visuals aimed at children? ... ;
- the language of the commercial – does the commercial use children's language?;
- the age of actors appearing in the commercial – are child actors depicted actively using a product or service for which children constitute the market; and
- the target audience for the commercial – is the target audience children?'

This list of factors indicates that the words 'directed to children' are likely to be interpreted narrowly so that clause 6.23 only applies to advertisements with a number of features indicating that they were designed specifically for a child audience, and not, for example, to advertisements intended for a general audience or an older audience but likely to attract the attention of children or to be watched by a significant number of children.

³⁷ Kunkel, D., Wilcox, B.L., Cantor, J., Palmer, E., Linn, S. and Dowrick, P. *Report of the APA Task Force on Advertising and Children*. Washington, DC: American Psychological Association, February 20, 2004. Available at <http://www.apa.org/releases/childrenads.pdf>, accessed 9 September 2009.

³⁸ Clause 6.23 of the CTICP defines 'children' (for the purposes of that clause) as 'people younger than 14 years of age'. Clause 6.3.1 defines 'substantial numbers of children' (for the purposes of section 6 of the CTICP) as meaning that 'children comprise 30% or more of the program's total audience or that 20% or more of all children in television homes in the license area are viewing the program'. The words 'substantial numbers of children' are not used anywhere in section 6, however, so it is not clear what effect if any this definition is intended to have.

The evidence of the effects of food advertising on children is based on children's exposure to food advertising per se, not just children's exposure to food advertising intended or designed specifically for a child audience.³⁹ There is no reason to assume that advertisements designed specifically for a child-audience are the only types of advertisements that influence children. In fact, one would expect many advertisements designed for adolescents or adults to hold particular appeal to children since children would perceive the advertisement or the advertised product to be 'grown up' and sophisticated, and would find adolescent or adult themes of advertisements interesting.

It is also concerning that 'children' is defined to mean people younger than 14 years of age. Children should be defined at the very least to mean people under 16 years of age (ideally under 18 years of age). Although children's ability to critically interpret advertising develops with age, research indicates that older children's development of cognitive defences to advertising does not prevent them being influenced.⁴⁰ Research has concentrated on children aged 6-12, but the evidence that is available for adolescents indicates that their food choices are even more likely to be affected by food advertising. It does not indicate, as has been assumed, that children and adolescents become better able to resist food advertising as they become older and more media literate.⁴¹ Research also supports a link between advertising and obesity in older children.⁴² The restrictions on television food advertising in the United Kingdom apply to programs of particular appeal to children younger than 16.

Recommendations:

Section 6 of the current CTICP should be retained and amended to state that unhealthy food advertisements directed to children must not be misleading or deceptive or create any impression that the product is healthy or contributes or is beneficial to, or ought to be consumed as part of, a healthy diet or active lifestyle.

The definition of children should be amended to state that 'children' means people under 16 or 18 years of age.

An advertisement should be considered to be 'directed to children' if any of the factors, such as the following, indicate that the advertisement is intended for or likely to appeal to children:

- The age of people (actors or presenters) in the advertisement (particularly whether the advertisement featured children who appeared to be younger than 16).
- Personalities or characters featured in the advertisement.
- Any offers of premiums, competitions, prizes or other benefits promoted in the advertisement that would be likely to interest children.
- Any activities featured in the advertisement that would be likely to interest children, for example, sports, games, competitions, quizzes, quests or challenges.
- The presentation or design of the advertisement, i.e. imagery, graphics, music or language likely to appeal to children
- The content of the advertisement, for example, themes, plots or concepts likely to interest or appeal to children,
- The nature of the product advertised – whether it is intended for children, likely to appeal to children, usually promoted to children, or typically consumed by children.
- The likely audience for the advertisement (based on the time when, and the program during or adjacent to which, the advertisement is broadcast).

Clause 6.20

Clause 6.20 of the CTICP requires advertisements 'directed to children' to 'exercise special care and judgment' and to comply with the advertising provisions of the CTS (CTS 30 - 34). The effect of clause 6.20 is to extend

³⁹ Cairns G, Angus K, Hastings G. The extent, nature and effects of food promotion to children: a review of the evidence to December 2008. Geneva: World Health Organization, 2009.

⁴⁰ As above.

⁴¹ Livingstone, S. & Helsper, E. Advertising foods to children: Understanding promotion in the context of children's daily lives. Prepared for the Research Department of the Office of Communications (Ofcom), February 2004, published as Appendix 1 to Ofcom. 'Childhood obesity: food advertising in context.' 22 July 2004.

⁴² Livingstone, S. New Research on Advertising Foods to Children: An Updated Review of the Literature. Published as Annex 9 to Ofcom Television Advertising of Food and Drink Products to Children consultation, 28 March 2006; JM McGinnis, JA Gootman, VI Kraak, eds. Food Marketing to Children and Youth: Threat or Opportunity? 2005, Washington DC, USA: Institute of Medicine of the National Academies.

the application of the advertising restrictions in the CTS beyond just advertisements shown during P or C programs or periods, to all advertisements 'directed to children' broadcast at any time. Removing this clause from the proposed CTICP would mean that this protection is no longer included in the broadcasting industry codes and that redress to ACMA is no longer available. This protection must be retained and needs to be strengthened.

First, the advertising restrictions in the CTS are very narrow in their scope and application and are largely ineffective for protecting children. For example, they do not prohibit the promotion to children of toys in fast food meals or many of the techniques used to influence children. Clause 6.20 only incorporates CTS 30 – 34, it does not incorporate CTS 35 – Promotions and endorsements by popular characters. While CTS 35 is also limited in scope, clause 6.20 should at least incorporate it to prohibit this popular advertising technique in all advertising directed to children.

Second, it is not clear whether the Advisory Note (discussed above) is to be used to decide whether advertisements are 'directed to children' for the purposes of clause 6.20.⁴³ But it is likely that 'directed to children' in clause 6.20 would be interpreted in a similarly narrow manner, so that clause 6.20 would only apply to advertisements designed exclusively or primarily for children, not to all advertisements likely to attract the attention of children, or to which children are likely to be exposed.

The definition of 'children' for the purpose of this clause is also unduly low (under 14 years of age). For the reasons outlined above, children should be defined to at least mean people under 16 years of age (ideally under 18 years of age).

Recommendation:

Clause 6.20 should also be amended to include a reference to, and thereby incorporate, CTS 35 (promotions and endorsements by popular characters).

At the very least, the definition of 'directed to children' proposed by the OPC and outlined above should expressly apply to clause 6.20. However preferably, the CTICP should require that CTS 30 - 35 apply to all advertising (not just advertising directed to children) during children's peak viewing periods (Weekdays: 6–9am and 4–9pm, weekends and school holidays: 6am–12pm and 4–9pm).

[Ideally, as proposed below, stricter restrictions on the advertising techniques most commonly used to market unhealthy food advertising to children should be introduced and apply at all times.]

Clause 6.24

Clause 6.24 of the current CTICP relates to the promotion of products or services in programs directed to children. It states: In any program mainly directed to children:

- 6.24.1 the host or any other regular presenter or character in the program must not sell or promote products or services; and
- 6.24.2 products that have names or packaging featuring the host or any other regular presenter or character in the program must not be recommend or promoted within the program; and
- 6.24.3 material in the program which recommends or promotes products or services must be presented as discrete segments, and its sponsorship must be advised to viewers in a way that will be clear to them; and
- 6.24.4 references to prizes for competitions must be brief.

⁴³ The Advisory Note states that it is intended to provide guidance 'for the purpose of applying clause 6.23' but it is entitled 'Commercials or Community Service Announcements Directed to Children' which is the heading of clauses 6.20-6.23 in the CTICP.

Removal of this clause would mean that the general requirements for product promotions in section 5 of the new CTICP would equally apply to promotions in programs directed to children. This is a significant step backwards. Children are very susceptible to in-program promotions and are likely to have a lot of difficulty differentiating between the product promotion and program content.⁴⁴ While the AFGC codes and AANA codes cover the placement of advertising or marketing communication in programs directed primarily to children, this is interpreted very narrowly, applying only to C and P programs and the few programs considered to be directed primarily to children (not programs that may appeal to adults and children or that have large child audiences).

Clause 6.24.4 must be retained and given its narrow application requires amendment. It currently applies only to programs 'mainly directed to children' and this has been interpreted narrowly by ACMA. For example, in December 2011 the OPC complained to ACMA that McDonald's promotions during the program It's a Knockout breached clause 6.24 of the CTICP. Despite It's a Knockout being the most watched television program (per week) by children aged 0 – 12 years in the period complained of, ACMA did not accept that the program was 'mainly directed to children' as it appealed to both adults and children.

To ensure that children are adequately protected, the OPC recommends that clause 6.24 be amended to apply to programs 'directed to children' more broadly defined to include not only programs directed mainly (primarily) to children, but also to programs that would appeal to children or have large child audiences. Clause 6.24 should also apply at times that the highest numbers of children watch television (Weekdays: 6–9am and 4–9pm, weekends and school holidays: 6am–12pm and 4–9pm).

(b) Complaints

The proposed amendments to the CTICP distinguish informal feedback (which may be provided by a range of methods, including telephone, social media or letter) from a formal Code Complaint (which must meet the criteria in s. 7.2 of the Code, e.g. must be in writing, contain prescribed information, be made about matter covered by the Code and made within 30 days of the relevant broadcast). Written responses are only required with respect to Code complaints.

The OPC remains concerned that formal Code Complaints may only be made in writing. Many consumers are likely to find it easier, and feel more comfortable, discussing their concerns about an advertisement over the telephone, rather than being required to put their concerns formally in writing.

The OPC would also query:

- a) whether the approach provided for in s.7.10.2 of the existing CTICP will continue to apply, whereby complaints regarding commercial content are referred to the ASB, or in the case of a complaint regarding the CTS, to ACMA?;
- b) whether the prescriptive requirements provided for in s.7.6 of the existing CTICP to publicise the Code will continue to apply? The proposed s.7.4.3 requires only that a licensee must broadcast Community Service Announcements which provide viewers with information about the code. The OPC encourage Free TV to retain of the current prescriptive requirements, that licensees broadcast at least 360 air spots each year across all viewing zones and that a reasonable proportion of this information explain how viewers may obtain copies of the Code. The announcements should also provide general advice of how a complaint may be made.

In addition, we note that clause 7.2.3(b) provides that *"A Code Complaint can only be made:...about a matter that the complainant has seen broadcast by the licensee in Australia"*. The summary table on page 6 of the *Invitation for Public Comment* notes that *"Complainants will need to have viewed the broadcast on terrestrial television in order to make a formal Code complaint"*. The explanatory notes provide that *"Subclause (b) provides that a complainant must have seen the material that is the subject of the complaint on television, as part of a terrestrial television broadcast in Australia"*. On the basis of this material it is not clear to us whether, under 7.2.3(b):

⁴⁴ Kunkel D, Wilcox B, Cantor J, Palmer E, Linn S, Dowrick P. Report for the APA Taskforce on Advertising and Children. Washington DC: American Psychological Association, 2004.

- (a) it is sufficient that the complainant has seen the relevant material that was broadcast, regardless of whether they saw it on television at the time it was broadcast or via a recording afterwards; or
- (b) whether complainants must have seen the commercial on television when broadcasted.

Our view is that (a) is the preferable approach because it is critical that community members and organisations, that have the relevant commercial brought to their attention by others and have an interest in advertising practices, are still able to make a complaint where they have seen a copy or recording of the relevant commercial. Consumers and consumer groups should not be required to monitor television advertisements in the hope of seeing the advertisement so that a complaint may be lodged. Licensees have ready access to information about the broadcast of advertisements in Australia to confirm that an advertisement was actually broadcast by the relevant licensee on terrestrial television. We recommend this issue be clarified in the terms of the Code.

Furthermore, the OPC's primary overarching concern with the complaints process under the CTICP is that licensees, the ASB and ACMA only investigate breaches of the CTICP following complaints by viewers; neither ACMA nor Free TV Australia undertake any monitoring of compliance with the CTICP, and Free TV Australia do not commence their own actions against licensees. Therefore, identification of advertisements in breach of the CTICP depends entirely on viewers.

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. A survey conducted in 2007 found almost all parents surveyed (92%) supported monitoring of compliance with advertising regulations, rather than reliance on public complaints.⁴⁵ 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.

The OPC welcomes the proposed s.7.4.2 of the CTICP, that Free TV Australia will publish an annual report containing a summary of the number and substance of Code Complaints received by licensees. However to promote transparency, the OPC would also recommend that full decisions by licensees and ACMA be posted on the ACMA website.

Recommendations:

ACMA should be required to monitor compliance with the CTICP (and the CTS) or require pre-vetting of advertisements. Alternatively, if ACMA does not have sufficient time or resources to do this, a separate watchdog could be established to monitor compliance and handle complaints.

The requirement that formal complaints be in writing should be removed, with obligations to formally respond to telephone complaints.

⁴⁵ 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.

Prescriptive requirements regarding the publicising of the Code should be retained, requiring at least 360 on air spots each calendar year across all viewing zones, information about how viewers may obtain copies of the Code and how complaints may be made.

Section 7 should be amended to expressly provide Free TV Australia with the power to commence own motion complaints about the placement and content of advertisements to licensees and/or ACMA. ACMA should also improve its procedures to improve the speed of the complaints handling process and devote more resources to the complaints handling.

(c) Enforcement and transparency

The OPC welcomes, in part, the statement in Free TV's consultation paper to this review (p.13), that the 'Commercials Advice division of Free TV supports this form of regulation (self-regulation under the AANA Codes and ABAC) by removing classification for television Commercials that are found to be in breach of the AANA Codes or the ABAC'. A lack of enforcement mechanisms or deterrence in the AANA codes have always caused breaches to be of little consequence, classifications removal would be a positive first step to improving enforcement and accountability.

However we would query whether to date any classifications have been removed, or whether this is now being proposed for consideration? To ensure a transparent procedure for removing classification of an advertisement, and compliance with this procedure, this enforcement mechanism should be included in the CTICP itself (rather than internal policy). The OPC would also query whether classification is removed or proposed to be removed for advertisements found to breach these codes by ACMA only, or also by the Advertising Standards Board? Can or could classification be re-applied for and if so, what are the safeguards to ensure the new advertisement is compliant? This approach should also apply to breaches of the AFGC's codes.

It is important to note of course that while de-classification of an advertisement would require the advertiser to cease broadcasting an advertisement in breach of the relevant codes, it would provide no incentive to advertisers running short term advertising campaigns (as the advertising campaign is likely to be finished before the ASB or ACMA has determined the complaint). To promote stronger deterrence, an application for advertising classification for a new advertisement should also be refused to any advertiser that found to have breached a relevant code during a specified time period, i.e. in the past 6 months prior to the new application for advertising classification being received. In addition, meaningful penalties capable of deterring and penalising breaches should apply.

Recommendations:

Amend the CTICP to require:

- Classification removal for television commercials that are found by the ASB or ACMA to breach the AANA Codes, the AFGC's codes and other relevant industry codes of practice, e.g. alcohol industry codes
- Classification refusal for advertisers found to have breached the AANA Codes, the AFGC's codes and other relevant industry codes of practice in a specified time prior to the application for advertising classification being received.
- Meaningful penalties capable of deterring and penalising breaches should apply

(7) Preferably, the CTICP should be amended to introduce comprehensive restrictions on unhealthy food advertising to meaningfully reduce children's exposure.

While the OPC would welcome steps by Free TV Australia to strengthen the current provisions of the CTICP that relate to advertising to children (as recommended above), the code would nevertheless remain grossly inadequate to reduce children's exposure to unhealthy food advertising and protect children from its harmful effects. The restrictions would not adequately address the problem of the volume of unhealthy food

advertising to children, nor would it adequately restrict the marketing techniques most commonly used to target children.

To comprehensively restrict unhealthy food advertising on free-to-air television under the CTICP, the code would need to:

- Carefully define key terms, including ‘children’, ‘unhealthy food’, ‘unhealthy food advertising’, and ‘directed to children’;
- Introduce time-based restrictions on unhealthy food advertising, particularly at peak viewing times (Weekdays: 6–9am and 4–9pm, weekends and school holidays: 6am–12pm and 4–9pm); and
- Introduce restrictions on the permitted content of advertisements that are directed to children.

For more detail, please refer to the OPC’s food advertising legislation blueprint, ‘[A comprehensive approach to protecting children from unhealthy food advertising and promotion](#)’. The blueprint 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.

The inclusion of comprehensive restrictions in the CTICP, across all time periods that children watch TV, would appear to be an appropriate first step towards attempting to phase out unhealthy food advertising through a co-regulatory scheme. At the very least, ACMA should refuse to endorse a code that does not contain volume restrictions.

If Free TV Australia is not willing to include these restrictions in the CTICP, comprehensive legislation will be required to ensure that they are introduced and that unhealthy food advertising is adequately phased out.

(8) Conclusion

The OPC thanks Free TV Australia for the opportunity to comment on its proposed CTICP. The OPC does not believe that food advertising to children is the sole cause of the overweight and obesity problem, or that effective regulation of food advertising alone would provide the solution. However, it does believe that the adoption of the recommendations outlined above would be the most appropriate and effective way for Free TV Australia to protect children from the possible harmful effects of food advertising, and would be consistent with the Act and international policy obligations. Most importantly, it would also be an effective strategy for improving children’s diets, as part of a broad multi-strategic approach to dealing with the health impacts of overweight and obesity in Australia.

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1 April 2015.